Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration

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ABSTRACT

In November 2014, the Obama administration announced the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiative, which built upon a program instituted two years earlier, the Deferred Action for Childhood Arrivals (DACA) initiative. As mechanisms to channel the government’s scarce resources toward its enforcement priorities more efficiently and effectively, both DACA and DAPA permit certain individuals falling outside those priorities to seek “deferred action,” which provides its recipients with time-limited, nonbinding, and revocable notification that officials have exercised prosecutorial discretion to deprioritize their removal. While deferred action thereby facilitates a highly tenuous form of quasi-legal recognition for its recipients, it does not provide legal immigration status. Accordingly, the two initiatives are not an equivalent substitute for legislative reform proposals that would create a pathway to durable legal status for a much larger number of individuals.

Nevertheless, critics have accused the Obama administration of imposing by decree precisely that which Congress has declined to authorize by statute: namely, legalization of noncitizens who lack lawful immigration status. In this Article, I critically examine those assertions and develop a rationale for the deferred action initiatives, anchored in rule of law values, that has received no meaningful attention in recent debates about DACA and DAPA. As the decision by U.S. District Judge Andrew S. Hanen enjoining those initiatives illustrates, legal discourse has mirrored and reinforced the same incorrect claims about deferred action that circulate in anti-immigration political discourse. Like the Obama administration’s political critics, Judge Hanen repeatedly mischaracterizes the initiatives as providing “legal status” and, on that basis, flays the Obama administration for “total[ly] abdicat[ing]” immigration enforcement. These conclusions ultimately amount to what I describe elsewhere as “judicial truthiness,” highlighting an erosion of the conventional lines between litigation, adjudication, and public discourse in politically salient cases more generally.

The flawed discourse surrounding DACA and DAPA underscores the need for a more careful assessment of the complex relationships between enforcement priorities, prosecutorial discretion, and the rule of law in an era of mass deportation. The blunt and distorted nature of that discourse, however, in turn has distorted the substantive analysis of those relationships. As the scale of the expansive and fragmented immigration enforcement regime has grown to such enormous levels—making the interrelated challenges of ensuring consistent execution of the law and fidelity to enforcement
priorities more formidable—the need for effective mechanisms to supervise the discretion exercised by rank-and-file officials has only grown more important. But even as it purports to respect the government’s enforcement priorities, the logic of Judge Hanen’s ruling would largely disable policymaking officials from implementing such mechanisms, requiring them instead to let the vagaries of the bureaucracy reign supreme. The decision therefore not only inhibits the agency’s ability to establish enforcement priorities and manage its scarce resources, but also fails to acknowledge the importance of rule of law values such as consistency, transparency, accountability, and nonarbitrariness in the execution of the immigration laws.

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INTRODUCTION

On November 20, 2014, President Obama announced a package of administrative actions on immigration that the Department of Homeland Security (DHS) planned to take using its existing legal authority. The most prominent of these measures built upon the government’s use of prosecutorial discretion (also referred to as “enforcement discretion”) to implement its enforcement priorities, which have long given precedence to removal of noncitizens deemed to present the greatest risks to national security, public safety, or border security. To more efficiently and consistently channel the government’s resources toward those priorities, DHS issued two administrative guidance documents.

The first document refined and rearticulated the government’s enforcement priorities themselves. The second established eligibility criteria and processes for certain individuals falling outside those priorities to seek “deferred action,” a longstanding mechanism by which immigration authorities exercise enforcement discretion. Deferred action provides its recipients with nonbinding, revocable


2. In this Article, I use the terms “prosecutorial discretion” and “enforcement discretion” interchangeably, since “prosecutorial discretion” in the immigration context is generally understood as applying “to a broad spectrum of discretionary enforcement decisions taken by a law enforcement agency” in addition to decisions “whether to bring charges against an individual.” Memorandum from Bo Cooper, Gen. Counsel, Immigr. and Naturalization Serv., to the Deputy Commissioner, INS Exercise of Prosecutorial Discretion 2 (Oct. 4, 1999), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf [http://perma.cc/37DA-RLTB] [hereinafter Cooper, INS Exercise of Prosecutorial Discretion] (noting that the term “prosecutorial discretion” may be “something of a misnomer”).


5. Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., for Leon Rodriguez et al., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as
notification that officials have deprioritized their removal. Under separate federal, state, or local legal authority, these individuals may then indirectly become eligible to seek certain benefits, such as employment authorization.

Two years earlier, DHS issued a similar guidance document announcing the Deferred Action for Childhood Arrivals (DACA) initiative, which set forth criteria for certain noncitizens who had unlawfully migrated to the United States as minors to seek deferred action. The new DHS guidance documents expanded DACA to include a larger category of these individuals and announced a new initiative, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which established analogous criteria for certain undocumented parents of U.S. citizens and lawful permanent residents to seek deferred action.

With as many as five million individuals potentially eligible for deferred action under DACA and DAPA, immigrants’ rights advocates welcomed the President’s announcement. To be sure, none of these advocates regarded the deferred action initiatives as equivalent to comprehensive immigration reform, which would create a pathway to durable, legal immigration status for a much larger number of individuals. Nevertheless, these advocates lauded the Obama administration for

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taking a “good first step,” which would afford a substantial subset of those individuals a provisional reprieve from removal while reform debates continue.  

But even before details of the DAPA program were announced, the Obama administration’s political opponents charged that the steps being contemplated would reveal the President to be nothing less than an “American caudillo,” a dark and tyrannical figure bent on engaging in “domestic Caesarism” by “eviscerating an entire statutory scheme.” Following the President’s announcement, those attacks persisted. Critics accused the President of making a “brazen power grab” to impose “executive amnesty” and give “legal status” to “illegals.” As characterized by critics, the initiatives allow U.S. citizen and lawful permanent resident children of undocumented immigrants—a category of individuals often derided as “anchor babies”—to become “automatic human shields” for their “illegal parents.” One prominent Republican senator characterized the deferred action initiatives as tantamount to “printing up [and] counterfeiting immigration documents,” while another raised the specter of “anarchy” and “violence” in response. No matter the particular formulations of their attacks, all of these critics essentially accuse the President of having unlawfully imposed by decree precisely that which Congress

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10. Preston, supra note 9 (quoting Alejandro Caceres, Executive Director of the Austin Immigrant Rights Coalition); see also Editorial, supra note 9 (describing the limited “respite” from deportation afforded by the deferred action initiatives as “cause for relief and celebration”).


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had declined to authorize by statute: legalization of noncitizens who lack lawful immigration status.

In political terms, these attacks—while legally unfounded, as I explain in this Article—are nevertheless unsurprising, given the toxic politics of immigration. More surprising, however, is the extent to which judicial discourse has closely mirrored the rhetoric and modes of argument that prevail in anti-immigration public discourse. Soon after the announcement, a group of Republican governors filed suit seeking to invalidate the deferred action initiatives.15 The complaint—which inveighs against the President for “unilaterally suspend[ing] the immigration laws” by “executive fiat”—was filed in Brownsville, Texas, in order to steer its assignment to U.S. District Judge Andrew Hanen, who has for years garnered headlines as a strident critic of the Obama administration’s immigration policies.16

Judicial opinions attacking the deferred action initiatives in similarly politicized terms have quickly followed. In mid-December 2014, U.S. District Judge Arthur Schwab, of the Western District of Pennsylvania, concluded that the President had unconstitutionally taken “unilateral legislative action” to permit undocumented immigrants to “become quasi-United States citizens.”17 In February 2015, Judge Hanen opined in Texas v. United States that the initiatives constituted “a new law” that grants undocumented immigrants “an award of legal status.”18 Echoing his earlier immigration-related commentaries, he blasted the Obama administration for its “total abdication and surrender of the Government’s statutory responsibilities . . . to enforce the immigration laws.”19 On that basis, Judge Hanen enjoined the new initiatives altogether. Several months later, in a lengthy opinion, a divided panel of the U.S. Court of Appeals for the Fifth Circuit denied

the government's motion to stay Judge Hanen's injunction pending appeal.20 These decisions conflict with other judicial rulings that have declined to block the deferred action initiatives.21

In this Article, I examine a series of issues arising from this litigation, focusing in particular on Judge Hanen's decision in Texas v. United States. Drawing more from the political discourse surrounding the deferred action initiatives than from sound legal principles, the ruling highlights an erosion of the conventional lines between litigation, adjudication, and public discourse in politically salient cases and underscores the need for more careful attention to the legal basis for those initiatives. As programmatic mechanisms to ensure the consistent, transparent, and accountable exercise of prosecutorial discretion by agency officials, DACA and DAPA enable eligible noncitizens to obtain a tenuous form of quasi-legal recognition far short of legal immigration status under existing law or legislative reform proposals. However, Judge Hanen—like the Obama administration's political opponents—elides these legal categories and distinctions, mischaracterizing the initiatives as “circumvent[ing] immigration laws” by providing “legal status.”22

