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UNCONSTITUTIONALITY OF OBAMA'S EXECUTIVE ACTIONS ON IMMIGRATION

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BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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CONTENTS

FEBRUARY 25, 2015

Page

OPENING STATEMENTS

The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 1
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 3
The Honorable Trey Gowdy, a Representative in Congress from the State of South Carolina, and Member, Committee on the Judiciary 5
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 6

WITNESSES

The Honorable Adam Paul Laxalt, Attorney General of Nevada
Oral Testimony 10
Prepared Statement 13
Josh Blackman (testifying in his personal capacity), Professor, South Texas College of Law
Oral Testimony 19
Prepared Statement 21
Elizabeth Price Foley (testifying in her personal capacity), Professor, Florida International University College of Law
Oral Testimony 25
Prepared Statement 27
Stephen H. Legomsky (testifying in his personal capacity), Professor, Washington University School of Law
Oral Testimony 59
Prepared Statement 61

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 101
Material submitted by the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary 118
Material submitted by the Honorable Judy Chu, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 127
Material submitted by the Honorable Hakeem Jeffries, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary 142

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 162
Material submitted by the Honorable Doug Collins, a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary .. 196

UNCONSTITUTIONALITY OF OBAMA'S EXECUTIVE ACTIONS ON IMMIGRATION

WEDNESDAY, FEBRUARY 25, 2015

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10:23 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte, (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Sensenbrenner, Smith, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Gowdy, Labrador, Farenthold, Collins, DeSantis, Buck, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Cohen, Chu, Deutch, Gutierrez, Richmond, DelBene, and Jeffries.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Kelsey Williams, Clerk; George Fishman, Counsel; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Tom Jawetz, Minority Counsel.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this morning's hearing on the unconstitutionality of President Obama's executive actions on immigration. I will begin by recognizing myself for an opening statement.

Last November, President Obama announced one of the biggest constitutional power grabs ever by a President. He declared unilaterally that, by his own estimation, almost 5 million unlawful aliens would be free from the legal consequences of their lawless actions. Not only that, by granting them deferred action, he would bestow upon them benefits such as legal presence, work authorization, and access to the Social Security Trust Fund and the Earned Income Tax Credit.

President Obama took these actions despite having stated over 20 times in the past that he didn't have the constitutional power to take such steps on his own. As the Washington Post's own "Fact Checker" concluded, "Apparently, he's changed his mind."

The Constitution is clear: It is Congress' duty to write our Nation's laws. Yet, President Obama admitted that, "I just took an action to change the law."

The Constitution is also clear that once laws are enacted, it is the President's responsibility to enforce them. The Constitution requires the President to take care that the laws be faithfully executed. Yet, the very integrity of our immigration laws is now in question.

Twenty-six States believe that President Obama's actions would cause them irreparable harm. They challenged his grant of deferred action in Federal district court in Texas. The court agreed with the States and has granted a temporary injunction halting, for the moment, the Administration's plans.

The court stated that the Administration is "not just rewriting the laws. It is creating them from scratch."

President Obama has justified his actions under the guise of prosecutorial discretion. Law enforcement agencies do have the inherent power to exercise prosecutorial discretion, the authority as to whether to enforce, or not enforce, the law against particular individuals.

However, telling entire classes of millions of unlawful aliens that they face no possibility of being removed is not prosecutorial discretion. It is simply an abdication of the executive branch's responsibility to enforce the laws.

The President relies on a memo prepared by his Justice Department's Office of Legal Counsel to attempt to justify his actions as constitutional. But that very memo finds that "immigration officials' discretion in enforcing the laws is not unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches."

The memo admits that the executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. And the memo quotes the Supreme Court's *Heckler v. Chaney* decision in stating that the executive branch cannot "'consciously and expressly adopt a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." The memo, in fact, is an indictment of President Obama's actions.

The Federal court in Texas agrees. It found that the grant of deferred action "does not simply constitute inadequate enforcement. The Government here is doing nothing to enforce the removal laws against a class of millions of individuals. The grant of deferred action does not represent mere inadequacy. It is complete abdication."

And the court points out that President Obama's actions go beyond even utter nonenforcement. He is, in fact, granting affirmative benefits to these aliens, as I described earlier.

In absolutely no way can President Obama's actions be considered a justifiable use of the Administration's powers of prosecutorial discretion. They are a clear violation of his constitutional responsibility to faithfully execute the laws.

The President also mistakenly claims that his actions are nothing new. It is true that previous Presidents of both parties have provided immigration relief to groups of aliens. However, most often, the actions were based on emergencies in foreign countries, thereby relying upon the broad constitutional power given to a President to conduct foreign affairs.

For example, Chinese students were protected from deportation after the Tiananmen Square massacre of 1989.

What about President George H.W. Bush's Family Fairness policy, which the White House cites to justify its power grab? This grant of voluntary departure was, in fact, authorized by the Immigration and Naturalization Act as it existed at the time.

Without any crisis in a foreign country to justify his actions, and in granting deferred action without any statutory authorization, President Obama has clearly exceeded his constitutional authority. No Administration has so abused and misused the power of prosecutorial discretion as has the Obama administration.

By assuming legislative power, the Obama administration is driving full speed ahead to a constitutional crisis, tilting the scales of our three-branch government in his favor and threatening to unravel our system of checks and balances. This Administration has entered the realm of rewriting the laws when it can't convince Congress to change them.

The House of Representatives has taken decisive action this year to protect the Constitution. We have passed a Department of Homeland Security appropriations bill that would defund a series of unconstitutional actions of the Obama administration, including this grant of deferred action.

Tragically, the House-passed bill is being filibustered in the Senate even as appropriated funds for the department are set to run out at the end of the week.

By not even allowing the bill to be debated, those Senators who have chosen the path of filibuster and obstruction are threatening DHS's access to funds designed to keep Americans safe. They are also denying the American people a fair debate on this vital issue of whether Congress needs to take action to protect all our constitutional liberties. We can only hope that they will relent in time.

I look forward to today's hearing and the testimony of our witnesses.

It is now my pleasure to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte, and to our witnesses.

Members of the Committee, in 3 days, the Department of Homeland Security will run out of funds. While tens of thousands of Federal Government workers could be furloughed, around 200,000 workers will be forced to come back to work without receiving a paycheck. They will be told to patrol the border, conduct investigations, and secure our ports, but they will not be paid.

Now, it is fairly well known that the Department of Homeland Security has notoriously low morale. That has been a problem since the department's creation a decade ago. This won't help.

But I am sure those workers will do their jobs, which is more than I can say for the legislative branch of our Federal Government. Why do I say that? Because Congress has certain responsibilities. Some are complicated and some are less complicated, and we have failed to live up to our responsibilities for years.

First, consider the most basic obligation we have. It is our responsibility to pass bills to fund the Government. If we don't do our job, the Government shuts down.

Congressional Republicans got their wish in October 2013 and shut the Government down for more than 2 weeks. Now, the majority here again is set on a collision course. This time, they will shut down the Department of Homeland Security because they refuse to pass a clean spending bill, because they want to block the Administration's executive actions on immigration.

Now, keep in mind that the spending bill we are talking about was negotiated between Republicans and Democrats in the House and the Senate. Truth be told, there are aspects of that bill that I disagree with. I strongly oppose that detention be mandated and believe that it is wasteful and unjust to include that language in the appropriations bill. But I also understand the importance of funding the Department of Homeland Security and the need to keep our Nation safe.

