

25 November 2014

We write as scholars and teachers of immigration law who have reviewed the executive actions announced by the President on November 20, 2014. It is our considered view that the expansion of the Deferred Action for Childhood Arrivals (DACA) and establishment of the Deferred Action for Parental Accountability (DAPA) programs are within the legal authority of the executive branch of the government of the United States. To explain, we cite federal statutes, regulations, and historical precedents. We do not express any views on the policy aspects of these two executive actions.

This letter updates a letter transmitted by 136 law professors to the White House on September 3, 2014, on the role of executive action in immigration law.<sup>1</sup> We focus on the legal basis for granting certain noncitizens in the United States “deferred action” status as a temporary reprieve from deportation. One of these programs, Deferred Action for Childhood Arrivals (DACA), was established by executive action in June 2012. On November 20, the President announced the expansion of eligibility criteria for DACA and the creation of a new program, Deferred Action for Parental Accountability (DAPA).

*Prosecutorial discretion in immigration law enforcement*

Both November 20 executive actions relating to deferred action are exercises of prosecutorial discretion. Prosecutorial discretion refers to the authority of the Department of Homeland Security to decide how the immigration laws should be applied.<sup>2</sup> Prosecutorial discretion is a long-accepted legal practice in practically every law enforcement context,<sup>3</sup>

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<sup>1</sup> See Letter to the President of the United States, Executive authority to protect individuals or groups from deportation (Sep. 3, 2014), <https://pennstatelaw.psu.edu/file/Law-Professor-Letter.pdf>

<sup>2</sup> See Thomas Aleinikoff, David Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 778-88 (7th ed. 2012); Stephen H. Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* 629-32 (5th ed. 2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1476341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341).

<sup>3</sup> Notably, in criminal law, prosecutorial discretion has existed for hundreds of years. It was a common reference point for the immigration agency in early policy documents describing prosecutorial discretion. See Doris Meissner, Immigration and Naturalization Service (INS) Commissioner, *Exercising Prosecutorial Discretion* 1 (Nov. 17, 2000) [hereinafter Meissner Memo], <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>; Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976),

unavoidable whenever the appropriated resources do not permit 100 percent enforcement. In immigration enforcement, prosecutorial discretion covers both agency decisions to *refrain* from acting on enforcement, like cancelling or not serving or filing a charging document or Notice to Appear with the immigration court, as well as decisions to *provide* a discretionary remedy like granting a stay of removal,<sup>4</sup> parole,<sup>5</sup> or deferred action.<sup>6</sup>

Prosecutorial discretion provides a temporary reprieve from deportation. Some forms of prosecutorial discretion, like deferred action, confer “lawful presence” and the ability to apply for work authorization.<sup>7</sup> However, the benefits of the deferred action programs announced on November 20 are not unlimited. The DACA and DAPA programs, like any other exercise of prosecutorial discretion do *not* provide an independent means to obtain permanent residence in the United States, nor do they allow a noncitizen to acquire eligibility to apply for naturalization as a U.S. citizen. As the President has emphasized, only Congress can prescribe the qualifications for permanent resident status or citizenship.

#### *Statutory authority and long-standing agency practice*

Focusing first on statutes enacted by Congress, § 103(a) of the Immigration and Nationality Act (“INA” or the “Act”), clearly empowers the Department of Homeland Security (DHS) to make choices about immigration enforcement. That section provides: “The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . .”<sup>8</sup> INA § 242(g) recognizes the executive branch’s legal authority to exercise prosecutorial discretion, specifically

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<http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>. See also, e.g., Angela J. Davis, *Arbitrary Justice* (2007); Hiroshi Motomura, *Prosecutorial Discretion in Context: How Discretion is Exercised Throughout our Immigration System*, American Immigration Council 2-3 (April 2012), [http://www.immigrationpolicy.org/sites/default/files/docs/motomura\\_-\\_discretion\\_in\\_context\\_04112.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf); Stephen H. Legomsky, Legal Authorities for DACA and Similar Programs (Aug. 24, 2014), <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/Editorial-Opinion/Graphics/executive%20action%20legal%20points.pdf>.

<sup>4</sup> 8 C.F.R. § 241.6.

<sup>5</sup> INA § 212(d)(5).