Like his earlier immigration-related commentaries, Judge Hanen's ruling is entirely continuous with the rhetoric and modes of argument that prevail in political discourse, and ultimately amounts to what I describe elsewhere as “judicial truthiness.”23 Indeed, at various points, the ruling appears directly influenced by that extrajudicial political discourse. While the Fifth Circuit's opinion declining to stay Judge Hanen's ruling is more measured in its tone, it reproduces the same basic substantive flaws.24 As such, these decisions illustrate a broader tendency in litigation involving politically salient issues, in which groups engage the judicial process using politically oriented modes of argument—even when the gaps between that political rhetoric and the applicable legal principles are considerable—


24. See Kalhan, supra note 23.
and judges respond in kind by discarding the norms of reasoned adjudication and judicial fact-finding in favor of the contemporary norms of political discourse.\textsuperscript{25}

Those distortions of the judicial process, in turn, distorted Judge Hanen’s substantive analysis in ways that have not been fully appreciated or analyzed. Contrary to what some observers have maintained, the decision cannot be understood as “narrowly” blocking certain “benefits” for undocumented immigrants while preserving the government’s ability to establish enforcement priorities and exercise enforcement discretion.\textsuperscript{26} Rather, at a more basic level, Judge Hanen’s ruling effectively seeks to disable policymaking officials from taking meaningful steps either to implement those priorities or to promote rule of law values—including consistency, transparency, accountability, and nonarbitrariness—in the agency’s execution of the immigration laws. While scholars have correctly observed that the decision’s rhetoric and reasoning sweep much further than its formal holding,\textsuperscript{27} this underlying, fundamental inconsistency in Judge Hanen’s opinion—between purporting to respect the government’s enforcement priorities and exercise of enforcement discretion, on the one hand, while simultaneously undermining its ability to execute those priorities in a manner that promotes rule of law values, on the other—has remained inadequately examined.

To examine the deferred action initiatives and the issues arising from these legal challenges, this Article proceeds in three Parts. In Part I, I explain how the deferred action initiatives operate and examine a series of basic factual and legal errors in Judge Hanen’s decision. Judge Hanen repeatedly mischaracterizes

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\item \textsuperscript{26} Michael W. McConnell, Why Obama’s Immigration Order Was Blocked, WALL ST. J., Feb. 18, 2015, at A15; see Anil Kalhan, Is Judge Hanen’s Smackdown of Executive Action on Immigration “Narrowly Crafted”? DORF ON LAW (Feb. 21, 2015), http://www.dorfonlaw.org/2015/02/is-judge-hanens-smackdown-of-executive.html [http://perma.cc/Y7YX-72HM].
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DACA and DAPA not only as creating legal status, but as conferring a coherent, aggregated package of ancillary “benefits”—thereby mirroring and reinforcing precisely the same incorrect claims about the initiatives that circulate in political discourse. In Part II, I highlight the striking continuities between Judge Hanen’s ruling in *Texas v. United States* and his provocative immigration-related commentaries in previous cases, which attacked the Obama administration’s immigration policymaking officials for the manner in which they have established enforcement priorities, issued administrative guidance, implemented policies, and exercised prosecutorial discretion. These commentaries not only raise questions about the appearance of justice in *Texas v. United States*, but also, insofar as they involve analogous issues, provide a window into the confused manner in which Judge Hanen squarely challenges the government’s enforcement priorities and exercises of prosecutorial discretion even as he purports to leave both undisturbed. In Part III, I examine that basic tension in the ruling, highlighting and developing a rationale for DACA and DAPA anchored in rule of law values, including consistency, transparency, accountability, and nonarbitrariness, which has received insufficient attention in discussions of the deferred action initiatives to date.

**I. Judicial Truthiness About Deferred Action**

At the core of Judge Hanen’s ruling is the incorrect assertion that DACA and DAPA create legal immigration status. That mistaken claim has proliferated widely in political discourse, and a variation on that same misunderstanding also has been reproduced by the Fifth Circuit in its opinion declining to stay Judge Hanen’s ruling. In this Part, I explain how the deferred action initiatives actually operate, highlighting the considerable gaps between the factual and legal realities of those initiatives and the manner in which Judge Hanen characterizes them in his opinion. While deferred action enables its recipients to obtain a tenuous and temporary form of quasi-legal recognition, it does not provide its recipients with any form of legal immigration status. As such, Judge Hanen’s fusillade of attacks on the deferred action initiatives ultimately rest on a wholly incorrect factual and legal foundation.

**A. The Tenuous “Nonstatus” of Deferred Action**

Both DACA and DAPA confer “deferred action,” which for decades has been a principal mechanism—among numerous others—by which immigration

28. For a discussion of those flaws in the Fifth Circuit’s opinion, see Kalhan, supra note 23.
authorities have exercised prosecutorial discretion. By itself, deferred action constitutes nonbinding, revocable notification that authorities have chosen not to seek the removal of a particular individual—and nothing more. The government’s own longstanding regulations, for example, describe deferred action as simply an “act of administrative convenience to the government which gives some cases lower priority.”

The use of deferred action has been justified most frequently by the need for executive officials to prioritize enforcement actions, due to limited resources, and by the humanitarian equities that individual cases might present. While deferred action has not been expressly authorized by Congress or expressly validated by the Supreme Court, both branches of government have long acknowledged this administrative practice as an established mechanism by which immigration authorities exercise prosecutorial discretion. The Supreme Court described and acknowledged the practice in 1999 in *Reno v. American-Arab Anti-Discrimination Committee*:

> At each stage [of the deportation process] the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as “deferred action”) of exercising that discretion for humanitarian reasons or simply for its own convenience.

Congress also has long acknowledged the agency’s practice of conferring deferred action—for example, by expressly clarifying that particular categories of individuals should be permitted to seek deferred action.

For years, observers have emphasized what the Court itself implicitly recognized in *American-Arab Anti-Discrimination Committee*: in formal terms, deferred action does not confer lawful immigration status. Indeed, strictly speaking,

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34. See Letter from Scholars and Teachers of Immigration Law on the Obama Administration’s Executive Actions on Immigration (Nov. 25, 2014), available at http://khn.co/lawprofessors-2014-11-25 [http://perma.cc/EVJ7-XNT]; Letter from Immigration Law Teachers and Scholars to the President of the United States Regarding Executive Authority to Protect Individuals or Groups
standing alone deferred action confers no benefits at all, but simply amounts to a memorialization and notification of the exercise of enforcement discretion. As Hiroshi Motomura has described, deferred action by itself is little more than the following: “If the president can make a list to prioritize who should be deported first, then I think it’s clear that he can give people at the bottom of that list a piece of paper saying you’re at the bottom.”

To be sure, that piece of paper is by no means meaningless. However tenuous, individuals can derive a limited sense of reprieve and security from being informed that the agency has no present intention to take enforcement action against them. In addition, once individuals have been granted deferred action—whether under DACA, DAPA, or otherwise—they subsequently may become eligible, under other federal, state, and local legal authority, to indirectly receive certain ancillary benefits. Deferred action accordingly may be understood as facilitating a highly circumscribed form of quasi-legal recognition that, as Geoffrey Heeren describes, places noncitizens in a “paradoxical middle ground between legality and illegality.”

Access to that “middle ground”—which Heeren describes as “nonstatus,” a form of immigration status purgatory—is a significant reason why potentially removable individuals seek deferred action in the first place, and one of the reasons why the Obama administration’s deferred action initiatives make some critics uncomfortable.

Importantly, however, the quasi-legal recognition that subsequently may arise from deferred action is inherently tenuous, and is a far cry from the full legal recognition extended to noncitizens with any form of legal immigration status. Deferred action provides no genuine immunity from removal, and despite longstanding efforts by immigrants’ rights advocates to make deferred action more legally durable, nobody has any recognized right to seek deferred action. Any par-

37. Heeren, supra note 36, at 1119.
ticular grant of deferred action may be revoked at any time and for any reason without any recognized right to judicial or administrative review. More broadly, the President—or a future president—could curtail or eliminate DACA or DAPA altogether at any time and for any reason—for example, due to increased funding for immigration enforcement or simply changed enforcement priorities. While it might currently seem that these initiatives, once implemented, would be politically difficult to rescind down the road, those future political calculations remain far from clear—and, in any event, are legally irrelevant.

Moreover, the structure of the quasi-legal recognition arising from deferred action is disaggregated and piecemeal—deriving not, as critics of the deferred action initiatives suggest, in any sort of coherent way from the guidance documents announcing DACA or DAPA or even from any particular grant of deferred action. Rather, that quasi-legal recognition arises from a constellation of entirely separate and dispersed sources of legal authority and administrative guidance that long predate DACA and DAPA, can vary significantly in different contexts, and often provide considerably more limited benefits than those afforded to individuals with legal immigration status. In all of these respects, the quasi-legal recognition that may arise from deferred action conceptually shares more continuities with the kind of quasi-legal recognition that invariably extends to all undocumented immigrants, in varying forms and degrees, than it does with the more complete legal recognition arising from any form of legal immigration status. After all, while undocumented immigrants are potentially removable, they have never been fully excluded from legal recognition and protection in the United States altogether. To the contrary, undocumented immigrants have a “dual legal identity,” in which they are legally deemed “outsiders” for many purposes but simultaneously recognized by the law as “members” for other purposes. For undocumented immigrants who have been granted deferred action, that ambiguous and unstable legal subjectivity persists.