Second, Congress is also failing to do its jobs because it is ultimately our responsibility to fix our broken immigration system. Instead of doing that work, we are holding hearing after hearing to vilify the President for taking important and common-sense steps to prioritize the deportation of felons before families.

The limited legislation that this Committee has considered would make our immigration system even less efficient, less humane, and less able to meet the needs of American families and businesses.

Earlier this month, we held two Immigration Subcommittee hearings on draft language of four deportation-only bills that would separate families, strip protection from DREAMers, destroy the agricultural industry and the millions of jobs that depend on it, and return vulnerable children to face persecution and violence with no meaningful due process.

Finally, I want to note that the title of today's hearing demonstrates a glaring disrespect for the Office of the Presidency and for this institution's responsibility to conduct oversight that is rooted in fact, rather than political presumption. The title of today's hearing is "The Unconstitutionality of Obama's Executive Actions on Immigration." Not "President Obama's Executive Actions," but "Obama's Executive Actions." Since when are we on such familiar terms with our Commander in Chief? I cannot recall a previous Administration during which Members of Congress from either side of the aisle showed such a persistent disrespect for the Office of the Presidency.

The title of this hearing is also interesting because it is a statement, not a question. It just presumes that the Administration's actions are unconstitutional, even though no court has found the actions unconstitutional, and there is strong legal authority and historical precedent supporting these policy decisions.

So in closing, our current immigration system is not working for American families, businesses, or the economy. These problems require real legislative solutions. So I urge my colleagues on this Committee to start doing the job that we were sent here to do.

Mr. Chairman, I yield back the balance of my time and thank you.

Mr. GOODLATTE. The Chair thanks the gentleman.

It is now my pleasure to recognize the Chairman of the Judiciary Subcommittee on Immigration and Border Security, the gentleman from South Carolina, Mr. Gowdy, for his opening statement.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Chairman, the thread that holds the tapestry of our country together is respect for and adherence to the rule of law. The law is the greatest unifying and the greatest equalizing force that we have in our culture. The law is what makes the richest person drive the precise same speed limit as the poorest person. The law is what makes the richest person in this country pay his or her taxes on precisely the same day as the poorest person in this country.

The law, Mr. Chairman, is symbolized by a blindfolded woman holding a set of scales and a sword. The law is both a shield and a sword. And it is the foundation upon which this Republic stands.

We think so highly of the law, Mr. Chairman, that in the oath of citizenship administered to those who pledge allegiance to this country, to their new country, it makes six different references to the law. So attempts to undermine the law via Executive fiat, regardless of motivation, are detrimental to the foundation of a democracy.

President Obama, after the November midterm elections, I hasten to add, announced one of the largest extraconstitutional acts ever by a Chief Executive. He declared, unilaterally, almost 5 million undocumented aliens would receive deferred action under some newfangled definition of prosecutorial discretion. Moreover, in addition to using prosecutorial discretion as a license to rewrite the law, he also conferred benefits on those same people.

You may like the policy. You may wish the policy where the law. But one person does not make law in a republic. If you enjoy a single person making law, you should investigate living in another country, because our Framers did not give us, nor have generations of our fellow citizens fought and served and sacrificed for a single person to make law in a unilateral way.

So removing consequences for breaking the law is one thing. Distilling benefits such as work authorization and immigration benefits is another.

The President himself recognized his own inability to do this, Mr. Chairman. More than 20 separate times he said he lacked the power to do what he ultimately did.

In 2011, he said this, and I quote, "The notion that I could just suspend deportations through Executive orders, that is just not the case." He told us time and time again, Mr. Chairman, that he was not a king.

His position may have changed, but the Constitution has not. And that document is clear and it is time-tested and it is true, and it says that Congress passes laws and it is the responsibility of the Chief Executive to take care that those laws are faithfully enforced.

Prosecutorial discretion——

[Technical difficulty.]

Mr. GOWDY. Is that better, Mr. Court Reporter? Let me see where I was.

His position may have changed, but the Constitution has not. Prosecutorial discretion is real and constitutionally valid, Mr. Chairman, but it is not a synonym for anarchy.

As U.S. District Court Judge Andrew Hanen wrote in his recent opinion, DHS does have discretion in the manner in which it chooses to fulfill the express will of Congress. It cannot, however, enact a program whereby it not only ignores the dictates of Congress, but actively moves to thwart them.

The Constitution gives the President a lot of power, Mr. Chairman. He is the Commander in Chief. He nominates the Supreme Court Justices. He can veto legislation for any reason or no reason. He can fail to defend the constitutionality of the law. He has the power of pardon. He has a lot of power, Mr. Chairman.

But what he cannot do is make law by himself. That is the responsibility of the Congress. If this President's unilateral extraconstitutional acts are not stopped, future Presidents, you may rest assured, will expand that power of the executive branch, thereby threatening the constitutional equilibrium.

The argument that previous Administrations have acted outside constitutional boundaries holds no merit with me. The fact that other people made mistakes is not a license for this Executive to do the same thing.

Mr. President, in conclusion, we live in a country where process matters. The end does not justify the means, no matter how good the intentions. When a police officer fails to check the right box on an application for a search warrant, the fruits of that search warrant are suppressed. What a police officer, even though he has the right suspect for the right crime, but he just fails to include one small part of those prophylactic Miranda warnings, what happens? The statement is suppressed, even though you have the right person, even though you have the right crime, because we view process over the end.

And I am going to say this, then I will finish, I will say this to those who benefit from the President's policies, you may be willing to allow the end to justify the means in this case. You may well like the fact that the President has abused prosecutorial discretion and conferred benefits in an unprecedented way. You may benefit from the President's failure to enforce the law today. But I will make you this promise, there will come a day where you will cry out for the enforcement of the law. There will come a day where you long for the law to be the foundation of this Republic. So you be careful what you do with the law today, because if you weaken it today, you weaken it forever.

With that, I would yield back.

Mr. GOODLATTE. The Chair thanks the gentleman for the very cogent remarks.

It is now my pleasure to recognize the Ranking Member of the Judiciary Subcommittee on Immigration and Border Security, the gentlewoman from California, Ms. Lofgren, for her opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman. The 113th Congress is considered to have been one of the most do-nothing Congresses in history. The biggest symbol of the Republican failure to govern was the unnecessary and irresponsible shutdown that lasted from Octo-

ber 1 through October 16. Federal employees were furloughed for a combined total of 6.6 million days. $2 billion was spent on payroll to these furloughed employees for work that they were prevented from doing. The recovering economy took a hit, and millions of Americans were denied access to programs and services that they rely on.

Perhaps it is fitting, then, that the 113th Congress ended with the so-called Cromnibus, a spending bill that promised to yet again put us on the path toward a government shutdown.

We are only 2 months into the 114th Congress, but it already seems like the Republican majority in the House and Senate is trying to outdo itself. For the past 6 weeks, rather than proceed with the DHS funding bill that Democrats and Republicans in the House and Senate agreed to last year, Republican leaders in the House and Senate have insisted that funding be contingent on a series of poison pill immigration riders demanded by the most extreme Members and supported by all but a few.

Since the Cromnibus was first hatched, many Republicans have argued that the President acted unconstitutionally on November 20, when he and the Secretary of Homeland Security announced a series of measures designed to bring a measure of sense to our broken immigration system. We have been told that these measures cannot be permitted to take effect.

Last week, of course, a Federal judge issued a preliminary injunction halting two of those measures, the Deferred Action for Parental Accountability Program and the expansion of the Deferred Action for Childhood Arrivals program. These efforts are designed to offer temporary protection from deportation to certain parents of U.S. citizens and lawful permanent residents, and to DREAMers with long ties to our country. The Department of Justice this week requested a stay of the injunction and noticed an appeal.