<sup>6</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>7</sup> Under INA § 212(a)(9)(B)(ii), a person will not be deemed unlawfully present during any “period of stay authorized by the Attorney General” (now the Secretary of Homeland Security). The Department of Homeland Security has authorized such a period of stay for recipients of deferred action. See Donald Neufeld, Lori Scialabba, & Pearl Chang, U.S. Citizenship and Immigration Services (USCIS), *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/revision\\_redesign\\_AFM.PDF](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF); U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (updated June 5, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

<sup>8</sup> INA § 103(a).

by barring judicial review of three particular types of prosecutorial discretion decisions: to commence removal proceedings, to adjudicate cases, and to execute removal orders.<sup>9</sup> In other sections of the Act, Congress has explicitly recognized deferred action by name, as a tool that the executive branch may use, in the exercise of its prosecutorial discretion, to protect certain victims of abuse, crime or trafficking.<sup>10</sup> Another statutory provision, INA § 274A(h)(3), recognizes executive branch authority to authorize employment for noncitizens who do not otherwise receive it automatically by virtue of their particular immigration status. This provision (and the formal regulations noted below) confer the work authorization eligibility that is part of both the DACA and DAPA programs.

Based on this statutory foundation, the application of prosecutorial discretion to individuals or groups has been part of the immigration system for many years. Longstanding provisions of the formal regulations promulgated under the Act (which have the force of law) reflect the prominence of prosecutorial discretion in immigration law. Deferred action is expressly defined in one regulation as “an act of administrative convenience to the government which gives some cases lower priority” and goes on to authorize work permits for those who receive deferred action.<sup>11</sup> Agency memoranda further reaffirm the role of prosecutorial discretion in immigration law. In 1976, President Ford’s Immigration and Naturalization Service (INS) General Counsel Sam Bernsen stated in a legal opinion, “The reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to enforce all of the rules and regulations presently on the books.”<sup>12</sup> In 2000, a memorandum on prosecutorial discretion in immigration matters issued by INS Commissioner Doris Meissner provided that “[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process,” and spelled out the factors that should guide those decisions.<sup>13</sup> In 2011, Immigration and Customs Enforcement in the Department of Homeland Security published guidance known as the “Morton Memo,” outlining more than one dozen factors, including humanitarian factors, for employees to consider in deciding whether prosecutorial discretion should be exercised. These factors — now

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<sup>9</sup> INA § 242(g); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

<sup>10</sup> INA § § 237(d)(2); 204(a)(1)(D)(i)(II,IV).

<sup>11</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>12</sup> Bernsen, *supra* note 3.

<sup>13</sup> Meissner Memo, *supra* note 3. Notably, the Meissner memorandum was a key reference point for related memoranda issued during the Bush administration, among them a 2005 memorandum from Immigration and Customs Enforcement legal head William Howard and a 2007 memorandum from ICE head Julie Myers on the use of prosecutorial discretion when making decisions about undocumented immigrants who are nursing mothers.

updated by the November 20 executive actions — include tender or elderly age, long-time lawful permanent residence, and serious health conditions.<sup>14</sup>

*Judicial recognition of executive branch prosecutorial discretion in immigration cases*

Federal courts have also explicitly recognized prosecutorial discretion in general and deferred action in particular.<sup>15</sup> Notably, the U.S. Supreme Court noted in its *Arizona v. United States* decision in 2012: “A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all . . . .”<sup>16</sup> In its 1999 decision in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court explicitly recognized deferred action by name. This affirmation of the role of discretion is consistent with congressional appropriations for immigration enforcement, which are at an annual level that would allow for the arrest, detention, and deportation of fewer than 4 percent of the noncitizens in the United States who lack lawful immigration status.<sup>17</sup>

Based on statutory authority, U.S. immigration agencies have a long history of exercising prosecutorial discretion for a range of reasons that include economic or humanitarian considerations, especially — albeit not only — when the noncitizens involved have strong family ties or long-term residence in the United States.<sup>18</sup> Prosecutorial discretion, including deferred action, has been made available on both a case-by-case basis and a group basis, as are true under DACA and DAPA. But even when a program like deferred action has been aimed at a particular group of people, individuals must apply, and the agency must exercise its discretion based on the facts of each individual case. Both DACA and DAPA explicitly incorporate that requirement.

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<sup>14</sup> John Morton, Director, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. [hereinafter Morton Memo].

<sup>15</sup> See e.g., *Lennon v. Immigration & Naturalization Service*, 527 F.2d 187, 191 n.5 (2d Cir. 1975); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979).