Unsurprisingly, therefore, neither proponents of legislative reform to legalize undocumented immigrants nor DACA- and DAPA-eligible individuals themselves regard deferred action as equivalent to legal status. Indeed, because

38. But see WADHIA, supra note 29, at 150–51 (arguing that individuals denied deferred action should be able to obtain independent judicial or administrative review of those denials).


of the vulnerabilities that result from coming forward to seek deferred action, large numbers of DACA-eligible individuals have chosen not to apply.42 Applicants must submit biometric data and other personal information to permit authorities to establish their identity, conduct background checks, and determine their eligibility. Unsuccessful applicants risk being placed in removal proceedings—which operates as a powerful deterrent against individuals with marginal applications from applying in the first place. But given deferred action’s tenuous nature, the vulnerabilities for successful applicants are also significant. If deferred action later were revoked or its renewal were denied, the data collected from applicants could make it much easier for the government to pursue their removal. Unlike more durable forms of discretionary relief from removal, therefore, deferred action has two distinct faces, for while it does confer a temporary (but revocable) reprieve from removal, it simultaneously operates as an ongoing mechanism of immigration surveillance and control and that can facilitate subsequent enforcement action.43

B. The Mischaracterization of Deferred Action as “Legal Status”

Despite these realities about deferred action, Judge Hanen’s ruling—echoing the inflamed politics surrounding immigration—is littered with assertions that the initiatives provide “an award of legal status” to millions of “illegal aliens.”44 Although “legal status” and “legal presence” have distinct legal meanings, Judge Hanen repeatedly conflates and uses the terms interchangeably. In a number of especially jumbled instances, he even mashes them up into what he calls “legal presence status,” a made-up concept with no legal meaning at all. For example:

- “The DHS has announced that the DAPA program confers legal status upon its recipients.”45


45. Id. at *29 n.45 (emphasis added).
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- “[T]his case does not involve the wisdom, or the lack thereof, underlying the decision by [DHS] Secretary Jeh Johnson to award legal presence status to over four million illegal aliens.”
- “[A]pproximately 636,000 [individuals] have applied for and received legal presence status through DACA.”
- “DAPA makes the illegal presence of millions of individuals legal.”
- “DAPA authorizes a new status of ‘legal presence’ along with numerous other benefits . . . .”
- “DHS knew . . . that by giving the recipients legal status, it was triggering obligations on the states as well as the federal government.”
- “DAPA turns its beneficiaries’ illegal status . . . into a legal presence.”

Judge Schwab’s ruling rests on similar premises, asserting that the initiatives enable “undocumented immigrants [to] become quasi-United States citizens.”

These elisions amount to an extended rhetorical sleight of hand. Consider, for example, Judge Hanen’s selective and out-of-context quotation from DHS’s website, an apparent attempt to spring a “gotcha moment” on the government. According to Judge Hanen, DHS necessarily concedes that DACA confers “affirmative status” when it states:

[Y]ou are considered to be lawfully present in the United States . . . and are not precluded from establishing domicile in the United States. Apart from immigration laws, “lawful presence,” “lawful status,” and similar terms are used in various other federal and state laws.

That discussion, however, concerns Section 212(a)(9)(B) of the Immigration and Nationality Act (INA), which imposes two waivable, time-limited bars on future admissibility for individuals who have been “unlawfully present” in the United States, depart the United States, and subsequently seek admission.

The statute deems individuals to be “unlawfully present” if they are present in

46. Id. at *2 (emphasis added).
47. Id. at *4 (emphasis added).
48. Id. at *39 (emphasis added).
49. Id. at *40 (emphasis added).
50. Id. at *48 n.76 (emphasis added).
the United States “after the expiration of a period of stay authorized by the Attorney General”—a phrase that the statute leaves undefined—or present in the United States without being admitted or paroled. But under both the terms of the statute itself and longstanding agency interpretations that well predate DACA and DAPA, unlawful presence does not accrue for many individuals without lawful status, including deferred action recipients. This nonaccrual of unlawful presence has no effect on either immigration status or potential removability, and does not eliminate any periods of unlawful presence that may have already accrued.

Accordingly, despite Judge Hanen’s insinuation, the statement on the DHS website has no bearing on immigration status or removability. It only is relevant for the narrow purpose of future inadmissibility—and even there, the practical significance appears negligible. Indeed, Judge Hanen’s opinion is an extended exercise in missing the very point of the language he selectively quotes: “lawful status” and “lawful presence,” as used in various legal contexts, do not always have the same legal meaning and are not necessarily equivalent to legal immigration status.

Tellingly, Judge Hanen declines to quote the language on the website immediately before the passage he cherry picks:

Q5: If my case is deferred, am I in lawful status for the period of deferral?

A5: No. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.

DHS emphasizes the same point repeatedly on the same webpage. Judge Hanen, however, fails to acknowledge that fact, much less to engage its significance.

With no factual or legal basis, Judge Hanen’s conclusion—that the initiatives create “legal status” and therefore involve “not just rewriting the laws [but] creating


56. Id.

57. Since the eligibility criteria for the new initiatives require continuous residence in the United States since January 1, 2010, most individuals eligible for deferred action under the new initiatives already have accrued sufficient unlawful presence to be subject to these prospective admissibility bars.

58. USCIS, Frequently Asked Questions, supra note 53.
them from scratch”—only makes sense in political terms. Substantively, there is no daylight between this conclusion and political allegations that the initiatives constitute “executive amnesty” and give “illegals . . . legal status.” Indeed, Judge Hanen dignifies this rhetoric when he insists—in openly relativist terms that constitute truthiness in its purest form—that whether the initiatives constitute “a blanket amnesty program,” as the administration’s opponents falsely claim, “is obviously a matter of opinion.”

C. “Total Abdication” by the “Deporter-in-Chief”?

A related set of conclusions—that the new initiatives “circumvent” immigration law and involve “total abdication and surrender of the Government’s statutory responsibilities”—similarly draws more from political rhetoric than sound legal principles. Echoing public discussions of legalization proposals that seek to provide undocumented immigrants with a “pathway to permanent residence,” Judge Hanen charges that the deferred action initiatives “establish[] a pathway for non-compliance and completely abandon[] entire sections of this country’s immigration law.” Insisting this claim “cannot be disputed,” he repeats versions of the charge throughout his opinion, blasting the Obama administration for “not seek[ing] compliance with federal law in any form.” Some of the Obama administration’s opponents routinely make the same kind of assertion when they accuse the President of acting like a king or an emperor, or engaging in “domestic Caesarism.”

These assertions might carry some validity if DACA and DAPA purported to confer legal status. Because deferred action does no such thing, however, the initiatives “circumvent” and “dispense with” precisely nothing. DAPA-eligible noncitizens remain potentially removable and subject to the future admissibility bars, and their children remain unable to sponsor their parents as immigrants.

60. Id. at *3.
61. Id. at *55.
62. Id. at *32, *34.
64. Douthat, supra note 11.
65. McConnell, supra note 26. The language of “dispensation” itself is significant, implying a power to suspend legislation akin to that historically claimed by English monarchs or the papacy. See 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, 804–08, 842–48 (2012).
immigrants before age twenty-one. Moreover, the Obama administration can hardly be accused of “total abdication” of immigration enforcement with a straight face. In recent years, federal expenditures on immigration control have exceeded $18 billion per year, more than the expenditures on all other federal law enforcement programs combined. The administration not only has enforced the immigration laws to the maximum extent of these appropriated funds, but has removed more individuals than any other administration in U.S. history. By the end of President Obama’s first term, the annual number of removals had exceeded 419,000 individuals—a level more than eighteen times higher than in 1985. After five years in office, the Obama administration already had removed as many individuals as its predecessor had in its full eight years in office.

Because of this record, immigrants’ rights advocates have pointedly called President Obama the “deporter-in-chief.” While administration officials and the President himself have vigorously defended their record, the nature of the mass deportation regime at the heart of that contention gives any suggestion that the Obama administration has “totally abdicated” immigration enforcement an odd, through-the-looking-glass quality. Judge Hanen does not make even a passing effort to reconcile his finding of “total abdication” with these facts demonstrating precisely the opposite.

