

## NOTE

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# EXECUTIVE AUTHORITY AND THE TAKE CARE CLAUSE

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### INTRODUCTION

The Obama administration announced a major immigration reform initiative in 2014, stating that it would refrain from taking deportation action against undocumented immigrants who were parents of U.S. citizens or lawful permanent residents (“LPRs”). The Obama administration justified its immigration initiative upon its authority to exercise executive nonenforcement discretion.<sup>1</sup> In immigration and other contexts, the Take Care Clause, stating that the President “shall take Care that the Laws be faithfully executed,”<sup>2</sup> has been treated as a source of the President’s power to defer the enforcement of the law.<sup>3</sup>

Exercising broad discretion *not* to enforce the law is a tempting solution for the President to exert significant authority without turning to Congress. In effect, the President can transform the reach of congressional laws to

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1 See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir. of U.S. Citizenship and Immigration Servs., et al. 2 (Nov. 20, 2014) [hereinafter Johnson Memorandum] (“Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual’s case for humanitarian reasons, administrative convenience, or in the interest of the Department’s overall enforcement mission . . . . [I]t simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.”), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

2 U.S. CONST. art. II, § 3.

3 While there are compelling policy arguments for and against Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), this Note does not seek to assess these programs from a public policy or humanitarian standpoint. Rather, this Note seeks to use DAPA to analyze how the executive branch must limit the exercise of its nonenforcement discretion if it is to remain dedicated to its duty to faithfully execute the laws.

achieve substantive policy goals.<sup>4</sup> Pertaining to immigration, Congress enacted the Immigration and Nationality Act of 1952, stating that people who enter the country illegally will be subject to deportation.<sup>5</sup> Yet in the past several years, the Department of Homeland Security announced two programs—Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)—under the premise of prosecutorial discretion to justify not enforcing deportation statutes against certain undocumented immigrants.<sup>6</sup> DACA deferred deportation for individuals who came to the United States as children yet never obtained citizenship or lawful status.<sup>7</sup> DAPA proposed to defer deportation for parents of U.S. citizens or LPRs who had no bridge to a lawful status in the country.<sup>8</sup>

In anticipation of pushback, when the Department of Homeland Security announced DAPA, the U.S. Department of Justice’s Office of Legal Counsel issued an Opinion on DAPA’s legality (“OLC Opinion”).<sup>9</sup> The OLC Opinion established a multifactor framework for defining the scope of the Executive’s enforcement discretion under the Take Care Clause to determine whether executive action effectively rewrote the laws or acted in conformity with congressional policy.<sup>10</sup> While the OLC Opinion in many regards is a poor attempt to provide guidance for the Executive acting under the Take Care Clause, it provides a baseline that the Office of Legal Counsel can build upon and use to assess other actions of enforcement discretion beyond the context of immigration.

While DACA’s fate is still indeterminate,<sup>11</sup> federal courts enjoined DAPA during the Obama administration. The courts viewed DAPA as a rewriting of

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4 See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 671 (2014) (“The Obama Administration, for example, has announced policies of abstaining from investigation and prosecution of certain federal marijuana crimes, postponing enforcement of key provisions of the Affordable Care Act, and suspending enforcement of removal statutes against certain undocumented immigrants.”).

5 Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); see 8 U.S.C. § 1227(a)(1)(A) (2012) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

6 See Johnson Memorandum, *supra* note 1, at 2–3.

7 Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., et al. 1 (June 15, 2012) [hereinafter Napolitano Memorandum], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

8 See Johnson Memorandum, *supra* note 1.

9 The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1 (2014) [hereinafter OLC Opinion].

10 See *id.* at 25–33.

11 There are two district court injunctions requiring President Trump to keep DACA in place. See, e.g., Roque Planas & Elise Foley, *Second Judge Blocks Trump Decision to End Deportation Relief for Dreamers*, HUFFINGTON POST (Feb. 13, 2018, 7:33 PM), <https://www.huff>

the law,<sup>12</sup> and President Trump later rescinded the deferred action program.<sup>13</sup> When addressing DAPA's legality, the Supreme Court requested briefing on whether DAPA violated the Take Care Clause,<sup>14</sup> yet avoided defining the scope of the Take Care Clause in this instance of executive inaction.<sup>15</sup>

Although DAPA never took effect, both immigration reform programs demonstrate that President Obama was able to reshape federal policy and narrow the reach of congressional legislation through his nonenforcement discretion. By one account, out of the total 11.3 million undocumented immigrants in the country, 1.2 million undocumented immigrants are eligible for DACA and 4.3 million would have been eligible for DAPA.<sup>16</sup> An exercise of executive *inaction* would have amounted to temporary deportation relief for almost half of the country's undocumented immigrants. As presidents increasingly implement policy goals through strategic inaction, the question arises as to when nonenforcement discretion runs up against the President's mandate to "take Care that the Laws be faithfully executed."<sup>17</sup> This question becomes increasingly important if the executive branch continues to make wide-ranging policy decisions under the guise of discretion.<sup>18</sup>

Part I of this Note will discuss the Department of Homeland Security's authority to regulate immigration and focuses on DACA and DAPA. Part II will address the U.S. Department of Justice's Office of Legal Counsel Opinion on DAPA's legality. Part III will turn to the lack of judicial constraints on or legislative responses to the executive branch's enforcement discretion. Part IV will propose that the executive branch should take a more active role in ensuring that the President remains faithful to the Take Care Clause when exercising prosecutorial discretion. Expounding upon the Office of Legal

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ingtonpost.com/entry/daca-dreamers-second-judge-injunction\_us\_5a8366a4e4b02b66c51301c5.

12 *Texas v. United States*, 809 F.3d 134, 169–70 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

13 See Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) [hereinafter *DACA Cancellation Memorandum*], <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

14 *United States v. Texas*, 136 S. Ct. 906, 906 (2016) ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.'").

15 Although the Supreme Court requested briefing on the Take Care Clause, it ultimately did not address the Clause during oral argument or when rendering a decision. The decision in whole stated that: "The judgment is affirmed by an equally divided Court." *Texas*, 136 S. Ct. at 2272 (per curiam).

16 *Texas*, 809 F.3d at 148, 174 n.138.

17 U.S. CONST. art. II, § 3.

18 There are additional concerns that Congress will continue to neglect reforming its immigration scheme. See, e.g., Sheryl Gay Stolberg & Thomas Kaplan, *Congress Struggles for Path Forward on Immigration*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/congress-immigration-dreamers.html>.

Counsel's multifactor framework is a solution for the executive branch to police itself not just in the context of immigration, but any time the executive branch broadly exercises its nonenforcement discretion.

## I. THE PRESIDENT'S ENFORCEMENT DISCRETION—DACA AND DAPA

### A. *The DHS's Statutory Authority to Regulate Immigration*

To understand executive nonenforcement in the contexts of DACA and DAPA, it is necessary to briefly review immigration law. Congress enacted the Immigration and Nationality Act of 1952 ("INA") and provided what is now the Department of Homeland Security ("DHS") with the authority to remove undocumented immigrants.<sup>19</sup> The INA created a system of removal for deportable immigrants<sup>20</sup> and specified that certain classes of immigrants are ineligible to receive visas and to be admitted into the United States.<sup>21</sup> Congress delegated to the DHS a broad regulatory scheme pertaining to immigration.<sup>22</sup> The Act announced that deportable immigrants generally included immigrants who were "inadmissible at the time of entry, ha[d] been convicted of certain crimes, or [met] other criteria set by federal law."<sup>23</sup> The other criteria for deportation included undocumented immigrants who failed to register or falsified documents; engaged in criminal activity endangering the public safety or national security; or voted unlawfully in violation of federal, state, or local law.<sup>24</sup> Congress tasked the DHS with initiating removal proceedings and executing final orders of removal.<sup>25</sup>

### B. *The DHS's Removal Discretion*

Despite the broad congressional mandate to remove undocumented immigrants, full enforcement of the INA has proven to be implausible.

