

My name is Shoba Sivaprasad Wadhia and I am law professor at Penn State Law in University Park where I direct the Center for Immigrants' Rights Clinic and serve as a Samuel Weiss Faculty Scholar. It is an honor to be here to celebrate Constitution Day.

All persons are protected by our Constitution. No statute or Executive Order is above our Constitution. Immigration law is complex and is governed by several sources. The immigration statute is called the Immigration and Nationality Act. The Act was passed by Congress in 1952 and has been compared second in complication to the U.S. tax code. There are sections in that Act that describe how a person might qualify for admission on a temporary or permanent basis; sections about why a person might face deportation from the United States; and parts about defenses to deportation like asylum.

Congress has delegated to federal agencies the responsibility of carrying out immigration law and policy. These agencies include the Department of Homeland Security, Department of State and the Department of Justice. A person facing removal might go before a judge employed by the Department of Justice. An individual applying for a green card based on marriage to a U.S. citizen might have paperwork filed with the Department of Homeland Security.

The details of the immigration law are indeed complex – but the human impact of cannot be overstated. Said Justice Kennedy in *Arizona v United States* “Discretion in the enforcement of immigration law embraces immediate human concerns. ... The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”

One powerful form of discretion in immigration law is called “prosecutorial discretion” or PD. When this discretion exercised favorably, Department of Homeland Security (as opposed to a judge) refrains from bringing enforcement actions against a person. There are more than one dozen types of prosecutorial discretion in immigration law, but in all cases the result is the same- a temporary reprieve—not legal status- rather legal limbo- what I sometimes call immigration “purgatory.”

Prosecutorial discretion exists for economic reasons: DHS has the funds to deport 400,000 or less than 4% of the roughly 11.2 million unauthorized immigrants living in the United States, so choices have to be made by the agency about who to target for removal and who to place on the backburner. This is similar to why PD operates in the criminal

system- prosecutors do not bring charges against every person who fishes without a license- why? Because there are bigger fish to fry. Pun intended.

Prosecutorial discretion also has a humanitarian dimension- It allows law enforcement officers to consider a person's equities. In the immigration context, DHS may choose to exercise discretion for those who have lived in the United States for many years and who bear other compelling factors.

The **legal foundation for prosecutorial discretion** can be found in multiple sources. At the heart of the Take Care clause of the U.S. Constitution is the President's responsibility to take care that the laws of the United States are faithfully executed. Courts have interpreted this to include the exercise of prosecutorial discretion.

Additionally, Congress has delegated the responsibility of setting priorities in immigration enforcement to the Department of Homeland Security. Further, Congress has charged DHS with administering and enforcing the immigration laws in section 103 of the INA. The U.S. Supreme Court has recognized that: "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." These authorities and more were most recently explained by 105 law professors in an open letter I co-authored to the President on August 14, 2017 to defend the legality of DACA.

DACA or Deferred Action for Childhood Arrivals is a policy announced in June 2012 by President Barack Obama. DACA enables those who entered the U.S. before turning 16 years old, are in school or graduated, meet residence and other requirements to apply for and receive deferred action, one form of prosecutorial discretion. Those granted DACA are eligible to apply for work authorization and protected from removal for a period of two years.

The DACA program has served as a gateway for [nearly 800,000](#) immigrant youth, the vast majority of whom are working or going to school in the United States. By its terms, those with DACA have lived in the United States for at least 10 years. More than 5,000 live in PA. The contributions of DACA recipients to the U.S. economic and educational space have been [extraordinary](#).

On September 5, 2017 and despite the program's support by 105 law professors, leading CEOs, university presidents, and several members of Congress from both parties, President Trump (through his Attorney General) announced that he would end DACA.