Moreover, Judge Hanen’s conclusion that states have standing because of this supposed “abdication” rests on a theory in significant tension with the Supreme Court’s decision in Arizona v. United States. According to Judge Hanen, the deferred action initiatives provide a “textbook example” of “a situation when the federal government asserts sole authority over a certain area of American life


67. Id.


71. 132 S. Ct. 2492 (2012).
and excludes any authority or regulation by a state; yet subsequently refuses to act in that area.”72 Echoing Justice Scalia’s dissent in Arizona—which unsuccessfully maintained that states have a “sovereign prerogative” to regulate immigration—Judge Hanen criticizes the federal government for blocking states from “all but token participation” in immigration control and then “den[y]ing the states any means to protect themselves” from unlawful migration, “even when the state seeks to enforce the very laws passed by Congress” 73. Oddly, he mischaracterizes the INA’s enforcement provisions as having been “enacted to protect the states”—rather than as instruments of federal policy enacted to advance the national interest—“because, under our federal system, [the states] are forbidden from protecting themselves.”74

All of this, in a word, is bizarre. Judge Hanen recognizes that Arizona effectively rejected his theory of state sovereignty over immigration—lamenting, for example, that the Court left states “virtually powerless to protect themselves from the effects of illegal immigration.”75 But rather than treating Arizona’s result as flowing from the supremacy of federal law, Judge Hanen paints a convoluted picture in which the immigration power has been improperly seized from the states—as if by force—and is now merely held in trust and exercised by federal authorities on behalf of the states as quasi-sovereign entities. That account is difficult to reconcile with Arizona’s rejection of any nineteenth century-style state sovereignty over immigration.76 Like Justice Scalia’s Arizona dissent itself, however—which Judge Richard Posner describes as “having the air of a campaign speech”—Judge Hanen’s account is entirely of a piece with the kinds of theories that circulate in anti-immigration political discourse.77

D. Sweeping Beyond “Benefits”

Judge Hanen is not incorrect in observing that individuals granted deferred action can subsequently become eligible to seek certain ancillary benefits. But as

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73. Id. at *17, *22–23; Arizona, 132 S. Ct. at 2514 (Scalia, J., dissenting).
74. Texas I, 2015 WL 648579 at *17. In a similarly odd manner, Judge Hanen characterizes the states as within the “zone of interests” that the INA seeks to protect and treats the INA’s enforcement provisions as conferring “rights” on U.S. citizens that the states may enforce through a parens patriae lawsuit. Id. at *17, *19.
75. Id. at *29.
discussed above, those benefits are not equivalent to those available to individuals with legal status—and in any event, their availability is governed by separate legal authority and administrative guidance that long predate DACA and DAPA and that already have fully satisfied the requirements of the Administrative Procedure Act. Accordingly, like “unlawful presence” under INA § 212(a)(9)(B), eligibility for those benefits is conceptually separate from immigration status or the exercise of prosecutorial discretion. If Judge Hanen’s ruling were correctly understood as confined to benefits, as some of its defenders maintain, then one would expect it to devote some attention to the actual legal authority governing whatever benefits troubled him. The opinion, however, devotes no attention to that authority at all.

Take, for example, employment authorization, which is not governed by DACA or DAPA, but by regulations promulgated decades ago using notice-and-comment rulemaking. Since the 1960s, immigration officials have exercised authority to grant or deny employment authorization to various categories of noncitizens, including recipients of deferred action. Formal regulations issued using notice-and-comment rulemaking have governed these practices since 1981. When Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), which imposed sanctions on employers that hire noncitizens “unauthorized” to work in the United States, it legislated against the background of those practices and expressly confirmed this regulatory authority. Under INA § 274A(h)(3), noncitizens are eligible to work in the United States if they are “alien[s] lawfully admitted for permanent residence” or “authorized to be so employed by this Act or by the Attorney General.”

Notably, just before Congress enacted IRCA and President Reagan signed it into law, an organization advocating broader immigration restrictions petitioned the INS either to rescind those regulations or to modify them to include only those noncitizens expressly authorized by statute to work in the United States by statute. The INS solicited public comments, and after IRCA became law the following year, it denied the petition. The agency emphasized IRCA’s confirmation of its regulatory authority, concluding that INA § 274A(h)(3) should be interpreted as an express acknowledgment and endorsement of how

the agency had exercised authority to grant work authorization before IRCA’s adoption. Moreover, the contrary interpretation not only would render the phrase “or by the Attorney General” superfluous, but also would render meaningless several other provisions that expressly prohibit work authorization for certain noncitizens. When the agency issued regulations to implement IRCA, it accordingly preserved the existing provisions permitting deferred action recipients to apply for work authorization.

Since then, immigration authorities have continued to grant employment authorization to deferred action recipients, but only, as before IRCA, upon a showing of “economic necessity to work.” Because that standard applies to individuals granted deferred action under DACA and DAPA—which is more restrictive than the standard for other noncitizens—there is no guarantee that individuals granted deferred action under those initiatives will necessarily receive work authorization at all. Indeed, a recent analysis of over 17,000 applications for employment authorization that were submitted by individuals granted deferred action and processed between 2011 and 2013 found that, in applying that “economic necessity” standard, almost 23 percent of those applications had not been approved.

While Congress has subsequently enacted major changes to the immigration laws—including changes concerning employment authorization itself—at no point has it sought to curtail this regulatory authority to grant work authorization to deferred action recipients. In their complaint, the plaintiffs did not directly challenge these regulations, but instead incorrectly treated work authorization as flowing automatically from DACA and DAPA themselves. Eventually, the parties did joust over this legal authority in their briefs, albeit to a limited extent. In Judge Hanen’s ruling, however, this legal authority plays no role whatsoever. If the ruling genuinely had been narrowly crafted to questions about benefits, then Judge Hanen’s lack of interest in the law governing those benefits makes little sense. Moreover, if the ruling genuinely had been meant to preserve the exercise of prosecutorial discretion, then there would have been no reason for him to enjoin

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85. 8 C.F.R. § 274a.12(c)(14) (2014).
86. WADHIA, supra note 29, at 69–72.
the processes for conferring deferred action under the new initiatives—since def-
ferred action *is* the exercise of prosecutorial discretion and nothing more. An in-
junction along those lines might have blocked the issuance of employment
authorization documents while letting DHS proceed with its plans to accept and
review applications for deferred action itself. While the number of DACA- and
DAPA-eligible noncitizens willing to seek deferred action under those cir-
cumstances certainly would have been more limited, that kind of injunction
would have been more consistent with a ruling limited to blocking benefits for
undocumented immigrants. Instead, Judge Hanen’s injunction bludgeoned
the Obama administration’s initiatives in their entirety, enjoining “any and all
aspects or phases” of their implementation.88

Nor did Judge Hanen tailor his injunction to those states that had actually
sued. Rather, the injunction blocked the initiatives nationwide—even though
he only concluded that Texas had standing and might suffer harm if they were
implemented. In making those findings, and assessing the balance of hardships
to the parties and the public interest, Judge Hanen ignored countervailing evi-
dence indicating that implementation of the initiatives would bring significant
benefits. In fact, twelve states and the District of Columbia strongly argued to
the court in an amicus brief not only that these benefits far outweighed the costs
alleged by the plaintiffs, but that substantial harms would result in their states
from blocking implementation.89

**II. POLITICAL COMMENTARY BY OTHER MEANS**

Judge Hanen’s ruling in *Texas v. United States* closely mirrors his impasioned
but gratuitous commentaries in several cases attacking the Obama admin-
istration’s immigration policies and its policymaking officials. In each instance,
Judge Hanen discarded the conventional norms of adjudication and the adversari-
al process and exhibited an unusually high degree of personal interest, animosity,
and emotional involvement in immigration-related questions far afield from the
issues actually before the court. These surrounding facts and circumstances might

88. Order of Temporary Injunction at 1–2, Texas v. United States, No. B-14-254 (S.D. Tex. Feb. 16,
KUY2-3692].

89. *States’ Motion for Leave to Participate as Amici Curiae and Brief in Opposition to Plaintiffs’ Motion
[http://perma.cc/Y8JU-TKRN].
or might not rise to a level that would warrant his disqualification or reassignment on remand. But regardless of how that question ultimately might be answered, Judge Hanen’s commentaries draw into sharper focus precisely where his factual findings and substantive legal conclusions ultimately fell short when reviewing the Obama administration’s deferred action initiatives, given the continuities between the issues addressed in these opinions and some of the analogous questions arising in *Texas v. United States*.

In *United States v. Cabrera*, Judge Hanen lambasted U.S. Citizenship and Immigration Service officials—calling them “accessories after the fact” who had “purposefully hinder[ed] law enforcement officers from doing their job”—for processing a valid request for a replacement green card by a lawful permanent resident who had pleaded guilty to a drug trafficking offense and been sentenced by Judge Hanen.90 Judge Hanen recognized that his four-page attack was gratuitous, since the opinion solely concerned his disagreement with a guidance document that was neither before the court nor had any bearing on the case’s disposition. Indeed, he deliberately waited until “the outcome of the case [was] no longer a pending question” before offering his comments—which rendered his opinion entirely nonadjudicative.91

With *Cabrera*, however, Judge Hanen was just getting warmed up. In *United States v. Nava-Martinez*, he ripped into immigration officials for “partic- ipat[ing] in … a criminal conspiracy” with “evil individuals” who “are violating the border security of the United States.”92 In the case before him, Judge Hanen accepted the guilty plea of an individual who had been hired by an undocumented woman from El Salvador to smuggle her ten-year-old daughter into the United States. The focus of his anger was DHS’s decision to release the daughter to her mother’s custody and its exercise of prosecutorial discretion not to pursue criminal charges or removal proceedings against the mother. Once again, the opinion was nonadjudicative, since he self-consciously waited until after the defendant was sentenced before offering his commentary—and since neither the mother nor the daughter were even before the court in any capacity.