19 Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered titles of the U.S. Code). Prior to 2002, Congress vested power to enforce immigration laws in the Immigration and Naturalization Service (INS), but in 2002, Congress vested in the Department of Homeland Security the power to enforce immigration laws. 8 U.S.C. § 1103(a)(1) (2012) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . .").

20 8 U.S.C. § 1227(a)(1)(A) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.").

21 *Id.* § 1182(a).

22 See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948))).

23 *Arizona v. United States*, 567 U.S. 387, 396 (2012).

24 See 8 U.S.C. § 1227(F)(3), (4), (6).

25 OLC Opinion, *supra* note 9, at 3.

There are approximately 11.3 million undocumented immigrants in the United States.<sup>26</sup> One report estimates that it would cost an average of \$10,070 per person, or \$114 billion total, to remove the entire population of undocumented immigrants.<sup>27</sup> The DHS only has the resources, however, to remove less than 400,000 undocumented immigrants per year.<sup>28</sup> Given the breadth of the INA's statutory prohibitions and the limitations of enforcement resources, agency discretion toward how resources are allocated is inevitable.

The immigration structure critically depends on executive discretion.<sup>29</sup> Congress expressly provided the DHS with discretion to “[e]stablish[] national immigration enforcement policies and priorities”<sup>30</sup> since the DHS cannot act “against each technical violation of the statute it is charged with enforcing.”<sup>31</sup> The discretion to determine whether a violation of the law warrants action is rooted in the President’s Article II responsibility to “take Care that the Laws be faithfully executed.”<sup>32</sup> Given that many INA violations go unpunished, it is critical to rely upon executive discretion to delay or suspend removal.

The method of discretionary relief relevant to immigration law is known as “deferred action.” The term deferred action refers to the temporary delay in the removal of undocumented immigrants.<sup>33</sup> Deferred action has been used in a wide array of immigration contexts.<sup>34</sup> Discretionary relief from immigration has included victims of domestic violence under the Violence Against Women Act (VAWA),<sup>35</sup> victims of human trafficking and certain other crimes,<sup>36</sup> foreign students impacted by Hurricane Katrina,<sup>37</sup> widows or widowers of U.S. citizens,<sup>38</sup> and direct relatives of U.S. soldiers.<sup>39</sup>

26 *Id.* at 1.

27 Philip E. Wolgin, *What Would It Cost to Deport 11.3 Million Unauthorized Immigrants?*, CTR. FOR AM. PROGRESS (Aug. 18, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/08/18/119474/what-would-it-cost-to-deport-11-3-million-unauthorized-immigrants/>.

28 OLC Opinion, *supra* note 9, at 1.

29 Price, *supra* note 4, at 681 (“As Congress well understands when it enacts federal criminal proscriptions, both prosecutorial and sentencing discretion are inevitable because of the broad reach of these proscriptions and the severity of authorized punishments. Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.” (quoting Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008))).

30 Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified as amended at 6 U.S.C. § 202 (2012)).

31 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

32 U.S. CONST. art. II, § 3.

33 OLC Opinion, *supra* note 9, at 12.

34 Johnson Memorandum, *supra* note 1, at 2 & n.2.

35 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv) (2012).

36 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered titles of the U.S. Code).

37 OLC Opinion, *supra* note 9, at 16.

38 *Id.* at 17.

C. *Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans and Lawful Permanent Residents*

The Obama administration premised two major immigration programs on deferred action. The first directive, DACA, offered temporary deportation relief for immigrants who entered the United States as children and met certain other specifications. The second directive, DAPA, extended deportation relief to parents of U.S. citizens and LPRs.

Turning to Obama's first major immigration program, DACA, the DHS announced on June 15, 2012, that it would defer the deportation of immigrants who came to the United States as children. The DHS set out specific criteria to be eligible for DACA:

[An individual is eligible if he/she] came to the United States under the age of sixteen; has continuously resided in the United States for at least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum; is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and is not above the age of thirty.<sup>40</sup>

While DACA conferred "no substantive right, immigration status or pathway to citizenship,"<sup>41</sup> individuals who met the criteria were eligible to receive renewable deferred action for two years.<sup>42</sup> After the two-year period, DACA recipients could request a renewal if they continuously lived in the United States and did not have a serious criminal conviction. Under deferred action, the DHS promised not to initiate removal proceedings and provided eligible candidates with temporary employment authorization in the United States.<sup>43</sup> This policy allowed the DHS to avoid expending limited resources on low-priority undocumented immigrants and to shift the focus toward individuals who posed a threat to the public.<sup>44</sup>

Turning to Obama's second major immigration program, the DHS announced DAPA on November 20, 2014. In a memorandum addressed to several immigration administrative agencies, the Secretary of Homeland

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39 See *id.* at 14–17. A spouse, parent, or child of a U.S. soldier who died "shall be eligible for deferred action, advance parole, and work authorization." Johnson Memorandum, *supra* note 1, at 2 n.2 (quoting National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694 (codified as amended at 8 U.S.C. § 1151)).

40 Napolitano Memorandum, *supra* note 7, at 1.

41 *Id.* at 3.

42 U.S. DEP'T OF HOMELAND SEC., DHS/USCIS/PIA-045, PRIVACY IMPACT ASSESSMENT FOR THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 3 (2012) [hereinafter PRIVACY IMPACT ASSESSMENT].

43 See *id.* at 3–4.

44 See *id.* at 2.

Security, Jeh Johnson, addressed two immigration policies. The memorandum first expanded certain parameters of DACA and then provided guidance for expanding deferred action to parents of U.S. citizens and LPRs.<sup>45</sup>

The memorandum first expanded DACA by removing the age cap to allow for all immigrants who entered the United States before they turned sixteen to be eligible for the program regardless of their age upon applying. The memorandum then extended DACA renewal and work authorization to three-year increments instead of two-year increments. Finally, the memorandum adjusted the date-of-entry requirement in which a DACA applicant must have been in the United States from June 15, 2007 to January 1, 2010.<sup>46</sup>

The memorandum then extended deferred action to include parents of U.S. citizens and LPRs who “have lived in the United States for five years or longer if they register, pass a background check and pay taxes.”<sup>47</sup> The DHS set out specific criteria to be eligible for DAPA: the individuals must have a child who is a U.S. citizen or LPR, have continuously lived in the United States since January 1, 2010, be physically present in the United States on the date of the memorandum and at the time of making a request for deferred action, must not be an enforcement priority, and must not have any factors that would make deferred action inappropriate.<sup>48</sup> DAPA provided for renewable deferred action in three-year increments and permitted individuals to be eligible for work authorization during the period of deferred action.<sup>49</sup>

The DHS premised both DACA and DAPA on prosecutorial discretion. The DHS stated that it exercises prosecutorial discretion for “humanitarian reasons, administrative convenience, or in the interest of the Department’s

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45 The memorandum provided “guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities . . . .” Johnson Memorandum, *supra* note 1, at 3.

46 *Id.* at 3–4.