The matter is firmly in the hands of the Federal courts, the branch of the Government that the Constitution entrusts to settle disputes arising under the Constitution and the laws of the United States.

Some people, including some Republicans in the House and Senate, have speculated that a court injunction would convince Republican leadership to stop holding the spending bill hostage. What we have seen over the past 2 weeks, however, is that many Republicans are even more determined to take us over a cliff and once more shut down the Government.

Several points are worth noting. First, we continue to hear Republicans minimize the impact of a shutdown on national security by arguing that 85 percent of DHS employees were deemed essential during the last Government shutdown. I just can't understand how we in Congress would take comfort at the idea of forcing Border Patrol agents to secure our borders, Coast Guard personnel to patrol the seas, and ICE officers and agents to conduct law enforcement investigations and secure detention facilities, without receiving their paycheck. It is unconscionable, really.

Further, it is bizarre that we will de-fund of the E-Verify program, stop the immigration enforcement efforts, but at the same time, because they are fee-supported, the processing of immigration petitions will be unimpeded. So the effort stops immigration en-

forcement, but it does nothing to actually stop the processing of immigration petitions.

Second, since we know the court has already temporarily halted implementation of DAPA, expanded DACA, it is important to remember what other initiatives congressional Republicans are trying to block as part of DHS funding. They voted overwhelmingly to eliminate the DACA program itself, stripping protection for more than 600,000 DREAM Act kids and subjecting them once more to deportation. They voted to prevent DHS from implementing a new enforcement strategy along our southern border and creating three new law enforcement task forces. They voted to block DHS and DOD from working together to ensure that U.S. citizens who wish to enlist in the military would be able to do so notwithstanding immigration status of close relatives. They voted to stop DHS from taking important steps to capitalize on the talents of entrepreneurs, to help companies attract and retain highly skilled immigrants, and to promote citizenship.

Just yesterday, USCIS issued a final rule extending work authorization to the spouses of certain H-1B visa holders who are beneficiaries of approved employment-based immigrant visa petitions. If the appropriations bill passed by the House were to have become law, USCIS would have been prevented from finalizing that rule.

Republicans don't talk about the fact that they are refusing to fund DHS unless they block each of these efforts, but that is what they voted to do.

Turning to today's hearing, I note that although the title of this hearing, as has been mentioned, presumes that the President's executive actions are unconstitutional, no court, including the Texas District Court that issued the preliminary injunction, has found that these actions are unconstitutional.

In fact, a challenge to the original DACA program brought by the State of Mississippi was thrown out of court for lack of standing. And a challenge to the Administration's recent executive actions blocked by Maricopa County Sheriff Joe Arpaio was also dismissed for lack of standing.

Of course, I am disappointed by the court's ruling, and I know millions of American families across the country are also greatly disappointed. Still, I expect that both programs will be upheld as fully within the President's legal authority by appellate courts.

I say this because there is ample legal and historical precedent supporting the President's action. The Supreme Court has long recognized the Administration's authority to exercise prosecutorial discretion when enforcing our immigration laws and has specifically recognized that granting deferred action is a legitimate exercise of that authority. Congress directed the Secretary of Homeland Security to establish national enforcement priorities and policies, and empowered the Secretary to perform acts that he deems necessary for carrying out his authority under the Immigration and Nationality Act.

Every year, Congress gives the Administration only enough money to apprehend, detain, and remove a fraction of the people in this country who are removable, and additionally directs the department to prioritize the removal of people with criminal convictions based on the severity of the offense. Although the Texas court

ruling seems to turn on the fact that DACA recipients may apply for work authorization and Social Security cards, it fails to acknowledge that the legal authority for granting work authorization and Social Security cards is entirely distinct from the authority to grant deferred action and, in fact, is statutory. All of those authorities long predated DACA, and Congress has never taken action to limit that discretion.

This is arguably the fourth hearing, Mr. Chairman, that we have held on the legal authority of the President's actions on immigration. The last two hearings——

Mr. GOODLATTE. The gentlewoman is advised that she is now 2 1/2 minutes over. We all exceeded by a minute or so.

Ms. LOFGREN. I will then conclude by saying that the courts will ultimately decide whether the Administration's programs can take effect. It is our responsibility to reform the law, and it would be irresponsible of us to shut the Government down. We should allow the courts to do their jobs, and we should do our own.

I would yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman.

We welcome our distinguished panel today. If you would all rise, I will begin by swearing in the witnesses.

Do you and each of you solemnly swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you very much. Let the record reflect that all the witnesses responded in the affirmative.

Adam Paul Laxalt currently serves as Nevada's 33rd Attorney General and is the youngest attorney general in the country. Prior to becoming attorney general, he was in private practice in Las Vegas. Attorney General Laxalt served in Iraq at Forward Operating Base Camp Victory, where his team was in charge of more than 20,000 detainees. He has also served as a Special Assistant U.S. Attorney, as an assistant professor of law in the Leadership, Ethics and the Law Department at the U.S. Naval Academy, and as a Special Adviser to the Undersecretary of State for Arms Control and International Security. Attorney General Laxalt graduated magna cum laude from Georgetown University and also graduated from Georgetown University Law Center.

Professor Josh Blackman is an assistant professor at the South Texas of College of Law, specializing in constitutional law and the United States Supreme Court, and is the author of "Unprecedented: The Constitutional Challenge to Obamacare" and over a dozen other articles about constitutional law. Professor Blackman clerked for the Honorable Danny J. Boggs of the U.S. Court of Appeals for the Sixth Circuit and for the Honorable Kim R. Gibson of the U.S. District Court for the Western District of Pennsylvania, and is also the founder and president of the Harland Institute, which provides a stylized law school experience for high school classrooms, and the founder of the Internet's premier Supreme Court fantasy league. Professor Blackman graduated magna cum laude from George Mason University Law School and magna cum laude from Penn State with a B.S. in information sciences and technology.

Professor Elizabeth Price Foley is a founding member and professor at Florida International University College of Law, where she teaches constitutional law. Prior to joining FIU, Professor Foley was a professor of law at Michigan State University College of Law, and served as a law clerk to the Honorable Carolyn King of the United States Court of Appeals for the Fifth Circuit. Professor Foley is the author of multiple books on constitutional issues, including "Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality," and presently serves on the editorial board of the Cato Supreme Court Review. Professor Foley graduated summa cum laude from the University of Tennessee College of Law and holds a B.A. in history from Emory University and an LL.M. from Harvard Law School.

Professor Stephen H. Legomsky is the John S. Lehmann University Professor at Washington University School of Law, focusing on U.S. comparative and international immigration, and is the founding director of the law school's Whitney R. Harris World Law Institute, a center for instruction and research in international and comparative law. He recently returned from a 2-year leave of absence, serving as chief counsel of U.S. Citizenship and Immigration Services. He is the coauthor of "Immigration and Refugee Law and Policy," which has been a required text at 176 law schools since its inception. Professor Legomsky graduated first in his class at the University of San Diego School of Law and clerked for the U.S. Court of Appeals for the Ninth Circuit.

Your written statements will be entered into the record in their entirety, and I ask that you each summarize your testimony in 5 minutes or less. To help you stay within that time limit, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. And when the light turns red, that is it. Your time is up. Please stop.

Attorney General Laxalt, welcome. You may begin.