How did we get here? As a campaign promise, President Trump indicated that he would end DACA. For the first six months of his administration, the President sent mixed messages about the fate of DACA. On June 29, 2017, a group of conservative state Attorney Generals (led by Texas) wrote a letter threatening to sue the administration if DACA was not rescinded by September 5. On September 5, Attorney General announced the end of DACA. During this press conference, he called DACA recipients “illegal aliens,” called DACA unlawful and unconstitutional and considered such a rescission to be in the national interest. He took no questions. In my view, his announcement was legally dishonest and dehumanizing. What followed was a mountain of misinformation about DACA, the DREAM Act and rule of law.

By the terms of the rescission, any person with DACA will retain their deferred action and work authorization until it expires. DHS will not accept NEW requests for DACA or advanced parole. In the case of individuals whose DACA will expire between now and March 5, 2018, renewals must be received by DHS by October 5, 2017. This means that immigration attorneys have less than 30 days to help file 150,000+ renewal applications. It also means that 2020 is the last year during which a DACA recipient will hold such status or an associated work permit.

Lawsuits have been filed on constitutional and statutory grounds to challenge the DACA rescission. So called deals between the Democrats and the President over a DREAM Act legislation have been reported in the press, but importantly this does not change the work that must be done between now and October 5, nor does it reduce the need for supporters of DACA or the DREAM Act to have accurate information about the details.

**Beyond DACA**, the future of discretion in immigration is uncertain. Despite major changes to enforcement, guidance from DHS suggests that individual [prosecutorial discretion](#) may be exercised on a case-by-case basis. **Even without this guidance**, prosecutorial discretion is in many ways inevitable—the government simply lacks the resources to carry out enforcement against every person who may be removable from the United States. However, how prosecutorial discretion is exercised matters. One concern is that instead of using priorities to guide enforcement, DHS will arbitrarily enforce the law against individuals and families who happen to be in the wrong place at the wrong time or other low-hanging fruit. Haphazard enforcement can lead to unintended or unlawful consequences, such as the separation of families and abuses of discretion. It is crucial for the Administration to rethink its enforcement priorities and ensure that prosecutorial discretion is exercised fairly.

**The Travel Ban**, or what I coin the Muslim/Refugee Ban, came in two versions. The first version was blocked because of litigation and the opinion by federal judges that these

Orders are likely in violation of the U.S. Constitution or immigration statute. The second version of the ban was signed on March 6 and by its terms, blocked entry for nationals from six countries: Iran, Libya, Somalia, Sudan, Syria and Yemen. Initially, it too was blocked by courts. The administration then appealed to the Supreme Court.

On June 26, the Supreme Court of the United States issued a significant but temporary decision on the travel ban, allowing part of the ban to go into effect. The formula offered was as follows: any national from the six countries impacted by the ban or refugee who lacks a credible “bona fide relationship to a person or entity” is banned from the United States. Unsurprisingly, attorneys and affected communities were eager to understand how “bona fide relationship” would be defined and applied. Hours before the ban was to go into effect at 8:00pm EST on June 29, the Departments of State and Homeland Security issued “guidance” which to say the least is controversial. Initial Guidance from DHS excluded several close family members as well as refugees with formal assurances from a U.S. based organization from the bona fide formula. Lawsuits challenging the agency’s bona fide test followed and the administration later expanded the formula to include more family members. Law aside, the debate around “bona fide relationship” raises fundamental questions about culture, identity and family.

Earlier this month, the Ninth Circuit Court of Appeals ruled against the government, finding that family members such as grandparents, aunts, uncles and cousins as well as refugees satisfy the bona fide standard. The administration appealed that decision on refugees and last Tuesday, won in the Supreme Court. now, the only definite meaning of Tuesday evening’s order is that the 24,000 foreign nationals seeking to enter the U.S. to live, with refugee status, will be kept out for now and will remain in a state of legal uncertainty until the Justices take further action.

On October 10, the Supreme Court will hold oral arguments on the legality of the ban. The outcome may rest on a number of legal theories- mootness, the Constitution, or the statute. The possibility for more pingpong in the courts before then is indeed high. Let me end there. Please visit the Center for Immigrants’ Rights table and attend our DACA session on 9/20. Thank you again for this honor.