47 Press Release, The White House, Office of the Press Sec’y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

48 Johnson Memorandum, *supra* note 1, at 4. Those eligible for DAPA are:

[I]ndividuals who: have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident; have continuously resided in the United States since before January 1, 2010; are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS [U.S. Citizenship and Immigration Services]; have no lawful status on the date of this memorandum; are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

*Id.*

49 *See id.* at 5; *see also* 8 C.F.R. § 274a.12(c)(14) (2018) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, [may apply for work authorization] if the alien establishes an economic necessity for employment.”).

overall enforcement mission.”<sup>50</sup> Additionally, the Department relied upon a scarcity rationale. The DHS indicated that it could not respond to all immigration violations due to its limited enforcement resources and it was therefore in the country’s best security and economic interests to defer action for immigrants who are not enforcement priorities.<sup>51</sup> DACA and DAPA demonstrated the DHS’s decision to decline from removing certain illegal immigrants for a period of time.<sup>52</sup> Deferred action can be revoked at any time at the discretion of immigration officials.<sup>53</sup> Additionally, DAPA provided eligible immigrants with lawful presence in the United States.<sup>54</sup> Lawful presence allows immigrants to receive government benefits, such as social security benefits or Medicare.<sup>55</sup> Lawful presence also ensures that the period of deferred action does not count against individuals—whose cases were deferred by DACA or DAPA—in future immigration proceedings.<sup>56</sup>

On November 20, 2014, in addition to announcing DAPA, the DHS released a separate memorandum reflecting the Department’s removal priorities.<sup>57</sup> The DHS reported three categories of priorities. The highest immigration enforcement priority included undocumented immigrants who were “threats to national security, public safety, and border security.”<sup>58</sup> The second-highest priority was undocumented immigrants convicted of several misdemeanors.<sup>59</sup> Finally, the third priority included undocumented immigrants who have been issued a final order of removal.<sup>60</sup> The DHS indicated that prosecutorial discretion was necessary to ensure that it devoted its lim-

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50 Johnson Memorandum, *supra* note 1, at 2; *see also* PRIVACY IMPACT ASSESSMENT, *supra* note 42, at 2 (“Deferred action is an exercise of this prosecutorial discretion to defer removal action against certain individuals who are unlawfully present in the United States in order to devote scarce enforcement resources to the highest priority removal cases, including individuals who pose a danger to national security or public safety or have been convicted of specific crimes.”).

51 *See* Johnson Memorandum, *supra* note 1, at 3.

52 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (“At each stage the Executive has discretion to abandon [deferred action and the INS has been] exercising that discretion for humanitarian reasons or simply for its own convenience.”).

53 *See* OLC Opinion, *supra* note 9, at 13.

54 Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1763–64 (2016).

55 *Id.*; *see also* *Texas v. United States*, 809 F.3d 134, 148–49 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

56 Bellia, *supra* note 54, at 1763–64; *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., <https://www.uscis.gov/archive/frequently-asked-questions> (last updated Mar. 8, 2018).

57 Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, et al. 1 (Nov. 20, 2014) [hereinafter *Prioritization Memorandum*], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

58 *Id.* at 1.

59 *Id.* at 3–4.

60 *Id.* at 4.



ited resources to top enforcement priorities.<sup>61</sup> These enforcement priorities remain uncontroversial and are viewed as a valid exercise of enforcement discretion.<sup>62</sup>

In anticipation of challenges to DAPA's legality, the U.S. Department of Justice's Office of Legal Counsel released a memorandum opinion accompanying DAPA.<sup>63</sup> In the opinion, the Office of Legal Counsel concluded that it was legally permissible for the DHS to implement a deferred action policy for parents of children who are either U.S. citizens or LPRs.<sup>64</sup> Additionally, the President addressed DAPA's legality in remarks to the nation by stating: "[T]here are actions I have the legal authority to take as President," and those actions are to "prioritize, just like law enforcement does every day."<sup>65</sup> Despite these measures, DAPA immediately fueled controversy from the public and from Congress.<sup>66</sup>

Despite the executive branch's precautionary measures, the courts soon addressed the question of DAPA's legality. Twenty-six states challenged DAPA in court under the Administrative Procedure Act (APA) and the Take Care Clause.<sup>67</sup> In an order issued on February 16, 2015, a Texas federal district court provided a preliminary injunction to prevent DAPA's implementation.<sup>68</sup> The district court's decision rested on APA grounds in finding that the states were likely to succeed on their claim that the DHS had created a substantive rule without complying with the APA's procedural requirements.<sup>69</sup> The district court nonetheless expressly declined to address the

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61 *Id.* at 2 ("DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.").

62 *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) ("But importantly, the states have not challenged the priority levels [the Secretary] has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities."). In the DHS Appropriations Act, Congress also instructed the DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251 (codified as amended in scattered titles of the U.S. Code).

63 See OLC Opinion, *supra* note 9.

64 *Id.* at 1-2.

65 Press Release, The White House, Office of the Press Sec'y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

66 For instance, Speaker John Boehner in a speech on the House floor quoted twenty-two times when Obama said he did not have the authority to pursue broad executive action on immigration law without Congress. Boehner stated, "[w]e are dealing with a president who has ignored the people, ignored the Constitution, and even his own past statements." Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama's Immigration Orders*, HILL (Jan. 14, 2015), <http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders>.

67 *Texas*, 86 F. Supp. 3d at 604-07 (S.D. Tex. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

68 *Id.* at 646-76.

69 *Id.* at 677.

states' constitutional claim under the Take Care Clause.<sup>70</sup> On appeal, the Fifth Circuit, in affirming the preliminary injunction, also skirted the separation of powers question and failed to address the Take Care Clause.<sup>71</sup> The Fifth Circuit instead concluded that DAPA conflicted with the INA, which "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization."<sup>72</sup>

The Supreme Court granted certiorari to review the injunction against the Obama administration's immigration policy. It requested briefing on the Take Care Clause in addition to the questions raised by the parties—"the parties are directed to brief and argue the following question: 'Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.'"<sup>73</sup> However, the Supreme Court ultimately did not address the Take Care Clause when hearing oral argument or when rendering its decision. The Court affirmed the Fifth Circuit's ruling by an equally divided vote (4–4).<sup>74</sup> The Court did not present substantive reasoning in its opinion, which stated in whole that "[t]he judgment is affirmed by an equally divided Court."<sup>75</sup> The Court's lack of detail provided no clarity as to the Justices' opinions on the Take Care Clause question. In effect, the Court allowed states to stall DAPA's implementation.<sup>76</sup>

The Court, however, had no occasion to readdress the Take Care Clause question before President Trump rescinded DAPA. On June 15, 2017, Secretary of Homeland Security John Kelly issued a memorandum rescinding the November 20, 2014, memorandum providing for DAPA and for DACA's expansion, yet leaving the June 15, 2012, DACA memorandum intact.<sup>77</sup> The

70 *Id.*

71 *Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) ("We find it unnecessary, at this early stage of the proceedings, to address or decide the challenge based on the Take Care Clause."). The court affirmed the preliminary injunction based on its finding that DAPA violated procedural requirements of the APA and substantive requirements of the INA. *Id.* at 170, 178, 186.

72 *Id.* at 184.

73 *United States v. Texas*, 136 S. Ct. 906, 906 (2016).

74 There was a vacancy on the Court at the time, following Justice Antonin Scalia's death.

75 *Texas*, 136 S. Ct. at 2272. The Court also declined to rehear the case, "dooming . . . President Obama's plan to spare millions of undocumented immigrants from deportation." Adam Liptak, *Millions at Risk of Deportation as Justices Refuse to Rehear Case*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/us/politics/supreme-court-immigration-obama.html>.

76 Peter M. Shane, *The U.S. Supreme Court's Big Immigration Case Wasn't About Presidential Power*, ATLANTIC (June 28, 2016), <https://www.theatlantic.com/politics/archive/2016/06/us-v-texas-wasnt-really-about-presidential-power/489047/>.

77 Memorandum from John F. Kelly, Sec'y of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al. 1–2 (June 15, 2017) [hereinafter DAPA Cancellation Memorandum], <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>.

Secretary referenced President Trump's new immigration enforcement priorities as relevant to his decision to rescind DAPA.<sup>78</sup> Soon after his inauguration, President Trump directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens, consistent with Article II, Section 3 of the United States Constitution."<sup>79</sup> Secretary Kelly indicated that the "preliminary injunction in this matter, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities" were all factors in his decision to rescind DAPA.<sup>80</sup>

Soon thereafter, President Trump rescinded DACA as well. On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke issued a memorandum rescinding the June 15, 2012, DACA memorandum.<sup>81</sup> Duke relied upon the Supreme Court's and the Fifth Circuit's rulings in *Texas v. United States* along with a letter from the Attorney General to determine that DACA should be terminated.<sup>82</sup> In a letter to the DHS, the Attorney General stated that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch."<sup>83</sup> DACA's fate is uncertain, however, given several recent district court injunctions requiring the Trump administration to keep DACA in place.<sup>84</sup>

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78 *Id.* at 1.