TESTIMONY OF THE HONORABLE ADAM PAUL LAXALT, ATTORNEY GENERAL OF NEVADA

Mr. LAXALT. Mr. Chairman, Ranking Member Conyers, and Members of the Committee, my name is Adam Paul Laxalt, and I am the Attorney General of Nevada. On behalf of Nevada, I thank you for the opportunity to testify today about the States' lawsuit challenging President Obama's unilateral executive action granting deferred action to over 4 million people. I represent one of the 26 States that have sued the Federal Government.

While immigration is the substantive issue underlying the President's executive action, this lawsuit is not ultimately about immigration. Rather, it is about the President's attempt to change the law through unconstitutional executive action.

Like most of us, I am the descendent of immigrants. My ancestors came here in search of a better life. My grandfather, Paul Laxalt, was the son of an immigrant sheepherder. He rose to become the Governor of Nevada and a United States Senator. In our Nation's history, similar stories have been repeated over and over. They are what we have come to know as the American dream.

However, it has never been true that in order to sympathize with the plight of immigrants, or to believe in the American dream, one

must reject our constitutional system. To borrow a phrase our President is fond of using, that is a false choice. In significant part, it is our commitment to the rule of law and to our Constitution that has drawn people to our shores across generations.

Before taking unilateral action, the President said the following, "I am President. I am not the king. I can't do these things just by myself." "There is a limit to the discretion that I can show, because I am obliged to execute the law." "I can't just make the laws up myself." "We can't ignore the law." "The fact of the matter is, there are laws on the books that I have to enforce." These are a series of comments the President made before this action.

Subsequently, on November 20, 2014, after repeatedly acknowledging his duty to faithfully enforce the immigration laws passed by this body, and after emphasizing that he lacked the authority to unilaterally change those laws, President Obama directed his Secretary of Homeland Security to do just that and change the law. To quote the President himself, he said, "I just took an action to change the law," that on November 25.

In accord with earlier statements by the President, a coalition of States brought suit in Federal court to enjoin the President's unilateral action. Since the lawsuit was originally filed, the number of States challenging the President's action has grown to the majority of the 50 States. The States' lawsuit focuses on three areas.

First, the Constitution requires the President take care that the laws be faithfully executed. During the Korean War, President Truman, relying on the exigencies of war, unilaterally seized the Nation's steel mills. President Truman justified unilateral action because Congress had refused to pass a statute authorizing his action. The Supreme Court held that Truman's actions were unconstitutional.

Here, as Judge Hanen, the Federal judge presiding over this case, has observed, no statute gives the Department of Homeland Security the discretion it is trying to exercise. Quite the contrary, the President's Executive order not only ignores the dictates of Congress, but actively thwarts them. For the same reason that Truman's unilateral action in the steel seizure case was held unconstitutional by the Supreme Court, we think President Obama's unilateral action here is unconstitutional.

Second, Federal statutory law, namely the Administrative Procedures Act, similarly requires that when an agency issues a substantive rule, it must be consistent with Congress' clear statutory commands. Under unambiguous Federal statutory law, the Department of Homeland Security—here I quote Judge Hanen again—is tasked with the duty of removing illegal aliens. Congress has provided that it shall do this. The word "shall" certainly deprives the DHS of the right to do something that is clearly contrary to Congress' intent.

The President's plan that millions of illegally present individuals be granted legal present work authorization eligibility for State and Federal benefits cannot be squared with Federal law, and, therefore, we believe violates the Administrative Procedures Act.

Third, when a Federal agency changes the rules, like the President has ordered here, the Administrative Procedures Act also requires that due process is followed. That is, the agency must give

fair notice of the rule change and allow public comment before implementing the change. Everyone agrees that was not done here, so this is the third reason the States are arguing the President's action violates the law.

As you all know, on February 16, Judge Hanen found the States had standing and issued a preliminary injunction enjoining the implementation of the DAPA program. Now why Nevada joined, as Nevada's chief law enforcement officer, Nevada law requires that I initiate or join litigation wherever necessary to protect and secure the interests of the State.

This suit is not about immigration. It is not about politics. It is about the rule of law and our constitutional system. This lawsuit transcends policy differences and seeks to prevent legislation from being usurped by executive fiat.

Nevada joined this lawsuit because upholding our constitutional process is more significant than any policy directive that any political party may be pushing at a particular time.

Thank you again, Mr. Chairman, for allowing me to testify before this Committee about this important issue.

[The prepared statement of Mr. Laxalt follows:]

Nevada Attorney General Adam Paul Laxalt's Testimony Regarding the States' Lawsuit Challenging the President's Unilateral Action on Immigration

House Committee on the Judiciary

Wednesday, February 25, 2015

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Mr. Chairman, Ranking Member Conyers, and Members of the Committee: My name is Adam Paul Laxalt, and I am the Attorney General of Nevada. On behalf of the people of Nevada, I thank you for the opportunity to testify about the States' lawsuit challenging President Obama's unilateral executive action granting "deferred action" to over 4 million people.

I'd like to address three things this morning: First, I want to clarify what this lawsuit is about. Second, I will discuss how the President's executive action impacts Nevada. And third, I will address the federal district court's ruling last week.

The States' Lawsuit

On November 20, 2014, after repeatedly acknowledging his duty to faithfully enforce the immigration laws passed by Congress, and after emphasizing that he lacked authority to unilaterally change those laws, President Obama directed his Secretary of Homeland Security to change the law. To quote the President himself, he said, "I just took an action to *change* the law." (Nov. 25, 2014).

While immigration is the substantive issue underlying the President's executive action, this lawsuit is not ultimately about immigration. Rather, it is about the President's attempt to change the law through unconstitutional executive action.

Like most of us, I am a descendant of immigrants. My ancestors came here in search of a better life. My grandfather, Paul Laxalt, was the son of an immigrant sheepherder. He rose to become the Governor of Nevada and a United States Senator. In our nation's history, similar stories have been repeated over and over. They are what we have come to know as the American dream.

However, it has never been true that in order to sympathize with the plight of immigrants, or to believe in the American dream, one must reject our constitutional system. To borrow a phrase our President is fond of using: that is a false choice. In significant part, it is our commitment to the rule of law and to our Constitution that has drawn people to our shores across the generations.

Before taking unilateral action, the President said the following:

> I am president, I am not king. I can't do these things just by myself. . . . [T]here's a limit to the discretion that I can show because I am obliged to execute the law. . . . I can't just make the laws up by myself. ... [W]e can't ignore the law. . . . [T]he fact of the matter is there are laws on the books that I have to enforce. (Sept. 28 and Oct. 25, 2014).

We agree. In accord with these earlier statements by the President, a coalition of states brought suit in federal court to enjoin the President's unilateral action. Since the lawsuit was originally filed, the number of states challenging the President's action has grown to a majority of the 50 states.

To better understand the lawsuit, it is best to start with what the President's November 20 executive action actually does. The executive action, made by the Secretary of Homeland Security at the direction of President Obama, purports to grant "deferred action" status to over four million individuals. Deferred action prevents removal of individuals who are currently in the country illegally. Deferred action grants these individuals legal presence and work authorization, and allows them to obtain a variety of state and federal benefits.

The States' suit argues that the President's executive action violates the law at least three different ways.

First, the Constitution requires that the President "take care that the Laws be faithfully executed." During the Korean War, President Truman, relying on the exigencies of war, unilaterally seized the Nation's steel mills. President Truman justified his unilateral action because Congress had refused to pass a statute authorizing his action. The Supreme Court held that Truman's actions were unconstitutional. Here, as Judge Hanen – the federal judge presiding over the States' case – has observed, "no statute gives the [Department of Homeland Security] the discretion it is trying to exercise" here. (Op. at 96). Quite the contrary, the administration's action "not only ignores the dictates of Congress, but actively acts to thwart them." (Op. at 99). For the same reason that Truman's unilateral action in the *Steel Seizure Cases* was held unconstitutional by the Supreme Court, so too is the administration's unilateral action unconstitutional.