In both rhetoric and substance, Judge Hanen’s ten-page commentary in *Nava-Martinez* closely foreshadowed his later opinion in *Texas v. United States*. Disapproving of how policymaking officials had implemented a settlement

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91. *Id.* at 737.
agreement that was not before the court, he accused those officials of being more interested in “rewarding criminal conduct” than “enforcing the current laws”: 93

This Court is quite concerned with the apparent policy . . . of completing the criminal mission of individuals who are violating the border security of the United States . . . .

The DHS, instead of enforcing our border security laws, actually assisted the criminal conspiracy in achieving its illegal goals . . . .

The DHS has simply chosen not to enforce the United States’ border security laws.94

He assailed these practices as the “shameful” result of “some policymaker” bent on “support[ing] the lawbreakers” and, without explaining the basis or relevance of his charges, accused them of “lower[ing] the morale of those law enforcement agents on the front line here on the border.”95 His bottom line was the same as it later would be in Texas v. United States: DHS “should cease telling the citizens of the United States that it is enforcing our border security laws because it is clearly not.”96

Finally, only months before the deferred action initiatives were announced, Judge Hanen wrote a blistering, twenty-four-page opinion in United States v. Ramirez criticizing an immigration judge’s decision to defer removal under the Convention Against Torture of an individual who Judge Hanen had previously sentenced for illegal reentry into the United States.97 Again, Judge Hanen acknowledged that he lacked jurisdiction over the issue. Nevertheless, he raked the government over the coals for not implementing the immigration laws according to his own preferences. He asserted that granting humanitarian relief to Ramirez, and others, provided an “open invitation to the most dangerous villains of society”—thereby turning “Main Street America” into a “rogue’s gallery”—and amounted to “the failure of the Government to enforce the laws of this country.”98 He offered his detailed views on the relationship between the government’s implementation of laws governing asylum and other humanitarian relief from removal and criminal activity by drug cartels—emphasizing that his armchair analysis was not based on the record, but on his “first-hand, in-the-trenches-knowledge of the border situation.”99

93. Id. at *3.
94. Id. at *1–*2.
95. Id. at *5.
96. Id. at *3 n.6.
98. Id. at 825, 832.
99. Id. at 827, 830 n.23.
By 2014, therefore, Judge Hanen had issued provocative and gratuitous commentaries in three separate immigration-related contexts in which he excoriated the Obama administration’s policymaking officials for the manner in which they established enforcement priorities, issued administrative guidance, implemented policies, and exercised prosecutorial discretion. In each case, his unusually high personal interest, animosity, and emotional involvement in immigration-related issues were plain to see. He went to great lengths to comment on issues that concededly were neither before the court nor relevant to his decision making, and he acknowledged that his opinions were partially based on extrajudicial information outside the formal record.

Given this substantial body of injudicious commentary, reasonable observers could not have been surprised—and indeed, no observers in fact seemed surprised—when Judge Hanen approached Texas v. United States in a comparable manner. At the hearing on the plaintiffs’ preliminary injunction motion, Judge Hanen underscored his unusually high interest and emotional investment in the Obama administration’s immigration enforcement policies, invoking his court’s location near the U.S.–Mexico border as relevant to his adjudication:

I will say that talking not just to me, but to anyone in Brownsville about immigration is like talking to Noah about the flood, both in legal terms and in practical terms. So, I mean, we’re the spearhead of the spear. If there’s any tip to it, we’re it.

And by that, we’ve seen the upsides of—and downsides of strict enforcement of immigration laws. I mean, as a judge, I’m compelled to sentence people who are here illegally at times when I think all they are trying to make a better life for their family, and that’s kind of a downside. We see the upside of it. We see—just last week we swore in over 100 new citizens. And we swear in thousands of new citizens a year here, and we get pleasure out of that.

We see the upsides and downsides of what some people might describe as a lax enforcement policy. I mean, we—probably in the circumference of just several miles around this courthouse, we probably have thousands of illegal aliens that are living and doing nothing more than supporting their family and raising them and trying to make a better life for themselves, but we’ve also seen some of the crimes that are committed. I mean, just earlier this fall, we had a Border Patrol
agent shot and killed in Willacy County allegedly by illegal aliens. So,
I mean, there are upsides and downsides about that, and we see that.100
Like his opinions in Cabrera, Nava-Martinez, and Rodriguez, these comments
suggest a remarkable willingness to casually rely upon extrajudicial information,
issues, and perspectives in the course of his adjudication. Judge Hanen’s ulti-
mate ruling in Texas v. United States also closely tracks those earlier opinions by
asserting that DHS’s policymaking officials—as opposed to its rank-and-file
officers—have “totally abdicated” immigration enforcement.
Moreover, these continuities with his earlier opinions also draw attention to
other ways in which Judge Hanen’s adjudication greatly suffered in Texas v. United
States. He treats several contested and complicated propositions about immigra-
tion policy as conclusively established without providing even cursory evidentiary
support—asserting, for example, that the “constant influx of illegal immigrants . . .
is causing the States to experience severe law enforcement problems,”101 that
“there can be no doubt that the failure of the federal government to secure the
borders is costing the states . . . millions of dollars in damages,”102 that it is “indis-
putable” that the states “are harmed to some extent by the Government’s action
and inaction in the area of immigration,”103 and that the government’s “failure to
secure the border has exacerbated illegal immigration into this country.”104
While Judge Hanen’s confidence in his own “first-hand, in-the-trenches-
knowledge of the border situation”105 might have induced him to believe other-
wise, none of those propositions are remotely as self-evident as he insists.
Like Judge Hanen’s earlier immigration-related opinions, therefore, Texas v. United States reads more like a document written to intervene in political de-
bates than a judicial opinion carefully analyzing legal issues arising from DACA
and DAPA. He writes nonchalantly about “self-deportation” as if that were a
noncontroversial, ordinary thing to discuss, and offers provocative commentary
on a series of controversial but ultimately tangential immigration-related matters,
including the “flood” of unaccompanied minors, the “specter of terrorism,” and
the inability of the “powers that be in Washington” to enact immigration re-

100. Transcript of Preliminary Injunction Hearing at 3–4, Texas v. United States, No. B-14-254 (S.D.
[http://perma.cc/LB7D-URXL].
102. Id. at *22.
103. Id.
104. Id. at *23, *25.
To a striking extent, Judge Hanen engages those political debates in personal terms. He repeatedly emphasizes (and distorts) statements by President Obama about the initiatives, including offhand comments in response to informal questions, and treats them as if they had determinative legal significance—even as he acknowledges that the President himself “has not directly instituted any program at issue in this case” and largely disregards the administration’s legal justifications for the initiatives, as opposed to its political motivations.107

Judge Hanen’s subsequent conduct only reinforces this impression, exhibiting an “uncommon interest and degree of personal involvement” in the issues raised in the deferred action litigation.108 His order denying the government’s motion for a stay pending appeal doubles down on the incorrect assertions in his original opinion and adds the new, wildly untrue assertion—based on extrajudicial information from the Internet—that President Obama personally “has ordered that the laws requiring removal of illegal immigrants that conflict with the 2014 DHS Directive are not to be enforced, and that anyone who attempts to do so will be punished.”109 In referring imprecisely to a “2014 DHS Directive,” Judge Hanen collapses two entirely separate administrative guidance documents—one delineating the government’s enforcement priorities and one establishing eligibility criteria for individuals to seek deferred action under DACA and DAPA—into a single “directive,” as if they were inextricably intertwined.110 However, contrary to the insinuation by Judge Hanen, the comment in question by the President solely concerned implementation of the government’s enforcement priorities—which, as discussed in Part III, Judge Hanen purports not to second guess.111


108. United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993); In re Boston’s Children First, 244 F.3d 164, 169–70 (1st Cir. 2001).


110. Id.

111. Compare Johnson, Enforcement Priorities Memorandum, supra note 4, with Johnson, DAPA Memorandum, supra note 5.
Subsequently, Judge Hanen has reiterated those assertions, issuing a highly unusual, sua sponte “supplemental order” that highlights information that he evidently discovered in media reports—without any prompting by the parties—in an effort to bolster the reasoning in his original opinion, as if in response to arguments and criticisms of the opinion raised in appellate proceedings and the public sphere. He also has fanned the flames on what seems best understood as a manufactured and contrived scandal, arising from a narrow misunderstanding among counsel in the litigation concerning the timing of the government’s implementation of a limited modification to renewals of deferred action under DACA—to the point of angrily demanding the government’s lawyer to answer, “I can trust what the president says? . . . That’s a yes or no question.”