<sup>16</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

<sup>17</sup> 525 U.S. 471 (1999). One source suggests that DHS has resources to remove about 400,000 or less than 4% of the total removable population. See Morton memo, supra note 14.

<sup>18</sup> For example, of the 698 deferred action cases processed by Immigration and Customs Enforcement between October 1, 2011, and June 30, 2012, the most common humanitarian reasons for a grant were: Presence of a USC dependent; Presence in the United States since childhood; Primary caregiver of an individual who suffers from a serious mental or physical illness; Length of presence in the United States; and Suffering from a serious mental or medical care condition. See Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345, 356-69 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758). See also, Shoba Sivaprasad Wadhia, *Relics of Deferred Action*, The Hill (2014), <http://thehill.com/blogs/congress-blog/civil-rights/224744-relics-of-deferred-action>.

### *Historical precedents for deferred action and similar programs for individuals and groups*

As examples of the exercise of prosecutorial discretion, numerous administrations have issued directives providing deferred action or functionally similar forms of prosecutorial discretion to groups of noncitizens, often to large groups. The administrations of Presidents Ronald Reagan and George H.W. Bush deferred the deportations of a then-predicted (though ultimately much lower) 1.5 million noncitizen spouses and children of immigrants who qualified for legalization under the Immigration Reform and Control Act (IRCA) of 1986, authorizing work permits for the spouses.<sup>19</sup> Presidents Reagan and Bush took these actions, even though Congress had decided to exclude them from IRCA.<sup>20</sup> Among the many other examples of significant deferred action or similar programs are two during the George W. Bush administration: a deferred action program in 2005 for foreign academic students affected by Hurricane Katrina,<sup>21</sup> and “Deferred Enforcement Departure” for certain Liberians in 2007.<sup>22</sup> Several decades earlier, the Reagan administration issued a form of prosecutorial discretion called “Extended Voluntary Departure” in 1981 to thousands of Polish nationals.<sup>23</sup> The legal sources and historical examples of immigration prosecutorial discretion described above are by no means exhaustive, but they underscore the legal authority for an administration to apply prosecutorial discretion to both individuals and groups.

Some have suggested that the size of the group who may “benefit” from an act of prosecutorial discretion is relevant to its legality. We are unaware of any legal authority for such an assumption. Notably, the Reagan-Bush programs of the late 1980s and early 1990s were based on an initial estimated percentage of the unauthorized population (about 40 percent) that is comparable to the initial estimated percentage for the November 20 executive actions. The President could conceivably decide to cap the number of people who can receive prosecutorial

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<sup>19</sup> See Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. Times (March 5, 1990), <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>.

<sup>20</sup> See 67 Interpreter Releases 204 (Feb. 26, 1990); 67 Interpreter Releases 153 (Feb. 5, 1990). Bush’s policy followed a narrower 1987 executive order by President Reagan’s immigration commissioner that applied only to children. 64 Interpreter Releases 1191 (Oct. 26, 1987). Congress later in 1990 legislatively provided some of them a path to legalization. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 301, 104 Stat. 4978, <http://www.justice.gov/eoir/IMMACT1990.pdf>.

<sup>21</sup> See Shoba Sivaprasad Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. See Also 59, n.46 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195735), citing Press Release, U.S. Citizenship and Immigration Services, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), [http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf).

<sup>22</sup> DED Granted Country- Liberia, U.S. Citizenship and Immigration, <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia> (last visited Nov. 22, 2014).

<sup>23</sup> Legomsky & Rodriguez, *Immigration and Refugee Law and Policy*, *supra* note 2, at 1115-17; See also David Reimers, *Still the Golden Door: The Third World Comes to America* 202 (1986).

discretion or make the conditions restrictive enough to keep the numbers small, but this would be a policy choice, not a legal issue.<sup>24</sup> For all of these reasons, the President is not “re-writing” the immigration laws, as some of his critics have suggested. He is doing precisely the opposite — exercising a discretion conferred by the immigration laws and settled general principles of enforcement discretion.