Second, federal statutory law – namely, the Administrative Procedure Act – requires that when an agency issues a substantive rule, it must be consistent with Congress's clear statutory language. Under unambiguous federal law, the Department of Homeland Security (here I quote Judge Hanen again) "is tasked with the duty of removing illegal aliens. Congress has provided that it 'shall' do this. ... The word 'shall' is not permissive or suggestive. Rather, it prevents the DHS from doing something that is clearly contrary to Congress's intent." (Op. at 98-98). The President's plan that millions of illegally present individuals be granted legal presence, work authorization, and eligibility for state and federal benefits runs contrary to federal law, thwarts statutory language, and violates the Administrative Procedure Act.

Third, when a federal agency changes the rules such as the President has ordered to be done here, the Administrative Procedure Act also requires that due process be followed – that is, the agency must give fair notice of the rule change and allow public comment before implementing the change. Everyone agrees that no such procedure was followed here.

On Constitutional grounds, on statutory grounds, and on due process grounds this executive action contradicts our laws.

Why Nevada Joined

Just a little over a month ago, I made the decision to have Nevada join the States' lawsuit and I did so for two primary reasons.

First, by joining this suit and stopping the Administration from taking illegal unilateral action this important issue will return to where it belongs – this Congress. Joining this lawsuit rightly acknowledges that sweeping immigration policy must be decided by the legislative branch and not by executive fiat. It must be done in a manner that is consistent with the Constitution, which means through legislation enacted by Congress.

Second, like the other attorneys general who had already joined the suit, and like all members of Congress, I swore an oath to defend and uphold the Constitution of the United States. In other words, this suit is not about politics. As the federal judge noted in his decision last week, it is not even about the "wisdom, or lack thereof, underlying the [President's] decision." (Op. at 4). Rather, it is about defending the separation of powers and the rule of law.

As Nevada's chief law enforcement officer, Nevada law requires that I initiate or join litigation whenever necessary "to protect and secure the interest of the State." In addition to the important constitutional interests just mentioned, the States have demonstrated, and Judge Hanen agreed in his opinion, that the President's unilateral action will impose millions of dollars in direct increased costs on the States.

My duties as a constitutional officer of the State of Nevada and my duties to protect the interests of Nevada compelled me to join the States' lawsuit.

The Federal Court's Ruling

Last week, the federal district court ruled in favor the States, holding that the States' case is likely to succeed on the merits. The court thus preliminarily enjoined the President's unilateral immigration plan. The court issued a rigorous 123 page opinion that addresses and ultimately dismantles the arguments in favor of the unilateral executive action.

First, the President has argued that the States don't have standing to challenge his action, because they are not injured. The court rejected that argument, pointing out that the States have shown they will need to spend millions of dollars merely processing and issuing new drivers licenses to the new class of "deferred action" applicants created by the President's unilateral plan. (Op. at 35). As the court explained, "the states cannot protect themselves from the costs inflicted by the [Federal] Government when 4.3 million individuals are granted legal presence with the resulting ability to compel state action." (Op. at 28-29). That alone – ignoring all of the other ways States may be injured – is sufficient to grant standing to the States.

Second, the President's main defense of the lawfulness of his unilateral action is that his plan is merely the executive branch exercising unreviewable prosecutorial discretion. Here, Judge Hanen went out of his way to give the executive branch its due, emphasizing that the Department of Homeland Security has broad discretion in its decisions on how to marshal resources, utilize manpower, and concentrate its efforts. (Op. at 70). But as the Judge held, the President's deferred action plan is not that: The plan "does not represent mere inadequacy; it is complete abdication. … [It] not only ignores the dictates of Congress, but

actively acts to thwart them." (Op. at 99). Whatever else it can be called, the President's plan goes well beyond mere nonenforcement:

> Instead of merely refusing to enforce the [Immigration & Naturalization Act's] removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel. ... Exercising prosecutorial discretion and/or refusing to enforce a statute does not also entail bestowing benefits. Non-enforcement is just that-not enforcing the law. Nonenforcement does not entail refusing to remove these individuals as required by the law and then providing three years of immunity from that law, legal presence status, plus any benefits that may accompany legal presence under current regulations. (Op. at 85-87).

Third, and related to the President's claim of prosecutorial discretion, the President has also argued that the unilateral order is merely an unreviewable policy statement as opposed to a substantive rule change. Here, Judge Hanen said that "actions speak louder than words." (Op. at 110). As the Judge explained:

> The DAPA program clearly represents a substantive change in immigration policy. It is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only "legal presence" in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled. It does more than "supplement" the statute; if anything, it contradicts the INA. It is, in effect, a new law. DAPA turns its beneficiaries' illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice .... the President, himself, described it as a change. (Op. at 111).

First, the President said that he lacked the authority to unilaterally change the immigration laws. Then the President said, "I just took an action to change the law." The federal government's lawyers now say that this isn't really a change to the law, it is just "policy guidance." Obviously, all three of these positions cannot all be true. The States would submit that the President was correct the first time. Neither he nor his Secretary of Homeland Security has the power to unilaterally change the law.

I want to finish by reiterating something I already said. This suit is not about scoring political points on a policy disagreement between Democrats and Republicans. Ultimately, this lawsuit is about stopping an unconstitutional exercise of executive power and returning this important issue to Congress, where it Constitutionally belongs.

This lawsuit should transcend policy differences and partisanship. It seeks to prevent legislation from being usurped by executive fiat. Protecting such distinctions goes to the core of the separation of legislative and executive powers and to the root of our Constitutional system. Nevada joined this lawsuit because upholding our Constitutional process is more significant than any policy objective that any political party may be pushing at a particular time.

Thank you again, Mr. Chairman, for allowing me to testify before the Committee about this important case.

Mr. GOODLATTE. Thank you, General Laxalt.

Professor Blackman, welcome. I understand your parents are with us today.

Mr. BLACKMAN. My dad is in the same color tie, so you know who he is.

Mr. GOODLATTE. Excellent.

TESTIMONY OF JOSH BLACKMAN (TESTIFYING IN HIS PERSONAL CAPACITY), PROFESSOR, SOUTH TEXAS COLLEGE OF LAW

Mr. BLACKMAN. Thank you. Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee, my name is Josh Blackman. I am a constitutional law professor at the South Texas College of Law in Houston, Texas. I am honored to have the opportunity to testify about why DAPA violates the Constitution and imposes a severe threat to the separation of powers.

In my brief time, I have three points. First, DAPA is an unprecedented exercise of presidential lawmaking power and is not consonant with the previous exercises of deferred action. Second, DAPA violates the President's duty to take care the laws are faithfully executed, as the Executive must enforce laws in good faith. Third, I will sound an alarm. Nonenforcement poses an encroaching threat to the separation of powers and the rule of law that Congress, not just the courts, must take steps to halt.

So first, Congress has not acquiesced or given the President the authority to implement DAPA. The Justice Department's Office of Legal Counsel claimed that four previous instances of deferred action justify DAPA and its antecedent DACA through express or implicit congressional approval. These claims are demonstrably false.

So first, in 1997, deferred action was granted for battered aliens under the Violence Against Women Act, VAWA, where a petition had already been approved, but a visa was not immediately available. Here, the deferred action served as a temporary bridge for those who would soon receive permanent status according to the laws of Congress.