All of this grandstanding makes for riveting political theater. As adjudication and legal analysis, however, it leaves much to be desired. A reasonable observer aware of all facts and circumstances surrounding the litigation might well conclude that this course of conduct has undermined the appearance of justice, by leaving an impression that Judge Hanen’s decision making has been clouded and distorted by improper, extrajudicial concerns. Even well short of that conclusion, however, Judge Hanen’s unusual and provocative commentaries serve to highlight and place in sharper relief some of the specific faults in his adjudication of the analogous factual and legal issues in *Texas v. United States*.


114. See Johnson v. Sawyer, 120 F.3d 1307, 1333–37 (5th Cir. 1997); see also *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700–01 (5th Cir. 2002).
III. SUPERVISED ENFORCEMENT DISCRETION AND THE RULE OF LAW IN INSTITUTIONAL CONTEXT

All of these flaws in Judge Hanen’s reasoning and approach to adjudication led him to falter in his substantive analysis of the complex issues arising from the government’s establishment of enforcement priorities and prosecutorial discretion guidelines in an era of mass deportation—an era in which, as noted above, enforcement activities are now conducted on a massive scale by a broad array of separate agencies, entities, and officials. Ultimately the deferred action initiatives must be understood and evaluated in light of the specificities of that sprawling regime, not in abstract or decontextualized terms, and in this Part, I develop a rationale for the deferred action initiatives that is informed by those contextual specificities. As frameworks to guide enforcement discretion within the immigration enforcement regime’s expansive and fragmented decisionmaking context, DACA and DAPA grow out of an evolving series of efforts, spanning multiple presidential administrations, to minimize the extent to which discretion is exercised in a manner that is arbitrary, inconsistent, or contrary to the agency’s priorities and policies. The initiatives not only seek to channel scarce enforcement resources toward agency priorities more efficiently and effectively than those previous efforts, but also seek to ensure that in executing the immigration laws, the agency and its personnel heed important rule of law values such as consistency, transparency, accountability, and nonarbitrariness. While Judge Hanen purports to respect the government’s authority to establish enforcement priorities and exercise enforcement discretion, his inattentiveness to the rule of law values promoted by DACA and DAPA causes him to simultaneously challenge those priorities and exercises of discretion more directly than it may initially appear.

A. Implementing Enforcement Priorities Through Supervised Discretion

Leaving aside whether it even could permissibly or practically do so, Congress in fact has not tried to fully micromanage how immigration authorities set priorities and exercise prosecutorial discretion, or even for that matter to give fully

coherent or consistent general instructions about how those priorities should be established or how enforcement actions should be carried out. To the contrary—especially given the millions of noncitizens potentially subject to the immigration law’s broad removability provisions, and congressional appropriations that permit enforcement action against only a small fraction of those individuals—Congress’s instructions and guidance to immigration authorities, enacted at different moments in time for a variety of different purposes, are in some tension with each other.\textsuperscript{118} The agency’s establishment of enforcement priorities is congressionally authorized under broad, express delegations of authority to enforce the immigration laws and establish “national enforcement policies and priorities,” but also under what Adam Cox and Cristina Rodríguez, applying William Stuntz’s insights on the structure of criminal law, describe as “de facto delegation.”\textsuperscript{119} To a limited extent, those priorities are also congressionally directed in express terms, but only partially—for example, through various provisions instructing authorities to prioritize enforcement actions against noncitizens with criminal convictions, in part based on the severity of their offenses.\textsuperscript{120}

The legal regime governing immigration therefore simultaneously authorizes, enables, and demands policymaking and supervisory officials in the executive branch to establish enforcement priorities and exercise enforcement discretion in a manner that necessitates tradeoffs among various goals and purposes.\textsuperscript{121} Accord-

\begin{itemize}
  \item \textsuperscript{121} As Adam Cox and Cristina Rodríguez similarly observe, because it is “not possible to coherently identify a set of congressional priorities for immigration enforcement through a careful, lawyerly exercise of inter-textual fidelity to the 300-page immigration code,” an attempt to tightly tether the exercise of enforcement discretion to congressional priorities “imposes an incoherent or impossible obligation in immigration law and many other enforcement contexts.” Adam B. Cox & Cristina M. Rodríguez, \textit{The President and Immigration Law Redux}, 125 YALE L.J. (forthcoming 2015) (manuscript at 5, 29). In part for this reason, it is by no means clear that OLC was correct in concluding that it would be legally impermissible to include parents of individuals granted deferred action under DACA within the category of individuals eligible for deferred action under DAPA. OLC Opinion, supra note 7, at 31–33; see Letter from Shoba Sivaprasad Wadhia et al. to the President of the United States 1 (Nov. 3, 2014), available at http://klhn.co/lawprofessors-2014-11-03 [http://perma.cc/ZM42-FGRR] (arguing that “there is no legal requirement that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals
ingly, policymaking officials have long issued guidance documents communicating the agency’s priorities and providing direction on how enforcement discretion should be exercised—at every stage of the removal process—to carry out those priorities and to promote other applicable principles, including rule of law values. In 1999, twenty-eight members of Congress from both parties—seeking to ameliorate unjust results under the severe provisions of the 1996 immigration laws—requested that Clinton administration officials provide stronger administrative guidance to encourage greater and more consistent use of prosecutorial discretion. Drawing an analogy to the “detailed guidelines” governing enforcement discretion by U.S. Attorneys, their letter urged immigration authorities to issue similar guidelines for rank-and-file officials—“both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner.”

Following this bipartisan request, INS Commissioner Doris Meissner issued a policy statement summarizing the agency’s priorities and discussing a nonexhaustive list of factors—including the individual’s immigration status, length of residence in the United States, criminal history, humanitarian equities, and other considerations—to guide prosecutorial discretion. While disclaiming any intent to “produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law,” she emphasized that stronger guidance was needed to “promot[e] consistency among the prosecutorial activities of different offices and between their activities and the INS’ law enforcement

whose dependents are lawfully present in the United States”); Cox & Rodríguez, supra (manuscript at 28–40).

122. Cooper, INS Exercise of Prosecutorial Discretion, supra note 2 (emphasizing need to “promot[e] public confidence in the fairness and consistency of the agency’s enforcement action” and “maintain[ ] proper chains of command and accountability”); Sargent, supra note 116 (emphasizing that “[t]here is inconsistency when there is a lack of uniform guidance,” and that “there are reasons to make issues like this public and to raise awareness and clarification”).


124. Id. at 2.

priorities.” To that end, she stressed that officials should exercise discretion “in a judicious manner at all stages of the enforcement process,” and to do so “subject to their chains of command.”

Subsequent guidance documents have reiterated these principles. In 2005, ICE’s principal legal advisor articulated criteria to guide prosecutorial discretion by agency attorneys, describing a number of different scenarios in which forgoing enforcement action would be deemed appropriate. He highlighted the need to exercise discretion “uniformly throughout our offices and in all of our cases,” noting that programmatic guidance was necessary because the scale and geographic extent of enforcement activities no longer made it practical for attorneys to make those decisions through routine, individualized consultation with officials initiating enforcement actions, as they had done in the past when the scale of the enforcement regime was smaller. In 2007, ICE Director Julie Myers reiterated the applicability of the Meissner memo to custody decisions involving nursing mothers, emphasizing that those decisions should be overseen “through the programs’ operational chain of command.”

Despite these efforts, enforcement patterns in the field remained inconsistent and diverged significantly from priorities and guidelines established by policymaking officials. Several factors have contributed to this divergence, including broad expansions in the categories of individuals potentially subject to removal proceedings, significant constrictions on eligibility for relief from removal, and tremendous growth in the resources available for enforcement activities. The combination of these developments has caused massive expansions in both the scale of the enforcement regime and in the occasions for officials to exercise enforcement discretion—which in turn has greatly complicated the

126. Meissner, Exercising Prosecutorial Discretion, supra note 125, at 2, 10; see also id. at 10 (emphasizing the importance of “promot[ing] consistency in the application of the immigration laws”).