### *The Constitution and immigration enforcement discretion*

Critics have also suggested that the deferred action programs announced on November 20 violate the President’s constitutional duty to “take Care that the Laws be faithfully executed.”<sup>25</sup> A serious legal question would therefore arise if the executive branch were to halt all immigration enforcement, or even if the Administration were to refuse to substantially spend the resources appropriated by Congress. In either of those scenarios, the justification based on resource limitations would not apply. But the Obama administration has fully utilized all the enforcement resources Congress has appropriated. It has enforced the immigration law at record levels through apprehensions, investigations, and detentions that have resulted in over two million removals.<sup>26</sup> At the same time that the President announced the November 20 executive actions that we discuss here, he also announced revised enforcement priorities to focus on removing the most serious criminal offenders and further shoring up the southern border. Nothing in the President’s actions will prevent him from continuing to remove as many violators as the resources Congress has given him permit.

Moreover, when prosecutorial discretion is exercised, particularly when the numbers are large, there is no legal barrier to formalizing that policy decision through sound procedures that include a formal application and dissemination of the relevant criteria to the officers charged with implementing the program and to the public. As DACA has shown, those kinds of procedures assure that important policy decisions are made at the leadership level, help officers to implement policy decisions fairly and consistently, and offer the public the transparency that government priority decisions require in a democracy.<sup>27</sup>

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<sup>24</sup> For a broader discussion about the relationship between class size and constitutionality, see Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, *supra* note 20.

<sup>25</sup> U.S. Const. art. II, § 3.

<sup>26</sup> U.S. ICE, FY 2013 ICE Immigration Removals, <http://www.ice.gov/removal-statistics/> (last visited Nov. 22, 2014); Marc R. Rosenblum & Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*, Migration Policy Institute (April 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

<sup>27</sup> For a broader discussion of the administrative law values associated with prosecutorial discretion, see Hiroshi Motomura, *Immigration Outside the Law* 19-55, 185-92 (2014); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012) (also providing a proposal for designing deferred action procedures), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1879443](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443).

*Conclusion*

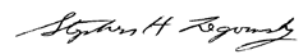
Our conclusion is that the expansion of the DACA program and the establishment of Deferred Action for Parental Accountability are legal exercises of prosecutorial discretion. Both executive actions are well within the legal authority of the executive branch of the government of the United States.



Hiroshi Motomura  
Susan Westerberg Prager  
Professor of Law  
University of California,  
Los Angeles,  
School of Law\*



Shoba Sivaprasad Wadhia  
Samuel Weiss Faculty  
Scholar and Clinical  
Professor of Law  
Pennsylvania State  
University  
Dickinson School of Law\*



Stephen H. Legomsky  
The John S. Lehmann  
University Professor  
Washington University  
School of Law\*

David Abraham  
Professor of Law  
University of Miami School of Law\*

Sabrineh Ardalan  
Lecturer on Law, Harvard Law School  
Assistant Director, Harvard Immigration and  
Refugee Clinical Program

Raquel Aldana  
Associate Dean for Faculty Scholarship  
Professor of Law  
University of the Pacific, McGeorge School  
of Law

David C. Baluarte  
Assistant Clinical Professor of Law  
Director, Immigrant Rights Clinic  
Washington and Lee University School of  
Law

Farrin R. Anello  
Visiting Assistant Clinical Professor  
Seton Hall University School of Law

Melynda Barnhart  
Professor of Law  
New York Law School

Deborah Anker  
Clinical Professor of Law  
Director, Harvard Immigration and Refugee  
Clinic  
Harvard Law School

Jon Bauer  
Clinical Professor of Law and Richard D.  
Tuliano '69 Scholar in Human Rights  
Director, Asylum and Human Rights Clinic  
University of Connecticut School of Law

---

\* all institutional affiliations are for identification purposes only

Lenni B. Benson  
Professor of Law  
Director, Safe Passage Project  
New York Law School

Jacqueline Bhabha  
Professor of the Practice of Health and  
Human Rights  
Harvard School of Public Health  
Lecturer in Law  
Harvard Law School

Linda Bosniak  
Distinguished Professor  
Rutgers University School of Law-Camden

Richard A. Boswell  
Professor of Law & Associate Dean for  
Global Programs  
U.C. Hastings College of the Law

Jason A. Cade  
Assistant Professor of Law  
University of Georgia Law School

Janet Calvo  
Professor of Law  
CUNY School of Law, New York

Kristina M. Campbell  
Associate Professor of Law  
Director, Immigration and Human Rights  
Clinic  
University of the District of Columbia David  
A. Clarke School of Law

Stacy Caplow  
Professor of Law and  
Associate Dean of Professional Legal  
Education  
Brooklyn Law School