Second, in 2001, deferred action was granted for aliens who were readily deemed to be bona fides under the Victims of Trafficking and Violence Protection Act. Here, too, the differed action served as a bridge. Lawful status was immediately available on the other side of the deferral.

Third, in 2005, deferred action was granted to foreign students who unfortunately lost their visas when Gulf Coast schools were closed following Hurricane Katrina. The deferred action bridged the gap and gave the students 4 months to enroll in another college or university in order to regain the status previously held.

Fourth, in 2009, deferred action was granted for aliens who were widowed by the untimely death of their citizen spouse before the minimum 2-year period. Deferred action was granted where visa petitions had been filed but not completely adjudicated by the Government because of administrative delays. Again, a visa waited shortly after deferral.

Historically, deferred action acted as a temporary bridge from one status to another, where benefits were construed as immediately arising post-deferred action. In contrast with DAPA, de-

ferred action serves not as a bridge but as a tunnel to dig under and through the INA. There is no visa, the proverbial pot of gold, awaiting on the other side of this deferred action rainbow.

My second point is that DAPA violates the President's duty to take care that the laws be faithfully executed. Article II imposes a duty on the President unlike any other in the Constitution. He shall, must, take care that the laws be faithfully executed. DAPA violates this duty for three reasons.

First, with DACA, the blueprint for DAPA, the Administration limited officers to turn discretion into a rubberstamp. This did not reallocate resources, or defer to congressional policy, but rather was an effort to bypass it, a transparent one at that.

Second, because DAPA is not consistent with congressional policy, according to Justice Jackson's decision in the steel seizure case, Presidential power is at its lowest ebb.

Third, like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. The President instituted these policies after Congress voted down the legislation he wanted. Further, the President repeated over and over and over again that he couldn't act unilaterally in the precise manner he did. His actions and statements create the prima facie case of bad faith and point to a violation of the "take care" clause.

Third and finally, while I support comprehensive immigration reform, the President's unconstitutional actions cannot be sanctioned. I hasten to add, if upheld, Democrats have much, much more to fear from this dangerous precedent. Generally, Democrats like when the Government takes more action and Republicans like when the Government takes less action. Today, Democrats may approve of the President's decision to halt deportations, delay unpopular provisions of Obamacare, or not prosecute marijuana crimes. However, the situation would be very, very different if a Republican President declined to enforce provisions of the Tax Code, wavived mandates under environmental laws, or declined to implement Obamacare altogether.

In the words of James Madison, Federalist No. 51, the only way to keep the separations of power in place is for ambition to counteract ambition. Although the courts play an essential role to serve as the bulwarks of a limited Constitution, our Republic cannot leave the all-important task of safeguarding freedom to the judiciary.

To eliminate the dangers of nonenforcement, the Congress must counteract the President's ambition. The failure to do so here will continue the one-way ratchet toward executive supremacy and the dilution of the powers of the Congress and the sovereignty of the people.

The rule of law and the Constitution itself are destined to fail if the separations of powers turn into mere parchment barriers that can be disregarded when the President deems a law broken.

Thank you very much, and I welcome your questions.

[The prepared statement of Mr. Blackman follows:]*

***Note:** Supplemental material submitted with this statement is not reprinted in this record but is on file with the Committee, and can also be accessed at: *http://docs.house.gov/meetings/JU/JU00/20150225/103010/HHRG-114-JU00-Wstate-BlackmanJ-20150225-SD003.pdf.*

Written Statement
Josh Blackman
Assistant Professor of Law
South Texas College of Law, Houston

"The Unconstitutionality of DAPA: Failing To Faithfully Execute The Laws"

Committee on the Judiciary
U.S. House of Representatives

February 25, 2015

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Josh Blackman, and I am a constitutional law professor at the South Texas College of Law in Houston. I am honored to have the opportunity to testify about why DAPA violates the Constitution and poses a severe threat to the separation of powers.[1]

In my brief time, I will make three points. First, DAPA is an unprecedented exercise of presidential lawmaking power, and is not consonant with previous exercises of deferred action.[2] Second, DAPA violates the President's duty to take care that the laws are faithfully executed, as the Executive must enforce the laws in good faith.[3] Third, I will sound an alarm—non-enforcement poses an encroaching threat to the separation of powers and the rule of law, that Congress, not just the courts, must take steps to halt.

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[1] I joined an amicus brief on behalf of the Cato Institute in support of Texas's constitutional challenge to DAPA. Brief for the Cato Institute and Law Professors as Amici Curiae Supporting Plaintiffs in Texas v. United States, before the Southern District of Texas (1:14-cv-245) (1/7/15), available at https://www.scribd.com/doc/251997148/Texas-v-U-S-Amicus-Brief-of-Cato-Institute-Josh-Blackman-and-Jeremy-A-Rabkin. I have included a copy of this brief with my testimony.

[2] I offer a detailed analysis of past instances of deferred action, and how Congress has not acquiesced to a practice as broad as DAPA, in my forthcoming article in the GEORGETOWN LAW JOURNAL ONLINE. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown Law Journal Online __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544. I have included a draft of the article with my testimony.

[3] I develop an originalist and textualist analysis of the Take Care clause, to show that DAPA is inconsistent with the President's constitutional duty in a forthcoming article in the TEXAS REVIEW OF LAW & POLITICS. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEXAS REVIEW OF LAW & POLITICS __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545558. I have included a draft of the article with my testimony.

I. Congress has not acquiesced, or given the President the authority to implement DAPA

The Justice Department's Office of Legal Counsel claimed that four previous instances of deferred action justify DAPA, and its antecedent, DACA, through express or implicit Congressional approval.[4] These claims are demonstrably false.

1. In 1997, deferred action was granted for battered aliens under the Violence Against Women Act ("VAWA")[5] where a petition had *already* been approved but a visa was not immediately available.[6] Here, the deferred action served as a temporary bridge for those who would soon receive permanent status according to the laws of Congress.
2. In 2001, deferred action was granted for aliens who were *already* deemed to be *bona fide* under the Victims of Trafficking and Violence Protection Act ("VTVPA").[7] Here too, the deferred action served as a bridge—lawful status was immediately available on the other side of the deferral.[8]
3. In 2005, deferred action was granted for foreign students who lost their visas when Gulf Coast schools were closed following Hurricane Katrina.[9] The deferred action bridged the gap, and gave the students four months to enroll at another College in order to regain the status they previously held.
4. In 2009, deferred action was granted for aliens that were widowed by the untimely death of their citizen spouse before the minimum two-year period.[10] Deferred action was granted where visa petitions had been filed, but not completely adjudicated because of administrative delays prior to the death. Again, a visa awaited shortly after the deferral.

Historically, deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action. In contrast, with DAPA deferred action serves not as a bridge for beneficiaries to a visa, but as a tunnel to dig under and through the INA. There is no visa—the proverbial pot of gold—waiting on the other side of this deferred action rainbow.

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[4] Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with Respect to Certain Individuals who Are the Parents of U.S. Citizens or Permanent Residents*, U.S. DEP'T. OF HOMELAND SECURITY (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf,

[5] Under VAWA, battered women were allowed to petition for a visa on their own, without having to rely on abusive family members to petition for them. *See, e.g.*, 8 U.S.C. 1154(a)(1)(iii) (an alien can file his or her own petition if "during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse").

[6] *See* 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii).

[7] Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas at 2 (Aug. 30, 2001), available at https://www.scribd.com/doc/251877266/Memo-INS-VTVPA.

[8] These visas are intended for victims of human trafficking, named after their section in the U.S. code. *See* 8 U.S.C. 1101(a)(15)(T), (U).