127. Id. at 1, 5.


129. Id. at 3; see also id. at 1–2.


131. See, e.g., Cox & Rodríguez, supra note 121. Analogous challenges arise in other areas of immigration control involving large-scale bureaucratic decision making, such as asylum adjudication and consular processing of visa applications. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295 (2007); James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 WASH. L. REV. 1 (1991).
agency’s supervisory tasks of ensuring fidelity to its priorities, consistency in the exercise of discretion, and public confidence that the laws are being fairly executed and enforced. Those tasks have been further complicated by intense pressures on both individual enforcement officers and the agency more generally to measure performance based on numbers of removals—in some instances to the point of reportedly instituting enforcement quotas.132 Even without formal quotas, those pressures can frustrate the agency’s priorities and guidelines by encouraging enforcement actions based on a numbers-driven sense of convenience or expedience, rather than judicious exercise of discretion in a manner that heeds those priorities and guidelines.133

While the Obama administration attempted to address this divergence by communicating the agency’s priorities and guidelines more concretely, those initial efforts were widely regarded as unsuccessful. An enforcement priorities memorandum by ICE Director John Morton articulated the agency’s priorities in terms of an elaborate hierarchy of categories and subcategories of potentially deportable noncitizens, rather than in more general terms.134 A subsequent memo built upon earlier guidelines for exercising prosecutorial discretion, setting forth more detailed criteria and drawing specific attention to factors warranting “particular care and consideration.”135 These efforts, however, did not yield significant changes in enforcement patterns, which remained inconsistent and seemingly arbitrary, and continued to diverge from the agency’s priorities and guidelines.136 Indeed, officials in the bureaucracy were not simply inconsistent in following these policy statements, but in some instances actively resisted them—to such an extent that one of the three ICE officers’ unions, encouraged by opposition politicians in Congress, formally voted “no confidence” in ICE’s leadership based on its


substantive disagreement with the policies established by those policymaking officials.137

The deferred action initiatives must be understood and analyzed in this context, as what one former ICE official describes as “a logical next step.”138 The initiatives modify, refine, and clarify the hierarchy of enforcement priorities set forth in the Morton memos and establish new procedures for discretionary decisions to deviate from those priorities when appropriate.139 But rather than exclusively delegating discretion to grant deferred action to front-line officers—and effectively giving them plenary authority to apply the detailed but open-ended criteria of earlier guidance documents—the initiatives establish a parallel framework that divides the exercise of prosecutorial discretion into two layers. The first layer involves an exercise of discretion by policymaking officials to establish a decisionmaking framework consisting of eligibility criteria, both qualifying and disqualifying, for noncitizens to be considered for deferred action. As the guidance documents for DACA and DAPA make clear, those eligibility criteria are intended to reflect and give effect to both the agency’s priorities themselves, and incorporate many of its longstanding factors to guide the exercise of prosecutorial discretion. The second layer instructs rank-and-file officers to apply those criteria and to decide whether to grant deferred action on an individualized, case-by-case basis. Moreover, rather than leaving deferred action to be granted primarily when enforcement actions already have been initiated, the initiatives permit noncitizens to affirmatively apply for deferred action from DHS’s immigration services agency, USCIS, before enforcement actions have been commenced—in order to eliminate the need for DHS’s enforcement-oriented agencies, U.S. Customs and Border Patrol (CBP) and ICE, to expend resources on enforcement actions against those individuals.140

139. Johnson, Enforcement Priorities Memorandum, supra note 4.
140. See also Meissner, Exercising Prosecutorial Discretion, supra note 125, at 6 (“As a general matter, it is better to exercise favorable discretion as early in the process as possible . . . in order to conserve the [immigration agency’s] resources and in recognition of the alien’s interest in avoiding unnecessary legal proceedings.”); Bernsen, Legal Opinion on Prosecutorial Discretion, supra note 31, at 7 (“Normally the appropriate time for the exercise of prosecutorial discretion is prior to the institution of [removal] proceedings.”).
B. The Core Inconsistency in *Texas v. United States*

For Judge Hanen, this supervised, programmatic approach to enforcement discretion evidently does not constitute the legitimate exercise of discretion at all. That conclusion, however—offered only implicitly, without any reasoned explanation—fails to adequately grapple with both the actual facts concerning DACA and DAPA and the relationship between agency enforcement priorities and prosecutorial discretion when immigration enforcement takes place on a massive but fragmented scale. Ultimately, the ruling rests upon an inconsistency that Judge Hanen fails to acknowledge, much less resolve: while he purports to respect and leave undisturbed the executive branch’s ability to establish enforcement priorities and exercise enforcement discretion, the entire thrust of his opinion directly challenges its ability to do precisely that.

First, in concluding that “discretion is virtually extinguished” under the two initiatives, Judge Hanen disregards the unambiguous terms of the guidance documents at issue, which unequivocally require not simply satisfaction of certain eligibility criteria, but also require officials to exercise individualized, case-by-case discretion before granting deferred action. Under the express terms of the policy statement announcing DAPA, for example, USCIS officials not only are directed to exercise prosecutorial discretion “on a case-by-case basis,” but also are required to determine that the individual “presents no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.” 141 But rather than focusing on those documents, Judge Hanen focuses instead—again, in strikingly personal terms—on informal comments by President Obama and out-of-context statements from the DHS website, concluding on that basis that “if an applicant meets the DACA criteria, he or she will not be removed.” 142 As in other parts of his opinion, Judge Hanen fails to explain why those political statements should be afforded determinative legal significance, especially in the face of guidance documents stating precisely the opposite. As the Fifth Circuit concluded, in upholding the dismissal of a previous lawsuit challenging DACA, the notion that officials are “always required to grant deferred action” under the initiatives is “erroneous.” 143

141. Johnson, DAPA Memorandum, supra note 5, at 4; see also Napolitano, DACA Memorandum, supra note 6, at 1–2 (requiring deferred action to be granted “on a case-by-case basis”).
While Judge Hanen inferred from apparently high approval rates under DACA that no individualized, case-by-case discretion would take place under the new initiatives, that logically flawed inference flows from a cascade of basic errors. While acknowledging that the language of the guidance documents announcing the new initiatives expressly requires individualized, case-by-case discretion, Judge Hanen concluded that language was “merely pretext” because the approval rates under DACA were especially high.144 In reaching this conclusion, Judge Hanen made essentially no effort to account for potential differences in the characteristics of individuals eligible for DACA and DAPA arising from the differences in eligibility criteria under the two initiatives. Since applicants for deferred action under DAPA must satisfy different eligibility criteria than applicants for deferred action under DACA, it is by no means self-evident that approval rates under DAPA will necessarily be the same as under DACA—especially since individuals eligible for DACA, as individuals who “were brought to this country as children” without any “intent to violate the law,” arguably might be more likely to have stronger positive equities simply by definition.145

But quite apart from this questionable premise in Judge Hanen’s reasoning, his finding is wanting at an even more fundamental level. As in any number of other legal contexts, high approval rates cannot by themselves establish that discretion is not being exercised or that meaningful procedures do not exist, since there is no legitimate reason to assume that the universe of DACA applicants constitutes a random or representative sample of all potentially deportable noncitizens.146 To the contrary, given the high costs of applying and the severe potential consequences if applications are denied or deferred action is later revoked, one should fully expect approval rates to be high—since noncitizens with marginal applications have exceedingly powerful incentives not to apply in the first place.147

In any event, as Stephen Legomsky has explained in detail, Judge Hanen’s analysis also is riddled with more basic factual errors and mischaracterizations

146.  George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 4 (1984); Conor Clarke, Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate, 66 STAN. L. REV. ONLINE 125 (2014).
147.  As Stephen Legomsky notes, “An undocumented individual with some additional misconduct in his or her background is unlikely to proactively approach the government [and submit detailed biographic and biometric information]—nor is that person likely to send the government $465—if he or she is unlikely to receive deferred action.” The Unconstitutionality of Obama’s Executive Actions on Immigration, Hearing Before H. Comm. on the Judiciary, 114th Cong., 1st Sess. (Feb. 25, 2015) (written statement of Stephen Legomsky) [hereinafter Legomsky Testimony].
about the agency’s actual practices under DACA. While Judge Hanen intimates that denials of deferred action applications for failure to satisfy the DACA and DAPA eligibility criteria do not involve any exercise of discretion, that conclusion misunderstands the nature of those eligibility criteria. For example, the policy statement announcing the new deferred action initiatives permits individuals to grant deferred action to individuals who do not fall within the agency’s delineated enforcement priorities. However, determining whether an individual falls within the agency’s enforcement priorities itself involves individualized, case-by-case determinations, especially given the open-ended manner in which some of those priorities are defined. The policy statement establishing the agency’s enforcement priorities itself requires officials to consider a variety of factors, “in the totality of the circumstances,” and makes clear that enforcement action may still be pursued against individuals who fall outside of the defined priorities if, in the judgment of an ICE field office director, “removing such an alien would serve an important federal interest.”