79 Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see also* DAPA Cancellation Memorandum, *supra* note 77, at 1.

80 DAPA Cancellation Memorandum, *supra* note 77, at 3. In a press release issued the same day, the Department of Homeland Security stated that Secretary Kelly rescinded DAPA "because there [was] no credible path forward to litigate the currently enjoined policy." Press Release, Dep't of Homeland Sec., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful#>.

81 DACA Cancellation Memorandum, *supra* note 13.

82 *Id.* (first citing *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); and then citing *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam)).

83 *Id.*

84 As of November 2018, the Ninth Circuit is expected to render a judgment soon and the Department of Justice filed a writ of certiorari before judgment to the Ninth Circuit requesting the Supreme Court intervene in the California case and address DACA's vitality. *See* Pete Williams, *Trump Administration Presses Supreme Court for Quick Action on DACA*, NBC NEWS (Nov. 5, 2018), <https://www.nbcnews.com/politics/supreme-court/trump-administration-presses-supreme-court-quick-action-daca-n931741>; *see also* Alan Feuer, *Citing Trump's 'Racial Slurs,' Judge Says Suit to Preserve DACA Can Continue*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/nyregion/daca-lawsuit-trump-brooklyn.html> (reporting that a federal district court judge in New York issued an injunction to keep DACA in place); Michael D. Shear, *Trump Must Keep DACA Protections for Now, Judge Says*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/us/trump-daca-improper.html> (explaining that a federal district court judge in California issued a nationwide injunction against DACA's rescission in a separate lawsuit).

## II. THE OFFICE OF LEGAL COUNSEL OPINION

During the Obama administration, the U.S. Department of Justice's Office of Legal Counsel (OLC) released an opinion regarding DAPA, entitled "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others" ("OLC Opinion").<sup>85</sup> The OLC primarily sought to answer whether it was permissible for the DHS to extend deferred action for (1) parents of U.S. citizens and LPRs and (2) parents of DACA recipients.<sup>86</sup> The OLC concluded that while the deferred action policy for parents of U.S. citizens and LPRs was a permissible exercise of the DHS's enforcement discretion, deferred action for parents of DACA recipients was impermissible.<sup>87</sup>

The OLC Opinion recognized that enforcement discretion is rooted in the Take Care Clause and necessarily involves an open-ended inquiry that "does not lend itself easily to the application of set formulas or bright-line rules."<sup>88</sup> Nonetheless, the OLC indicated there were four principles encompassing the scope of enforcement discretion under the Take Care Clause. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise."<sup>89</sup> Second, "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences."<sup>90</sup> Third, the Executive cannot "'consciously and expressly adopt[ ] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>91</sup> Fourth, "non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis."<sup>92</sup> The OLC relied upon *Heckler v. Chaney*<sup>93</sup> to draw out these four principles, and stated that:

[A]ny expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute.<sup>94</sup>

The OLC thus acknowledged that deferred action under the President's duty to take care that the laws are faithfully executed is not unlimited and estab-

85 OLC Opinion, *supra* note 9.

86 *Id.* at 1–2. The OLC Opinion also addressed the DHS's prioritization policy and found it to be a permissible exercise of the DHS's discretion. *Id.* at 9–11.

87 *Id.* at 2.

88 *Id.* at 5.

89 *Id.* at 6 (alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

90 *Id.* (citing *Heckler*, 470 U.S. at 833).

91 *Id.* at 7 (alteration in original) (quoting *Heckler*, 470 U.S. at 833 n.4).

92 *Id.*

93 *Heckler*, 470 U.S. 821.

94 OLC Opinion, *supra* note 9, at 24.

lished a four-factor inquiry to delineate whether a particular deferred action program is constitutional.<sup>95</sup>

The OLC then applied the four-factor framework to the DHS's proposal to extend deferred action to parents of U.S. citizens and LPRs. In addressing the first principle, whether the enforcement decision is within the scope of the agency's expertise, the OLC analyzed the DHS's justifications for DAPA. The DHS justified DAPA on two grounds: (1) the resource constraints of removing undocumented immigrants from the country and (2) the humanitarian interest of keeping parents with their children who are lawfully present in the United States. The OLC found that the DHS satisfied the first principle because determining how to address resource constraints and humanitarian concerns are both within the DHS's expertise.<sup>96</sup>

In addressing the second principle, whether the Executive attempts to effectively rewrite the laws to match its policy preferences, the OLC found that the DHS's proposal to extend deferred action to parents of U.S. citizens and LPRs was in harmony with congressional policy. The OLC specified that the DHS's proposal "track[ed] a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States."<sup>97</sup> Since the DHS's program did not grant parents of U.S. citizens and LPRs any legal rights to remain in the United States and the parents were low deportation priorities, the OLC reasoned, DAPA did not circumvent the INA.<sup>98</sup>

Turning to the third principle, whether the Executive adopts a policy effectively abdicating its statutory responsibilities, the OLC considered the Agency's "severe resource constraints" and removal priorities.<sup>99</sup> The OLC observed that the DHS's resource constraints restricted the Agency in its removal power and that the Agency's proposed program deferred the removal of undocumented immigrants near the bottom of the Agency's enforcement priorities.<sup>100</sup> The OLC explained that since immigration officials made deferred action determinations on a case-by-case basis, the DHS avoided concerns that it either abdicated its statutory responsibilities or created a categorical entitlement to deferred action for immigration relief.<sup>101</sup>

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95 *Id.* (explaining that congressional intent "help[s] to inform [the DHS's] consideration of whether the proposed deferred action programs are 'faithful[ ]' to the statutory scheme Congress has enacted." (third alteration in original) (citing U.S. CONST. art II, § 3)).

96 *Id.* at 26 ("Like determining how best to respond to resource constraints, determining how to address such 'human concerns' in the immigration context is a consideration that is generally understood to fall within DHS's expertise." (quoting *Arizona v. United States*, 567 U.S. 387, 396 (2012))).

97 *Id.* at 27.

98 *Id.* at 27–28; *see also* Prioritization Memorandum, *supra* note 57.

99 OLC Opinion, *supra* note 9, at 28.

100 *Id.*

101 *Id.* at 29 ("[A] categorical entitlement to deferred action . . . could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.").

The OLC Opinion established that the DHS satisfied the third principle and did not abdicate its statutory responsibilities by deferring removal for parents of U.S. citizens and LPRs.

Finally, the OLC addressed the fourth principle: whether the Agency exercised discretion on a case-by-case basis. The OLC determined that the DHS's proposed program provided for "the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief."<sup>102</sup> Indeed, the proposed program "would resemble in material respects the kinds of deferred action programs Congress ha[d] implicitly approved in the past."<sup>103</sup>

Additionally, the OLC Opinion considered whether the proposed program would be problematic given its size, since the proposed program would apply to approximately four million of the 11.3 million undocumented immigrants.<sup>104</sup> It found that the size of the program was unproblematic because "only a fraction" of undocumented immigrants would be eligible and because "Congress has granted a prospective entitlement to lawful status without numerical restriction."<sup>105</sup>

After the OLC concluded that the DHS's proposed deferred action program for parents of U.S. citizens and LPRs was permissible, it determined that the DHS's proposed deferred action program for parents of DACA recipients was impermissible. The OLC focused on two differences between the programs. First, it asserted that deferred action for parents of DACA recipients would amount to an expansion of family-based immigration relief.<sup>106</sup> It indicated that the INA does "not express . . . concern for uniting persons who lack lawful status."<sup>107</sup> Second, it indicated that there was no precedent or implicit congressional approval for extending deferred action to parents of DACA recipients.<sup>108</sup> Extending deferred action to parents of DACA recipients had no stopping point, and opened the door to extending deferred action to any relative of DACA recipients.<sup>109</sup>

Ultimately, the OLC's four-factor framework did not prevent DAPA from being challenged and rescinded. However, the OLC's four-factor framework for evaluating the validity of an executive's enforcement discretion has broader implications for how the Take Care Clause constrains enforcement discretion, which this Note will discuss below.