Benjamin Casper  
Visiting Associate Clinical Professor  
University of Minnesota Law School

Linus Chan  
Visiting Associate Professor of Clinical Law  
University of Minnesota

Howard F. Chang  
Earle Hepburn Professor of Law  
University of Pennsylvania Law School

Michael J. Churgin  
Raybourne Thompson Centennial Professor  
in Law  
University of Texas at Austin

Marisa Cianciarulo  
Professor of Law  
Director, Bette & Wylie Aitken Family  
Violence Clinic  
Chapman University Dale E. Fowler School  
of Law

Evelyn Cruz  
Clinical Professor of Law  
Director, Immigration Law & Policy Clinic  
Arizona State University  
Sandra Day O'Connor College of Law

Ingrid Eagly  
Assistant Professor of Law  
UCLA School of Law

Philip Eichorn  
Adjunct Professor - Immigration Law  
Cleveland State - Cleveland Marshall  
School of Law

Bram T. Elias  
Clinical Visiting Associate Professor  
University of Iowa College of Law

Stella Burch Elias  
Associate Professor of Law  
University of Iowa College of Law



Jill E. Family  
Professor of Law  
Director, Law & Government Institute  
Widener University School of Law

Niels Frenzen  
Clinical Professor of Law  
Gould School of Law  
University of Southern California

Maryellen Fullerton  
Professor of Law  
Brooklyn Law School

César Cuauhtémoc García Hernández  
Visiting Professor  
University of Denver Sturm College of Law

Lauren Gilbert  
Professor of Law  
St. Thomas University School of Law

Denise L. Gilman  
Clinical Professor  
Co-Director, Immigration Clinic  
University of Texas School of Law

John F. Gossart, Jr.  
Adjunct Professor of Law  
University of Baltimore School of Law  
University of Maryland School of Law  
United States Immigration Judge 1982-  
2013, retired

P. Gulasekaram  
Associate Professor of Law  
Santa Clara University

Anju Gupta  
Associate Professor of Law  
Director, Immigrant Rights Clinic  
Rutgers School of Law - Newark

Susan R. Gzesh  
Senior Lecturer & Executive Director  
Pozen Family Center for Human Rights  
University of Chicago

Jonathan Hafetz  
Associate Professor of Law  
Seton Hall University

Dina Francesca Haynes  
Professor of Law and  
Director of Human Rights and Immigration  
Law Project  
New England Law, Boston

Susan Hazeldean  
Associate Clinical Professor  
Cornell Law School

Ernesto Hernández-López  
Professor of Law  
Fowler School of Law, Chapman University

Laura A. Hernandez  
Professor  
Baylor Law School

Michael Heyman  
Professor of Law  
John Marshall Law School

Barbara Hines  
Clinical Professor of Law  
Co-Director, Immigration Clinic  
University of Texas School of Law

Laila L. Hlass  
Clinical Associate Professor  
Boston University School of Law

Geoffrey Hoffman  
Clinical Assoc. Professor  
Director, Immigration Clinic  
University of Houston Law Center

Mary Holper  
Associate Clinical Professor  
Boston College Law School

Alan Hyde  
Distinguished Professor and Sidney Reitman  
Scholar  
Rutgers University School of Law - Newark

Kate Jastram  
Lecturer in Residence  
Executive Director, The Honorable G.  
William & Ariadna Miller Institute for  
Global Challenges and the Law  
University of California, Berkeley, School  
of Law

Kit Johnson  
Associate Professor of Law  
University of Oklahoma College of Law

Anil Kalhan  
Associate Professor of Law  
Drexel University Kline School of Law

Daniel Kanstroom  
Professor of Law, Dean's Research Scholar,  
and  
Director, International Human Rights  
Program  
Boston College Law School

Elizabeth Keyes  
Assistant Professor  
University of Baltimore School of Law

Kathleen Kim  
Professor of Law  
Loyola Law School Los Angeles

David C. Koelsch  
Associate Professor  
Immigration Law Clinic  
University of Detroit Mercy School of Law

Jennifer Lee Koh  
Associate Professor of Law and  
Director, Immigration Clinic  
Western State College of Law

Kevin Lapp  
Associate Professor of Law  
Loyola Law School, Los Angeles

Christopher Lasch  
Associate Professor of Law  
University of Denver Sturm College of Law