Second, Judge Hanen evidently believes that genuine prosecutorial discretion demands not only individualized decision making—which, as just discussed, DACA and DAPA in any event require—but also ad hoc and unguided decision making exclusively by rank-and-file ICE enforcement officers, without any meaningful supervision, direction, or participation by policymaking officials or the involvement of other rank-and-file officials, such as those within USCIS, with other immigration-related responsibilities. The basis for this position is left entirely unexplained. Strangely, given Judge Hanen’s insistence that his ruling does not second-guess the agency’s priorities, he concludes in sweeping terms that the initiatives are “not a necessary adjunct for the operation of the DHS or for effecting its stated priorities” at all—based on the bare fact that noncitizens eligible for deferred action have not yet been deported:

[Non-enforcement] is what the DHS has been doing for these [DAPA] recipients for the last five years—whether that was because the DHS could not track down the millions of individuals they now deem eligible for deferred action, or because they were prioritizing removals according to limited resources, applying humanitarian consid-

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148. *Id.* at 9–14; *see also Texas IV*, 2015 WL 3386436, at *21–25 (Higginson, J., dissenting).
150. *See Legomsky Testimony, supra* note 147, at 13 (“The fact that the discretion is exercised in applying the threshold criteria rather than separately after the threshold criteria have been met does not make the determination any less discretionary.”).
erations, or just not removing these individuals for “administrative convenience.” 153

“[U]nburdened by the factual,” this hopelessly confused line of reasoning cannot be reconciled with any plausible understanding of the institutional context from which the deferred action initiatives have actually emerged. 154 As attention to that context makes clear, the agency’s protracted efforts to ensure fidelity to its priorities and consistent application of its prosecutorial discretion guidelines over the past five years have been fitful and largely unsuccessful over that period. While it certainly is true that noncitizens eligible to apply for DACA and DAPA have not been deported during that period—simply by definition—large numbers of similarly situated individuals have not been so fortunate, owing to the agency’s inability to ensure that rank-and-file officers exercise discretion in a manner that complies with its priorities and guidelines and is sufficiently consistent.

Ultimately, Judge Hanen’s ruling must be understood as resting on an assumption that policymaking officials should be restricted or even disabled altogether from establishing a programmatic framework to supervise the exercise of discretion throughout the enforcement regime. In fact, in his order denying the government’s motion for a stay of his order pending appeal, he makes that assumption all but explicit. 155 That assumption is fully consistent with the remarkably high level of disdain he exhibits for immigration “policymaker[s]” in Nava-Martinez and his other immigration-related commentaries, in which he reams those officials for “thwart[ing]” and “negat[ing] the efforts” of “those that are actually doing the work of protecting Americans.” 156 But it also is directly at odds with his own insistence that the agency’s enforcement priorities are “not subject to judicial second-guessing.” 157 After all, those priorities would have little meaning if policymaking officials were disabled altogether from implementing mechanisms to ensure they are actually carried out—particularly in the face of active resistance from rank-and-file officials or enforcement patterns that significantly diverge from the agency’s priorities and guidelines.

153. Id. at *44. In fact, Judge Hanen wastes no time in directly second-guessing those enforcement priorities, questioning DHS’s exclusion of DAPA-eligible individuals from its third priority—even though that category is limited by its terms to noncitizens issued final removal orders on or after January 1, 2014. Id. at *35 n.49 (“DAPA recipients arguably fall under Priority 3, but the Secretary’s DAPA Memorandum seems to indicate he thinks otherwise.”).


Without question, the formalized and divided approach to enforcement discretion established by DACA and DAPA changes what the exercise of that discretion in fact looks like. Indeed, that is the very purpose of instituting that kind of approach in any form. When policymakers establish criteria to inform the exercise of discretion by rank-and-file officers, rather than affording them plenary authority to exercise that discretion without guidance or supervision, that necessarily constrains and narrows the scope of the discretion being exercised. In addition, assigning primary responsibility for deferred action decision making to the benefits-oriented USCIS—which DHS is entirely free to do—places those decisions in an agency with a different set of institutional responsibilities, incentives, practices, and cultural norms than the enforcement-oriented ICE, whose performance ultimately may be measured, in practice, more on the basis of the numbers of individuals apprehended, detained, and deported than on the basis of how it exercises prosecutorial discretion.158

However, to conclude from the reconfiguration of discretion that “discretion is virtually extinguished,” as Judge Hanen does, is mistaken. While the extent to which enforcement discretion is tailored to every last particular fact and circumstance about the individuals seeking deferred action might well be narrower under this regime, the guidance documents announcing DACA and DAPA are crystal clear that deferred action must still be granted on an individualized, case-by-case basis.159 The kinds of constraints that DACA and DAPA place on the individualized exercise of discretion by individual rank-and-file officers are inherent in any meaningful effort to establish enforcement priorities or to delineate guidelines and policies for how prosecutorial discretion should be exercised. Although it is possible to ignore the tradeoffs involved, one cannot wish them away. While flexibility and fine-grained attention to detailed facts and circumstances certainly may be diminished in a regime that constrains plenary, unguided, and unaccountable front-line discretion, those potential losses may be significantly outweighed by the corresponding gains in more rationally implementing the agency’s enforcement priorities and promoting important rule of law values, including consistency, predictability, and the minimization of arbitrariness.

158. In practice, as Adam Cox and Cristina Rodríguez observe, assigning primary responsibility to USCIS also has the effect of centralizing the exercise of enforcement discretion in a smaller and less dispersed set of actors, which may make the task of administrative supervision less complex. Cox & Rodríguez, supra note 121 (manuscript at 63–64).

A more coherent programmatic regime to enable policymaking officials to guide the exercise of enforcement discretion within the bureaucracy in more effective and efficient directions may achieve a more “acceptable balance” between those competing sets of values, and also may promote greater transparency and democratic accountability in the execution of the immigration laws. While it might arguably be desirable, from a policy perspective, to institute that kind of regime using notice-and-comment rulemaking, as a formal legal matter DHS was not required to do so, since the policy statements announcing DACA and DAPA do not purport to be binding and still require individualized, case-by-case discretion before granting deferred action.

Whether, and in what particular institutional forms, these kinds of programmatic mechanisms to guide the exercise of prosecutorial discretion may be justified to promote rule of law values and ensure consistency with the agency’s enforcement priorities have been much less prominent questions in both political and legal discussions of DACA and DAPA than other relevant and important arguments concerning resource constraints and humanitarian concerns. However, these rule of law values are considerably more important than this limited attention might suggest. Indeed, given the prominent role in those discussions of arguments concerning the President’s constitutional obligation to “take care that the laws be faithfully executed,” the limited attention to rule of law values may be somewhat surprising. Properly evaluating arrangements that seek to promote these values requires careful attention to the institutional specificities of immigration control. As the scale of the enforcement regime has grown to such enormous levels—making the interrelated challenges

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160. See Abrams, supra note 117, at 3–4, 7–8 (describing a “competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness, on the one hand, and the need for flexibility, sensitivity, and adaptability on the other”).


163. See, e.g., Wadhia, supra note 31, at 244–45. For helpful but limited analysis of these rule of law values in the context of deferred action, see, for example, MOTOMURA, supra note 117, at 204–05; WADHIA, supra note 29, at 134–45; Metzger, supra note 161, at 1927–29; Saikrishna Bangalore Prakash, The Statutory Nonenforcement Power, 91 TEX. L. REV. 115, 116 (2012); Shane, supra note 27.

164. U.S. CONST. art. II, § 3.
of ensuring sufficiently uniform execution of the law and fidelity to enforcement priorities more formidable—the need for effective mechanisms to guide the discretion exercised in the field has only grown more important.\footnote{See Hyde et al., Guidelines for Use of Prosecutorial Discretion in Removal Proceedings, \textit{supra} note 123 (urging executive branch officials to develop stronger and more formalized administrative guidance to encourage greater and more consistent use of prosecutorial discretion).} On Judge Hanen’s largely fact-free, decontextualized, and politicized view, however, policymaking officials evidently must “abdicate” responsibility (as he might put it) to supervise those exercises of discretion and must instead let the vagaries of the bureaucracy reign supreme at the rule of law’s expense.

\section*{CONCLUSION}

Judge Hanen’s 123-page ruling bursts at the seams with political rhetoric and “ideological dudgeon” that rivals anything one might hear at a congressional hearing.\footnote{Michael Dorf, \textit{Is There a Silver Lining in Judge Hanen’s Injunction Against the Obama Immigration Policy?}, DORF ON LAW (Feb. 17, 2015, 10:11 AM), http://www.dorfonlaw.org/2015/02/is-there-silver-lining-in-judge-hanens.html [http://perma.cc/6YSC-FYK9].} Unfortunately, like his earlier immigration-related commentaries, it utilizes equally politicized modes of analysis and reasoning, casting aside the norms of judicial fact-finding, reasoned adjudication, and the adversarial process in a manner that distorts his substantive analysis. As David Martin has noted, “[i]t is the agency, not each individual enforcement officer, that has the responsibility to make . . . decisions about resource allocation and overall policy,” whether in the context of immigration control or any other law enforcement setting.\footnote{David A. Martin, \textit{A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade}, 122 YALE L.J. ONLINE 167, 183 (2012).} While that basic proposition seems unremarkable, Judge Hanen’s analysis and approach to adjudication—along with his failure to properly engage the facts and laws at issue, his injudicious antagonism toward immigration policymaking officials, and his unusually high personal interest and involvement in immigration enforcement questions more generally—lead him to turn that basic proposition directly on its head. The net result is not simply an opinion that seeks to effectively disable the ability of policymaking officials to ensure fidelity to agency priorities or promote rule of law values in the execution of the immigration laws, but one that creates the appearance of a politicized quest for truthiness, rather than a judicious quest for truth.