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102 *Id.* at 31.

103 *Id.* at 29.

104 *Id.* at 30.

105 *Id.* at 30–31.

106 *Id.* at 32 ("First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of . . . immigration law . . . . [T]he immigration laws do not express comparable concern for uniting persons who lack lawful status . . . with their families.")

107 *Id.*

108 *Id.* at 32–33.

109 *Id.* at 33.

### III. JUDICIAL AND CONGRESSIONAL LIMITS ON EXECUTIVE ENFORCEMENT DISCRETION

The Take Care Clause is understood simultaneously as a source of executive enforcement discretion and as an obligation to ensure that the executive branch executes Congress's laws.<sup>110</sup> Since broad categorical prosecutorial discretion has played a significant role in presidential action, there is a potential limiting principle suggested by the Take Care Clause. This Part evaluates whether the courts or Congress cabin executive enforcement discretion. This Part first looks at the Supreme Court's deference toward executive discretion and then turns to Congress's inaction toward deferred action.

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110 Many scholars have addressed the scope of the Take Care Clause through the lens of executive nonenforcement. See, e.g., Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1723 (2016) (discussing the Obama Administration's executive discretion with regards to the Affordable Care Act and stating that "[t]he Administration thus used the public announcements of its nonenforcement policies to encourage the regulated community to disregard provisions of the ACA. Prospectively licensing large groups of people to violate a congressional statute for policy reasons is inimical to the Take Care Clause."); Bellia, *supra* note 54, at 1756 ("This Article uses DAPA to explore the tension between the discretion-granting and discretion-limiting features of the Faithful Execution Clause."); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (arguing that there is no presidential nonenforcement power, rather the Take Care Clause imposes a duty on the President to enforce all congressional laws and that the Obama administration breached its constitutional duty by refusing to enforce immigration laws); Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) ("Through a long and varied course of interpretation, however, the Court has read that vague but modest language [in the Take Care Clause] . . . either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government."); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1525 (2018) ("[C]an nonenforcement violate the Take Care Clause and, if so, when? . . . [I]f the executive branch can simply refuse to enforce a statute because the President disagrees with the legislature's policy choice, Congress's powers may be negated. Can that outcome be reconciled with the Take Care Clause?" (footnote omitted)); Price, *supra* note 4, at 675–76 ("The requirement of 'faithful[ ]' execution in the Take Care Clause invites inquiry into the proper scope and rigor of law enforcement that a 'faithful' executive agent should perform . . . . The executive branch thus exceeds its proper role, and enters the legislature's domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations." (alteration in original)); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) ("The 'take Care' clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws. If judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives."); Symposium, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1677–1949 (2016).

### A. *Judicial Deference to Executive Inaction*

The Supreme Court has interpreted the Take Care Clause as a source of executive enforcement power.<sup>111</sup> Through a series of cases, courts have relied upon the Take Care Clause to justify the President's far-reaching prosecutorial discretion and have done little to interfere.<sup>112</sup> The Court has effectively abdicated its role of judicial review in demonstrating its unwillingness to evaluate an executive nonenforcement decision.<sup>113</sup>

Most relevantly, in *Heckler v. Chaney*,<sup>114</sup> the Court linked enforcement discretion with the Take Care Clause.<sup>115</sup> In this case, death row inmates petitioned the Food and Drug Administration (FDA) arguing that the states' use of drugs for human execution violated the Federal Food, Drug, and Cosmetic Act ("FDCA"), and requested that the FDA take enforcement actions to prevent the FDCA violations.<sup>116</sup> The Court declined to require the FDA to exercise its enforcement power against drugs used for human executions.<sup>117</sup> It reasoned that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and the "presumption is that judicial review is not available."<sup>118</sup> In concluding that an agency's decision to abstain from enforcement action is presumptively immune from judicial review, the Court's understanding of prosecutorial discretion under the Take Care Clause informed its interpretation. The Court stated that:

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111 See Goldsmith & Manning, *supra* note 110, at 1837 ("[T]he Court has treated the Take Care Clause as the source of the President's prosecutorial discretion—a power that, as recent events have shown us, may give the President room to reshape the effective reach of laws enacted by Congress."); cf. Rubenstein & Gulasekaram, *supra* note 110, at 610 ("[T]he parameters of [the Take Care Clause] are murky. On some occasions, the Court has conjured the Take Care Clause for the proposition that the President cannot suspend or supersede Congress's laws; at other times, however, the Court has cited the Take Care Clause as the fount of inherent prosecutorial discretion.").

112 See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *Heckler v. Chaney*, 470 U.S. 821 (1985); *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007).

113 See Price, *supra* note 4, at 683 ("Courts, indeed, have disclaimed virtually any authority to review executive charging decisions."). See generally Abby L. Timmons, Note, *Too Much of a Good Thing: Overcrowding at America's National Parks*, 94 NOTRE DAME L. REV. (forthcoming 2018) (discussing the Court's unwillingness to intervene when the Bureau of Land Management, a federal agency that administers public lands, refused to take action against all-terrain vehicle use on federal lands because the Court found it was a matter of agency discretion).

114 470 U.S. 821 (1985).

115 Notably, there has been much scholarly attention on *Heckler v. Chaney* and how the Court has invoked the Take Care Clause to find that the Executive has broad prosecutorial discretion. See, e.g., Goldsmith & Manning, *supra* note 110, at 1847–48; Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 506–07 (2017); Price, *supra* note 4, at 684.

116 *Heckler*, 470 U.S. at 821.

117 *Id.* at 827.

118 *Id.* at 831.



[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>119</sup>

The Court also explained that an agency is better able than a court to balance the factors that contribute to a decision not to enforce.<sup>120</sup> These factors include “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”<sup>121</sup> The Court then deferred to Congress to determine whether executive nonenforcement should be reviewed by the courts.<sup>122</sup> In sum, *Heckler v. Chaney* created a presumption that agencies exercising nonenforcement discretion are immune from judicial review and provided agencies with wide latitude to make nonenforcement determinations.<sup>123</sup>

Likewise, in *United States v. Armstrong*,<sup>124</sup> the Court invoked the Take Care Clause to justify unreviewable agency discretion. The *Armstrong* Court declined a request for discovery on a claim of selective prosecution<sup>125</sup> and reasoned that the “Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation's criminal laws.”<sup>126</sup> The Court recognized that prosecutorial discretion included balancing factors such as “the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan.”<sup>127</sup> The Court went on to explain that U.S. Attorneys “have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>128</sup> While the Court ulti-

119 *Id.* at 832 (quoting U.S. CONST. art. II, § 3).

120 *Id.* at 831–32 (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise . . . . An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”).

121 *Id.* at 831.

122 *Id.* at 833, 838 (“[W]e essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable [and] Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.”).

123 See Louis W. Fisher, *Executive Enforcement Discretion and the Separation of Powers: A Case Study on the Constitutionality of DACA and DAPA*, 120 W. VA. L. REV. 131, 149–50 (2017).

124 517 U.S. 456 (1996).

125 *Id.* at 456–57.

126 *Id.* at 464 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

127 *Id.* at 465 (quoting *Wayte*, 470 U.S. at 607).

128 *Id.* at 464 (quoting U.S. CONST. art. II, § 3).

mately relied upon the Equal Protection Clause, the Court treated the Take Care Clause as a source of prosecutorial discretion.