[9] See Press Release, USCIS, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1 Student _11_25_05_PR.pdf .

[10] Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009)

II. DAPA violates the President's Duty To "Take Care That The Laws Be Faithfully Executed."

Article II imposes a duty on the President unlike any other in the Constitution: he "shall take Care that the Laws be faithfully executed."[11] DAPA violates this duty for three reasons:

1. With DACA, the blueprint for DAPA,[12] the administration limited officers to turn discretion into a rubber stamp. This did not reallocate resources to further congressional policy on a case-by-case basis, but was rather a transparent effort to bypass it.
2. Because DAPA is not consonant with congressional policy, according to Justice Jackson's decision in *The Steel Seizure Case*, presidential power is at its "lowest ebb."[13]
3. Like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. The President instituted these policies after Congress voted down the legislation he wanted. Further, the President repeated over and over again that he could not act unilaterally. His actions and statements create the *prima facie* case of bad faith, and point towards a violation of the "Take Care" clause.

III. Non-enforcement Poses A Threat To Separation of Powers and Rule of Law

While I support comprehensive immigration reform, the President's unconstitutional actions cannot be sanctioned. I hasten to add, that if this practice is upheld, Democrats have much more to fear from this dangerous precedent. Generally, Democrats like when the federal government takes *more* action, and Republicans prefer when the government takes *less* action. Today, Democrats may approve of the President's decision to halt deportations, or delay unpopular provisions of Obamacare, or not prosecute marijuana crimes. However, the situation would be very different if a Republican President declined to enforce provisions of the tax code, waived mandates under environmental laws, or declined to implement Obamacare altogether.

In the words of James Madison, the only way to keep the separation of powers in place is for "ambition . . . to counteract ambition."[14] Although the Courts play an essential role to serve as the "bulwarks of a limited Constitution,"[15] our Republic cannot leave the all-important task of safeguarding freedom to the judiciary. To eliminate the dangers of non-enforcement, the Congress must counteract the President's ambition.[16] The failure to do so here will continue the one-way ratchet towards executive supremacy, and a dilution of the powers of the Congress, and the sovereignty of the people.

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[11] U.S. CONST. art. III, § 3.

[12] Secretary Johnson, in establishing DAPA, "direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis." Johnson, *supra* note 3, at 4. Secretary Johnson's memorandum mirrors his predecessor, Secretary Janet Napolitano's invocation of discretion. It begins that "DHS must exercise *prosecutorial discretion* in the enforcement of the law." *Id.* at 1 (emphasis added). While DAPA has not yet gone into effect, it is safe to assume that it will adopt priorities and guidelines "similar" to those of DACA, except on a much larger scale.

[13] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

[14] Federalist No. 51 (J. Madison).

[15] Federalist No. 78 (A. Hamilton).

[16] Josh Blackman, "Obama's overreach? Look in the mirror, Congress," Los Angeles Times, November 22, 2014, http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html.

The rule of law, and the Constitution itself, are destined to fail if the separation of powers turn into mere "parchment barriers"[17] that can be disregarded when any President deems the law "broken."

Thank you, and I welcome your questions.

[17] Federalist No. 48 (J. Madison).

Mr. GOODLATTE. Thank you, Professor Blackman.

Professor Foley, welcome.

TESTIMONY OF ELIZABETH PRICE FOLEY (TESTIFYING IN HER PERSONAL CAPACITY), PROFESSOR, FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW

Ms. FOLEY. Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, thank you for the opportunity to testify again today.

My criticisms with the President's immigration actions are based on legal process and not any particular policy or political results. What shape immigration reform may ultimately take is not my concern as a constitutional scholar. My sole concern is with preserving the Constitution and its separation of powers architecture.

President Obama has repeatedly said that his motivation for taking executive action on immigration is because he wants to fix our broken immigration system. What this means is that he is trying to fix our immigration law because, of course, immigration law is the only immigration system that we have.

So he thinks our immigration law is broken, and he believes that it is broken because it fails to exempt certain categories that he thinks deserve exemption from deportation and to whom he believes the law should grant benefits, such as work permits. But fixing a law by unilaterally changing it by granting exemptions, remedies, and benefits that the law doesn't provide is legislating. Or to be more precise, it is amending. That is a power that is given exclusively to Congress by the Constitution.

The President's duty under the Constitution is not to fix a law that he thinks is broken, but to faithfully execute that law. When a President takes it upon himself the power to change a law he doesn't like, we have no democracy anymore. We have, instead, a legislature of one.

If Congress doesn't oppose President Obama's Executive orders on immigration, it will be writing its own institutional obituary. When Congress fails to express disagreement with executive action, the courts tend to construe that as acquiescence or implied authorization by Congress. This is so-called category one from Justice Jackson's concurrence in the Youngstown steel seizure case. So Congress needs to be very careful here. It has a constitutional responsibility to vigorously protect its turf.

President Obama's immigration actions are unconstitutional for three separate and distinct reasons that I elaborate in the written statement. First, they alter the status of certain illegal immigrants, magically transforming them from deportable to not deportable. Second, they provide a remedy called deferred action that Congress has not explicitly or implicitly authorized for this category of people. Third, they confer benefits upon certain illegal immigrants that, again, Congress has not explicitly or implicitly approved for this population.

While any one of these particular reasons will render executive action unconstitutional, when you have all three of them existing as you do here with President Obama's executive actions on immigration, it creates sort of a Bermuda Triangle of unconstitutionality

that has a uniquely powerful gravitational pull that is capable of eviscerating Article I's legislative powers.

It is the combination of all three of these aspects of President Obama's Executive orders on immigration that make it uniquely dangerous to this institution. I would like to highlight two points that I elaborate on in the written statement that I think bear a little special mention.

First, by granting work permits to DACA and DAPA recipients, President Obama's immigration orders encourage employers to hire illegal immigrants over lawful residents. That is because the Affordable Care Act does not allow illegal immigrants to obtain tax credits when they buy qualifying health insurance. So what happens is if you hire more DACA and DAPA recipients, this lessens the employer's exposure to what is called the employer responsibility tax under the ACA. So the more illegal immigrants you hire who are eligible for DACA and DAPA, then the fewer who are eligible to buy health insurance, and the fewer who are going to obtain a tax credit for doing so, and, therefore, the fewer employees that you have in your workplace who are capable of triggering that employer responsibility tax.

Now, why do I go into that detail? Because it means one important thing. President Obama's immigration actions undermine the ACA itself by undermining its goal of providing insurance via the workplace. So it is no small irony here that by granting work permits to DACA and DAPA recipients, President Obama is, in fact, undermining his own signature legislative achievement.

Second, DACA and DAPA recipients are eligible to apply for something called for advance parole. That means they can get advanced permission to leave the country and come back relatively quickly. Without advance parole, if you enter this country illegally and you leave, you have to then stay out for a long period of time, usually about 3 to 10 years, before you are allowed to reenter. So once a DACA or DAPA recipient reenters this country after being advanced paroled, they are considered to be paroled back into the country, and paroled individuals under the statute are eligible to adjust their legal status. They can do this as long as they qualify for a visa, such as, let us say, an employer-sponsored visa.

So what does this mean? It means that at least for some DACA and DAPA recipients, obtaining advanced parole will provide a——

Mr. GOODLATTE. Professor Foley, you have exceeded your time limit considerably as well. Could you please summarize?

Ms. FOLEY. Absolutely.