Jennifer J. Lee  
Clinical Assistant Professor  
Legal Director, Sheller Center for Social  
Justice  
Temple University Beasley School of Law

Stephen Lee  
Professor of Law  
University of California, Irvine

Christine Lin  
Clinical Instructor / Staff Attorney  
Center for Gender & Refugee Studies  
Refugee & Human Rights Clinic  
University of California, Hastings College  
of the Law

Beth Lyon  
Professor of Law  
Director, Farmworker Legal Aid Clinic  
Co-Director, Community Interpreter  
Internship Program  
Acting Director of Clinical Programs  
Villanova University School of Law

Stephen Manning  
Adjunct Professor of Law  
Lewis & Clark College

Lynn Marcus  
Professor of the Practice  
Co-Director, Immigration Law Clinic  
University of Arizona James E. Rogers  
College of Law

Miriam H. Marton  
Director, Tulsa Immigrant Resource  
Network  
Visiting Assistant Clinical Professor of Law  
University of Tulsa College of Law

Elizabeth McCormick  
Associate Clinical Professor of Law  
Director, Immigrant Rights Project  
Director, Clinical Education Programs  
University of Tulsa College of Law

M. Isabel Medina  
Ferris Family Distinguished Professor of  
Law  
Loyola University New Orleans College of  
Law

Stephen Meili  
Vaughan G. Papke Clinical Professor in  
Law  
University of Minnesota Law School

Vanessa Merton  
Professor of Law  
Pace University School of Law

Andrew Moore  
Associate Professor of Law  
University of Detroit Mercy School of Law

Jennifer Moore  
Professor of Law  
Weihofen Professorship  
University of New Mexico School of Law

Daniel I. Morales  
Assistant Professor of Law  
DePaul University College of Law

Nancy Morawetz  
Professor of Clinical Law  
Co-Director, Immigrant Rights Clinic  
NYU School of Law

Karen Musalo  
Bank of America Foundation Chair in  
International Law  
Professor & Director, Center for Gender &  
Refugee Studies  
U.C. Hastings College of the Law

Alizabeth Newman  
Clinic Law Professor  
Immigrant & NonCitizens Rights Clinic  
CUNY School of Law

Noah Novogrodsky  
Professor of Law  
University of Wyoming College of Law

Fernando A. Nuñez  
Visiting Assistant Professor of Law  
Charlotte School of Law

Mariela Olivares  
Associate Professor of Law  
Howard University School of Law

Michael A. Olivas  
William B. Bates Distinguished Chair in  
Law and  
Director, Institute for Higher Education Law  
and Governance  
University of Houston Law Center

Patrick D. O'Neill, Esq.  
Adjunct Professor of Immigration Law  
University of Puerto Rico School of Law

Sarah Paoletti  
Practice Professor of Law  
University of Pennsylvania Law School

Sunita Patel  
Practitioner-in-Residence  
Civil Advocacy Clinic  
American University, Washington College  
of Law

Huyen Pham  
Associate Dean for Faculty Research &  
Development  
Professor of Law  
Texas A&M University School of Law

Michele R. Pistone  
Professor of Law  
Villanova University School of Law

Luis F.B. Plascencia  
Assistant Professor  
School of Social and Behavioral Sciences  
Arizona State University

Polly J. Price  
Professor of Law  
Emory University School of Law

Doris Marie Provine  
Professor Emerita, Justice & Social Inquiry  
School of Social Transformation  
Arizona State University

Nina Rabin  
Associate Clinical Professor of Law  
Director, Bacon Immigration Law and  
Policy Program  
James E. Rogers College of Law, University  
of Arizona

Jaya Ramji-Nogales  
Professor of Law  
Co-Director, Institute for International Law  
and Public Policy  
Temple University, Beasley School of Law

Renee C. Redman  
Adjunct Professor of Law  
University of Connecticut School of Law

Ediberto Roman  
Professor of Law & Director of Citizenship  
and Immigration Initiatives  
Florida International University

Victor C. Romero  
Maureen B. Cavanaugh Distinguished  
Faculty Scholar & Professor of Law  
Penn State Law

Joseph H. Rosen  
Adjunct Professor  
Atlanta's John Marshall Law School

Carrie Rosenbaum  
Professor of Immigration Law  
Golden Gate University School of Law

Rachel E. Rosenbloom  
Associate Professor  
Northeastern University School of Law