More recently in *Association of Irrigated Residents v. EPA*,<sup>129</sup> the D.C. Circuit declined to review the Environmental Protection Agency's (EPA) agreements with animal feeding operations ("AFOs"),<sup>130</sup> holding that the agreements were valid nonenforcement actions.<sup>131</sup> In this case, community members and environmental groups petitioned the EPA to control AFOs' pollution and odors.<sup>132</sup> Since the EPA had no precise method of measuring AFO emissions, the EPA entered into consent agreements with AFOs. The condition for the agreements was that each AFO would "assist in developing an emissions estimating methodology" in exchange for the EPA's nonenforcement of violations against the AFOs for a specified period of time.<sup>133</sup> The court agreed with the EPA that the consent agreements were an exercise of enforcement discretion rather than an exercise of rulemaking. The court reasoned that the "EPA's 'cabining' of its ability to sue AFOs for a period of time is not based on a substantive interpretation of the statutes, but rather is a way to defer enforcement of those substantive interpretations *until* EPA has determined how their requirements apply in the particular case of AFOs."<sup>134</sup> The court then concluded that the "EPA's exercises of its enforcement discretion are not reviewable by this court."<sup>135</sup> Once again, a federal court indicated that once an action is classified as an exercise of enforcement discretion, the agency essentially gets a "pass" to do as it pleases.

While there have been challenges to executive enforcement discretion, the courts have emphatically declined to address the bounds of the Take Care Clause.<sup>136</sup> The courts have cited the Take Care Clause to justify executive nonenforcement discretion, but when courts found that enforcement discretion went too far, they evaded defining the Clause's parameters. As discussed above, in *United States v. Texas*, the Supreme Court requested briefing on the scope of executive nonenforcement.<sup>137</sup> The United States asserted that the Take Care Clause is nonjusticiable and that the Executive

129 494 F.3d 1027 (D.C. Cir. 2007).

130 AFOs are facilities that house animals to be processed for human consumption. *Id.* at 1028.

131 *Id.*

132 *Id.*

133 *Id.* at 1029. The AFOs were able to avoid liability for violations of the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; and the Emergency Planning and Community Right-to-Know Act. *Id.*

134 *Id.* at 1034.

135 *Id.* at 1037.

136 The courts have a history of answering large separation of powers questions narrowly. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (deciding a narrow issue of whether detention is lawful of a U.S. citizen captured overseas as an enemy combatant); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.").

137 *See supra* Section I.C.

was faithfully executing the law by allocating resources in a permissible way.<sup>138</sup> Texas disagreed, explaining that the government failed to provide for any limiting principle on executive action.<sup>139</sup> After briefing and oral argument, the Court declined to address the Take Care Clause when it issued its per curiam decision.<sup>140</sup> *United States v. Texas* is another example of the courts' tendency to sidestep the scope of the President's constitutional mandate to ensure the faithful execution of the laws.

### B. Congressional Inaction Towards Executive Nonenforcement

While the Supreme Court indicated that Congress may limit an agency's enforcement power,<sup>141</sup> Congress has not provided constraints or guidance on executive enforcement discretion.<sup>142</sup> The Supreme Court stated that "we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable" and that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."<sup>143</sup>

Despite Congress's awareness of deferred action, it has not acted to limit the practice.<sup>144</sup> For instance, in 2011, Congress considered a bill to temporarily suspend deferred action except under certain circumstances. The *Hinder the Administration's Legalization Temptation Act* proposed to suspend the executive branch's authority to grant deferred action for immigrants except for humanitarian or security purposes.<sup>145</sup> Despite these efforts, neither the House nor the Senate voted on the bill.

In addition, Congress expressly gave the DHS the discretion to establish immigration enforcement priorities and recognized that the DHS cannot act against every technical violation of Congress's immigration laws.<sup>146</sup> Congress has demonstrated an awareness and implicit approval that deferred action would be available to certain undocumented immigrants, such as VAWA peti-

138 Brief for Petitioners at 73–74, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (No. 15-674).

139 Brief for State Respondents at 72, *Texas*, 136 S. Ct. 2271 (No. 15-674).

140 *Texas*, 136 S. Ct. at 2272.

141 *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

142 See Rubenstein & Gulasekaram, *supra* note 110, at 623 ("[T]he Court has provided only sporadic and somewhat fuzzy parameters on what the President's duty to 'faithfully execute the law' entails.").

143 *Heckler*, 470 U.S. at 833, 838; see also Price, *supra* note 4, at 684 ("In the civil context, courts have indicated that, at least theoretically, Congress could regulate executive enforcement discretion.").

144 See Markowitz, *supra* note 115, at 540–44.

145 OLC Opinion, *supra* note 9, at 18 n.9 (citing H.R. 2497, 112th Cong. (1st Sess. 2011); S. 1380, 112th Cong. (1st Sess. 2011)).

146 Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified as amended at 6 U.S.C. § 202 (2012)).

tioners and T and U visa applicants.<sup>147</sup> At times, Congress has also indicated that some immigrants should be eligible for deferred action, including immediate family members of LPRs killed on September 11, 2001 and family members of U.S. citizens killed in combat.<sup>148</sup> Congress has thus repeatedly acknowledged the DHS's use of deferred action for undocumented immigrants, yet has failed to provide any real constraints on the President's use of deferred action. There is the potential for the executive branch to abuse its Take Care power, provided that there has been a historical practice for judicial and legislative branches to not constrain executive power.<sup>149</sup>

#### IV. EXPANDING THE OLC'S FRAMEWORK TO CABIN THE EXECUTIVE'S ENFORCEMENT DISCRETION

While the Take Care Clause is a fount of inherent executive enforcement discretion, this discretion goes too far when it is unfettered by any tangible constraints. Since court guidance is sparse<sup>150</sup> and Congress has had little to say about limiting the Executive's use of deferred action, it remains unclear as to what the exact parameters of the President's duty to faithfully execute the laws are. Under the Take Care Clause, the President has the duty to take care that the law is *faithfully* executed, implying some constitutional constraints on the President's ability *not* to enforce the law under the guise of prosecutorial discretion. While prosecutorial discretion may well be "an 'exclusive authority' of the executive branch,"<sup>151</sup> the Take Care Clause may provide some internal constraints.<sup>152</sup> This Part considers how the OLC's DAPA framework can be enhanced to account for the constraints on executive enforcement discretion embedded in the Take Care Clause and can be

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147 See OLC Opinion, *supra* note 9, at 18–19 ("Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice. On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens."); see also Price, *supra* note 4, at 760.

148 OLC Opinion, *supra* note 9, at 19.

149 Cf. Price, *supra* note 4, at 687 ("In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith . . . . Reliance on all forms of executive authority, without resort to Congress, thus becomes a nearly irresistible temptation for modern Presidents." (footnote omitted)).

150 *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

151 Price, *supra* note 4, at 685.

152 Cf. Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1613 (2016) ("With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches.").

used in future situations where the Executive broadly exercises enforcement discretion.<sup>153</sup>

*Youngstown Sheet & Tube Co. v. Sawyer*<sup>154</sup> provides a lens through which to view the Executive's power as self-controlling. In *Youngstown*, the Court held unconstitutional President Truman's action to take possession of the country's steel mills during the Korean War.<sup>155</sup> *Youngstown*, much like the DAPA litigation, involved claims that there was insufficient presidential authority to act under Article II.<sup>156</sup> Justice Jackson's enduring concurrence provides a framework for the Executive's abuse of power.<sup>157</sup> Jackson critiqued the executive branch's argument that past presidential practice authorized the steel mill seizure.<sup>158</sup> He was critical of the advice given to President Truman that he had authority to seize the country's steel mills and asserted that it was advice never given nor taken by President Roosevelt.<sup>159</sup> Jackson claimed that presidential action requires focusing on how that power has been used in the *past* and how it could be used by the executive branch in the *future*.<sup>160</sup> Jackson's message to the executive branch was one "of prudence and stewardship in the exercise of power."<sup>161</sup>

It is not a coincidence that the district court in *Texas v. United States* cited to Jackson's message in its opinion that the Obama administration overstepped its executive authority.<sup>162</sup> The district court in *Texas v. United States*

153 Cf. Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016) (arguing that the Court should assume a role in reviewing and policing presidential inaction).

154 343 U.S. 579 (1952).

155 *Id.* at 587–89.

156 Patricia Bellia, *Executive Power After United States v. Texas*, REG. REV. (July 20, 2016), <https://www.theregreview.org/2016/07/20/bellia-executive-power-after-united-states-texas/>.

157 *Youngstown*, 343 U.S. at 634–55 (Jackson, J., concurring).

158 *Id.* at 648–49.

159 *Id.* ("The Solicitor General, acknowledging that Congress has never authorized the seizure here, says practice of prior Presidents has authorized it. He seeks color of legality from claimed executive precedents, chief of which is President Roosevelt's seizure of June 9, 1941, of the California plant of the North American Aviation Company. Its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure."); Bellia, *supra* note 156.

160 Bellia, *supra* note 156 ("Stewardship of the presidency requires attention not only to the policy goals of its current occupant, but also to the accretion of power that overly broad assertions of executive authority will generate for future administrations.").

161 Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233, 282 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

162 *Texas v. United States*, 86 F. Supp. 3d 591, 663–64 (S.D. Tex. 2015); *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) ("Past action previously taken by the DHS does not make its current action lawful. President Truman in *Youngstown Sheet & Tube Co. v. Sawyer*, similarly sought 'color of legality from claimed executive precedents,' arguing that, although Congress had not expressly authorized his action, 'practice of prior Presidents has authorized it.' The Supreme Court firmly rejected the President's argument finding that the claimed past executive actions could not 'be regarded as even a precedent,

cited to *Youngstown* as an example of how past practice by the executive branch does not create a source of power for future action.<sup>163</sup> The court sought to reaffirm the principle that presidential action, or inaction, requires a consideration of how that power may be aggrandized by the executive branch in the future. In the case of DAPA, sweeping assertions of executive enforcement discretion could feed into broad presidential power to make policy decisions in the future.<sup>164</sup>

Jackson's concurrence also acknowledged that congressional inaction would expand presidential power absent judicial intervention.<sup>165</sup> Jackson noted that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."<sup>166</sup> He commented on the Solicitor General's argument about the Commander-in-Chief Clause by stating that "[w]hile broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head," are narrower and "[e]ven then, heed has been taken of any efforts of Congress to negative [the President's] authority."<sup>167</sup> Jackson's message to Congress also rings true with regard to DAPA. Congress has ceded power to the executive branch by leaving a wide gap between the INA and the actual enforcement of the law by the executive branch.<sup>168</sup> In the immigration context, the executive branch needs to police itself because Congress and the courts will not do so otherwise. Jackson's concern that congressional complacency will deteriorate limits on executive power has materialized in DAPA.<sup>169</sup>

The OLC offered a multiprong functional framework in an attempt to cabin enforcement discretion exercised through the deferred action immigration programs.<sup>170</sup> While the OLC framework falls short of providing a set of limiting principles for the executive branch to constrain itself,<sup>171</sup> if the

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much less an authority for the present [action].'" (quoting *Youngstown*, 343 U.S. at 649 (Jackson, J., concurring))).

163 *Id.*

164 Bellia, *supra* note 156.

165 *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

166 *Id.*; Bellia, *supra* note 161, at 276–77 ("Justice Jackson's critique is truly an *intra*-executive branch critique rather than a judicial critique, pitting the claims of current advisors to President Truman against the narrower claims of advisors past.").

167 *Youngstown*, 343 U.S. at 645; Bellia, *supra* note 161, at 276.

168 See Bellia, *supra* note 156.

169 See *id.*

170 See *supra* Part II.

171 See generally Bellia, *supra* note 54; Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); *Recent Executive Opinion: Immigration Law—Office of Legal Counsel Issues Opinion Endorsing President Obama's Executive Order on Deferred Action for Parental Accountability—The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Pre-*

framework is enhanced, it could provide a blueprint for the OLC to check agency enforcement discretion. This framework can provide practical constraints on the executive branch to ensure that it does not skirt its duty to faithfully execute congressional legislation. Federal agencies should consult the OLC before making general policy decisions premised on executive non-enforcement discretion so the OLC can provide a public report with its enhanced four-factor analysis.

The first principle of the OLC's DAPA framework stated that enforcement decisions should reflect factors within the scope of the agency's expertise.<sup>172</sup> The OLC indicated that the factors may include "whether the agency has enough resources to undertake the action," "whether agency resources are best spent on this violation or another," "the proper ordering of [the agency's] priorities," and "the agency's assessment of 'whether the particular enforcement action [at issue] best fits the agency's overall policies.'"<sup>173</sup> In a thin analysis, the OLC concluded that the DHS satisfied this principle by considering resource constraints and humanitarian interests, both within the Agency's expertise.

In order to cabin enforcement discretion and determine the scope of the agency's expertise, the OLC should first interview agency officials and employees. The OLC can inquire about agency practices and overall agency efficiency to explore what avenues are available before the executive branch exercises broad enforcement discretion. The OLC should analyze each factor it mentioned in turn—agency resources generally, the allocation of resources specifically, the proper ordering of the agency's priorities, and the agency's overall policies. Additionally, the OLC should assess in detail the agency budget constraints both before and after an enforcement decision would take effect. This way, the OLC can make a reasoned decision as to whether the enforcement decision reflects considerations within the agency's expertise.

The second principle of the OLC's DAPA framework stated that the Executive's enforcement decisions cannot attempt to effectively rewrite the laws to match its policy preferences.<sup>174</sup> The agency's enforcement decisions should be in accord with congressional policy underlying the statutes Congress charges the agency with administering. The OLC found that DAPA was consonant with the congressional policy underlying the INA because "[n]umerous provisions of the [INA] reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States."<sup>175</sup>

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*sent in the United States and to Defer Removal of Others*, 38 *Op. O.L.C.* (Nov. 19, 2014), 128 *HARV. L. REV.* 2320 (2015) [hereinafter *Recent Executive Opinion*].

172 OLC Opinion, *supra* note 9, at 6.

173 *Id.* at 6 (alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)).

174 *Id.*

175 *Id.* at 26.

To provide for more robust constraints on executive inaction, the OLC should first compare the executive nonenforcement policy alongside the text of the statute it purports to align with. In order to properly consider whether an enforcement decision is a rewriting of the law, the OLC should examine the congressional history, legislative debates, statutory text, and any amendments made thereafter. Next, the OLC should take into account what legal rights the executive policy affords individuals that the statutory text does not. Finally, in considering whether the nonenforcement policy is a rewriting of the law, the OLC should consider the statute's broad goals and grapple with whether the policy aligns with those goals. Holistically, the OLC should consider whether the lack of fidelity to the precise text of the statute varies so far that there is a Take Care Clause violation, something the OLC never did in the OLC Opinion.

With regard to immigration, the OLC should have compared DAPA alongside the text of the INA. In its opinion, the OLC did not properly grapple with whether DAPA's grant of lawful presence violated the Act. It failed to address separately whether forbearance, lawful presence, or work authorization violated the INA. The INA specifies that the cancellation of removal can occur for a maximum of 4000 undocumented immigrants a year.<sup>176</sup> The INA also reserves visas for parents of U.S. citizens, but the citizen has to be at least twenty-one years old and the parent generally must not have previously held an unlawful presence in the United States.<sup>177</sup> If the OLC directly compared DAPA with the INA, it would find that DAPA was directly contradictory to the INA's explicit numerical and age requirements for immigrants to remain in the country.