Rubén G. Rumbaut  
Professor of Sociology, Criminology, Law  
and Society  
University of California, Irvine

Ted Ruthizer  
Lecturer in Law  
Columbia Law School

Leticia M. Saucedo  
Professor of Law and  
Director of Clinical Legal Education  
UC Davis School of Law

Heather Scavone  
Assistant Professor of Law  
Director of the Humanitarian Immigration  
Law Clinic  
Elon University School of Law

Andrew I. Schoenholtz  
Professor from Practice  
Georgetown Law

Philip Schrag  
Delaney Family Professor of Public Interest  
Law  
Georgetown University Law Center

Bijal Shah  
Acting Assistant Professor  
NYU School of Law

Ragini Shah  
Clinical Professor of Law  
Suffolk University Law School

Careen Shannon  
Adjunct Professor of Law and Director,  
Immigration Law Field Clinic  
Yeshiva University, Benjamin N. Cardozo  
School of Law

Anna Williams Shavers  
Cline Williams Professor of Citizenship  
Law  
University of Nebraska College of Law

Bryn Siegel  
Professor, Immigration Law  
Pacific Coast University School of Law

Anita Sinha  
Practitioner-in-Residence  
American University, Washington College  
of Law

Dan R. Smulian  
Associate Professor of Clinical Law  
Co-Director, Safe Harbor Project  
Brooklyn Law School

Gemma Solimene  
Clinical Associate Professor of Law  
Fordham University School of Law

Jayashri Srikantiah  
Professor of Law and  
Director, Immigrants' Rights Clinic  
Stanford Law School

Juliet Stumpf  
Professor of Law  
Lewis & Clark Law School

Maureen A. Sweeney  
Law School Associate Professor  
University of Maryland Carey School of  
Law

Barbara Szweda  
Associate Professor  
Lincoln Memorial University Duncan  
School of Law

Margaret H. Taylor  
Professor of Law  
Wake Forest University School of Law

David Thronson  
Associate Dean for Academic Affairs and  
Professor of Law  
Michigan State University College of Law

Allison Brownell Tirres  
Associate Professor & Associate Dean of  
Academic Affairs  
DePaul University College of Law

Scott Titshaw  
Associate Professor  
Mercer University School of Law

Phil Torrey  
Lecturer on Law, Harvard Law School  
Clinical Instructor, Harvard Immigration  
and Refugee Clinical Program  
Harvard Law School

Enid Trucios-Haynes  
Interim Director, Muhammad Ali Institute  
for Peace and Justice  
Professor of Law  
Louis D. Brandeis School of Law  
University of Louisville

Diane Uchimiya  
Professor of Law  
Director of Experiential Learning  
Director of the Justice and Immigration  
Clinic  
University of La Verne College of Law

Gloria Valencia-Weber  
Professor Emerita  
University of New Mexico School of Law

Sheila I. Vélez Martínez  
Assistant Clinical Professor of Law  
University of Pittsburgh School of Law

Alex Vernon  
Acting Director of Asylum and Immigrant  
Rights Law Clinic  
Visiting Assistant Professor of Law  
Ave Maria School of Law

Rose Cuison Villazor  
Professor of Law & Martin Luther King Jr.  
Hall Research Scholar  
University of California at Davis School of  
Law

Leti Volpp  
Robert D. and Leslie Kay Raven Professor  
of Law  
University of California, Berkeley

Jonathan Weinberg  
Professor of Law  
Wayne State University

Deborah M. Weissman  
Reef C. Ivey II Distinguished Professor of  
Law  
School of Law  
University of North Carolina at Chapel Hill

Lisa Weissman-Ward  
Clinical Supervising Attorney &  
Lecturer in Law  
Stanford Law School

Anna R. Welch  
Associate Clinical Professor  
University of Maine School of Law

Virgil O. Wiebe  
Professor of Law  
Robins, Kaplan, Miller & Ciresi Director of  
Clinical Education  
Co-Director, Interprofessional Center for  
Counseling and Legal Services  
University of St. Thomas School of Law,  
Minneapolis

Michael J. Wishnie  
William O. Douglas Clinical Professor of  
Law and  
Deputy Dean for Experiential Education  
Yale Law School

Stephen Yale-Loehr  
Adjunct Professor  
Cornell University Law School

Elizabeth Lee Young  
Associate Professor of Law  
University of Arkansas School of Law