It would be sensible for the OLC to address whether DAPA lacked fidelity to the INA. While DAPA does not *grant* lawful status, unlike the cancellation of removal and visa statutory sections, DAPA's forbearance from removal provided immigrants with *lawful presence* in the United States, which paused the accrual of unlawful presence and allowed immigrants to be able to benefit from governmental programs.<sup>178</sup> If the executive branch was acting with prudence, it would have taken a closer look at the INA and would have found that the gap between the INA and DAPA is too large to sustain.

Additionally, the OLC failed to adequately grapple with the notoriously complex congressional immigration goals. Rather than handpick particular INA provisions or provide general justifications for the Executive's action,<sup>179</sup> it would be beneficial if the OLC demonstrated in detail how the President's proposed program aligns with congressional policy and why there are no viable alternatives. In order to grapple with whether agency inaction conforms

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176 8 U.S.C. § 1229b(e)(1) (2012).

177 *Id.* § 1151(b)(2)(A)(i).

178 *See* Bellia, *supra* note 54, at 1762–65.

179 Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014), <https://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> (“This level-of-generality problem is a standard one that arises in all statutory interpretation . . .”).



with the Take Care Clause, the OLC needs to balance counterarguments, weigh alternatives, and assess contrary evidence.<sup>180</sup>

The third principle of the OLC's framework stated that the Executive cannot adopt a general policy that abdicates its statutory responsibilities.<sup>181</sup> The OLC concluded that DAPA would not amount to an abdication of statutory responsibilities because the parents of U.S. citizens and LPRs are "near the bottom of the list of the agency's [valid] removal priorities."<sup>182</sup>

To enhance the third principle, the OLC should first use tools of statutory interpretation to discern if executive discretion is an abdication of statutory responsibilities. The OLC should then address whether the exercise of executive nonenforcement discretion is substantively lawful under the relevant statutory scheme.

In the case of immigration, rather than providing a conclusive, one paragraph determination that DAPA was not an abdication of the Executive's statutory responsibilities, a tighter analysis would have elaborated on alternative interpretations. In particular, the OLC could delve into a discussion of the legislative history surrounding the statute's enactment, the surrounding statutory provisions, other statutes similar to the one at issue, and any subsequent amendments.<sup>183</sup>

Additionally, the OLC needs to address whether DAPA was substantively unlawful under the INA. While the INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country,'" the OLC Opinion did not properly grapple with the INA's intricate regulatory scheme.<sup>184</sup> The Fifth Circuit held as an alternative holding that DAPA violated the INA under *Chevron* because Congress had "addressed the precise question at issue"<sup>185</sup> and the INA "prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."<sup>186</sup> It is beyond the DHS's powers to pro-

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180 Cf. *Recent Executive Opinion*, *supra* note 171, at 2327 (explaining the "ways in which the Opinion's limiting principle presents much thornier challenges than the OLC's Opinion suggests").

181 OLC Opinion, *supra* note 9, at 7.

182 *Id.* at 28.

183 See *Yates v. United States*, 354 U.S. 298 (1957) (discussing various methods of statutory interpretation, including the plain meaning, *noscitur a sociis*, *eiusdem generis*, *in pari materia*, avoiding absurd results, statutory amendments, legislative history, and the rule of lenity), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978).

184 *Texas v. United States*, 809 F.3d 134, 163 n.80 (5th Cir. 2015) (quoting *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011)), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

185 *Id.* at 186 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011)).

186 *Id.* (quoting *Mayo Found.*, 562 U.S. at 53).

vide an entire class of undocumented immigrants with lawful presence and work authorization when Congress's words seemed to hold the opposite is true.<sup>187</sup> In assessing future instances of the executive branch exercising its nonenforcement discretion, the OLC should take a closer look at whether an agency action is substantively unlawful.

Finally, the fourth principle posited that enforcement discretion must be applied on a case-by-case basis.<sup>188</sup> The OLC found that DAPA permitted case-by-case enforcement discretion and did not "categorically declin[e] to enforce the law with respect to a particular group of undocumented aliens."<sup>189</sup>

In the future, the OLC should first consider the size of the executive nonenforcement action in its assessment of whether enforcement discretion is made on a case-by-case basis. The OLC should next consider the time constraints, if any, on an executive nonenforcement action as a factor in whether enforcement discretion is made on a case-by-case basis. The OLC should ensure that there is a definitive date by which the executive branch will reevaluate whether its nonenforcement policy is consonant to the Take Care Clause.

As discussed above, the OLC Opinion peripherally assessed whether DAPA would be problematic due to its size.<sup>190</sup> However, the OLC was conclusory in determining that size was unproblematic because immigrants eligible for DAPA represented "only a fraction" of the undocumented immigrants in the United States.<sup>191</sup> The OLC did not fully justify how the size of the program affected whether enforcement discretion is made on a case-by-case basis, and only cursorily acknowledged that millions of undocumented immigrants would be eligible for DAPA. Size should play more of a role in assessing whether enforcement discretion could be made on an individualized basis. Additionally, the OLC Opinion did not consider how long DAPA would last, and instead justified DAPA because the grant of deferred action is time limited and revocable by the Agency at any time.

Each principle of the four-factor framework can be utilized to more carefully scrutinize the President's use of enforcement discretion in immigration and other contexts. For instance, the OLC did not publish any endorsement of DACA, so it is unknown what grounds form the basis of DACA's legality. The OLC only provided that DACA implemented "deferred action on a case-by-case basis" and "the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion."<sup>192</sup> The OLC framework should be used to analyze deferred action in DACA and a variety of other domestic policy contexts. Each time the executive branch creates a nonenforcement

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187 *Id.* at 169.

188 OLC Opinion, *supra* note 9, at 7.

189 *Id.* at 29.

190 *See id.* at 30–31.

191 *Id.* at 31.

192 *Id.* at 18 n.8.

policy, the OLC should publish a detailed four-factor analysis, disclosing the sources it relied upon to formulate its opinion. This will provide for increased accountability and allow for the public to independently analyze the OLC's reasoning. An enhanced, publicly reviewable OLC framework provides a safety valve against presidential overreach.

Additionally, the Take Care Clause may impose other internal constraints on the Executive. In its analysis, the OLC should also consider the agency's past actions and whether an enforcement decision is similar to other programs it has historically undertaken as Jackson contemplated in his *Youngstown* concurrence. Supplementary procedures could be grafted onto executive enforcement discretion when agencies' nonenforcement policies flip-flop after an election. To prevent agency flip-flopping, the OLC should have to provide notice of the Executive's intent to change enforcement discretion policies. The OLC should be required to issue a detailed report justifying the President's change in position on enforcement discretion. This analysis should consider factors such as whether there was a change in facts or whether a prior policy "engendered . . . reliance interests."<sup>193</sup> While the President is not an agency and certainly is not constrained by the APA,<sup>194</sup> parallel agency constraints may prove useful for the executive branch to exercise self-control. An agency switching its nonenforcement policy should "show that there are good reasons for the new policy."<sup>195</sup> The OLC should analyze whether and how much a change in policy will upset reliance interests so that there are substantive internal constraints within the executive branch. The OLC should utilize its multifactor framework with the above suggestions incorporated to constrain the executive branch.

## CONCLUSION

How to best prevent abuses of executive discretion is a pressing question. Presidents have been using nonenforcement to effectively amend statutory policies. Because the other branches fail to adequately cabin executive discretion, the executive branch must apply internal constraints in order to be in conformity with its Take Care obligations. The Executive is not acting upon the faithful execution of the law by selectively choosing not to enforce the law in accordance with particular policy preferences. The OLC Opinion provides a useful starting point for thinking about how the executive branch

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193 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). While an agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate[,] [s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.

*Id.* (citing *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996)).

194 *See Dalton v. Specter*, 511 U.S. 462, 476 (1994) (explaining that a President is not an agency under the APA and is therefore not subject to the APA requirements).

195 *Fox Television Stations*, 556 U.S. at 515.

can comport with its Take Care Clause duty to faithfully enforce the law. It can be improved by providing a more detailed analysis of the four prongs as outlined in the OLC Opinion and elaborated in Part IV.