It means that they will be able to have a pathway to U.S. citizenship. This is problematic because Congress has the sole power to decide who is granted citizenship under the Constitution. And even if just one person under DACA and DAPA is granted advanced parole and are applying, subsequently, for an adjustment of status, what we have is the fundamental usurpation of Congress' power over naturalization.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Foley follows:]

WRITTEN STATEMENT

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"THE UNCONSTITUTIONALITY OF PRESIDENT OBAMA'S EXECUTIVE ACTIONS ON IMMIGRATION"

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 25, 2015

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, thank you for the opportunity to discuss the constitutionality of President Obama's executive actions on immigration.

I strongly support congressional deliberation of immigration reform proposals, and believe that reform is both desirable and inevitable on this subject. The objections I will voice to you regarding the President's immigration orders are based on legal *process*, not any particular political or policy *results*. What shape or form immigration reform ultimately takes is not my concern as a constitutional scholar, nor should it be to any federal judge. My concern is solely with preserving the Constitution and its architecture of separation of powers.

To be constitutional, immigration reform must come about through the normal legislative process. It cannot be accomplished by executive fiat. Specifically, I believe that both the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) programs violate Article I, section one's declaration that "All legislative Powers . . . shall be vested in a Congress of the United States," as well as Article II, section three's concomitant duty that the President "shall take Care that the Laws be faithfully executed."

Without the separation of powers, the United States is no better than a banana republic. When a President takes upon himself the power to change existing law or do an "end run" around Congress when it will not bow down to his will, we have no democracy anymore.

Unilateral immigration reform by the President thus sets a dangerous precedent. If allowed to stand, President Obama's immigration orders will empower future Presidents to flagrantly disrespect Congress's will, bypass the process of congressional debate and compromise, and allow one person, the President, to undermine our democracy itself.

I believe President Obama's immigration orders are unconstitutional for three distinct reasons, any one of which would be a sufficient basis for a court to enjoin them as violative of separation of powers. To summarize briefly, the three unconstitutional dimensions of these executive orders are:

(1) status alteration;

(2) remedy alteration; and

(3) conferral of benefits.

When executive action combines all three of these unconstitutional aspects—as President Obama's immigration actions do—it creates a Bermuda Triangle of unconstitutionality, with a uniquely powerful gravitational force capable of destroying laws. The combination of all three unconstitutional aspects is uniquely dangerous to our republic, and must be fought with every tool available to Congress.

I will discuss each of these three unconstitutional actions separately and then proceed, in section four, to explain why President Obama's immigration orders are not properly characterized as an exercise of "prosecutorial discretion." Section V will explain how the President's executive actions on immigration also violate the Constitution's vertical separation of powers, or federalism.

I. STATUS: PRESIDENT OBAMA'S IMMIGRATION ORDERS ALTER THE LEGAL STATUS OF LARGE CATEGORIES OF ILLEGAL IMMIGRANTS

Current law declares that any alien who is "present in the United States in violation of this chapter or any other law of the United States . . . is deportable."[1] Those who enter the U.S. without proper documentation commit a crime called "improper entry by alien," which is a misdemeanor upon first offense and a felony upon a subsequent offense.[2] Because illegal entrants are "present in the United States in violation of this chapter or any other law of the United States," they are "deportable."[3]

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[1] 8 U.S.C. § 1227(a)(1)(B).

[2] *Id.* at § 1325(a).

[3] *Id.* at § 1227(a)(1)(B).

Similarly, current law also states that anyone who enters this country and is "inadmissible by the law existing at such time is deportable."[4] The Immigration and Nationality Act (INA) contains a comprehensive definition of "inadmissibility," which excludes from admission to the U.S. numerous categories of individuals, including those with certain physical, mental or substance abuse ailments, criminals, suspected substance abuse traffickers or terrorists, previously removed aliens, practicing polygamists, and members of communist or other totalitarian parties.[5] In addition, one of the most common bases for "inadmissibility" under the INA is what is known as the "intending immigrant" situation, whereby an alien seeks to enter the U.S. and immigrate (remain permanently), but lacks documentation demonstrating that she has authorization to do so.[6] Because these individuals who enter the U.S. with the intent to remain are "inadmissible" aliens under the INA, they are "deportable" under the law.

Under DACA, approximately 1.1 million individuals whom Congress has deemed "deportable" under the INA are no longer deportable.[7] Specifically, DACA—which was recently expanded by the Administration—grants individuals a "deferred action" status, meaning they no longer deportable during a three-year period (the original DACA was only two years), renewable indefinitely, if they:

(1) entered the U.S. before age 16;

(2) have lived in the U.S. continuously since January 1, 2010 (the original DACA date was June 15, 2007);

(3) are of any age (removing the original DACA requirement that eligible individuals must have been born since June 15, 1981); and

(4) meet all of the other DACA paperwork and processing guidelines.[8]

Under DAPA, an additional 4 million illegal immigrants whom Congress has declared "deportable" under the INA are no longer deportable.[9] Specifically, under DAPA, individuals are granted "deferred action" status and consequently no longer deportable for a three-year period, renewable indefinitely, if they:

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[4] *Id.* at § 1227(a)(1)(A).

[5] *Id.* at § 1182.

[6] *Id.* at § 1182(a)(7)(A)(i)(I).

[7] Jens Manuel Krogstad and Ana Gonzalez-Barrera, *If Original DACA Program is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, FacTank, Pew Research Center, Dec. 5, 2014 (also revealing that of the 1.1 million estimated DACA-eligible individuals, over 700,000 have thus far applied for non-deportable status) [hereinafter Krogstad and Gonzalez-Barrera].

[8] USCIS, Dep't of Homeland Security, *Executive Actions on Immigration*, *available at* http://www.uscis.gov/immigrationaction.

[9] Krogstad and Gonzales-Barrera, *supra* note 7.

(1) are the parent of a U.S. citizen or lawful permanent resident as of November 20, 2014;

(2) have lived in the U.S. continuously since January 1, 2010;

(3) are not an enforcement priority for removal, as defined by a separate DHS memo issued November 20, 2104.[10]

In addition to DACA and DAPA, the Office of Legal Counsel (OLC) memo of November 19, 2014, reveals that the Administration has also implemented a third, broader "prioritization" policy, whereby illegal immigrants deemed "deportable" by Congress are no longer deportable unless they:

(1) pose a threat to national security, public safety or border security;

(2) have been convicted of multiple or significant misdemeanor offenses, or are apprehended and cannot establish continuous U.S. presence since January 1, 2014, or those who have significantly abused the visa or visa waiver programs; and

(3) have been issued a final order of removal on or after January 1, 2014.[11]

The first three categories of illegal immigrants—those who pose a threat to national security, public safety or border security—are identified as "highest priority" categories for removal.[12] The second and third categories are, respectively, designated "second and third priority" categories.[13] According to the OLC memo, illegal immigrants who fall outside these three priority categories are not to be deported at all.[14] Specifically, those outside these three priority categories may be deported only if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest."[15]

President Obama's executive actions have thus altered the legal status for many more illegal immigrants beyond just the DACA and DAPA populations, allowing deportation outside these three priority categories only if an ICE Field Director specifically finds that their removal would

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[10] USCIS, Dep't of Homeland Security, *Executive Actions on Immigration*, *available at* http://www.uscis.gov/immigrationaction.

[11] The Dep't of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 38 Op. Off. Legal Counsel ____(Nov. 19, 2014), at 1 [hereinafter OLC Memo].

[12] *Id.* at 8.

[13] *Id.* at 8-9.

[14] Indeed, OLC makes it clear that even within these three priority categories, the executive branch plans to retain "discretion" to refuse to deport if, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similar discretionary provisions would apply to aliens in the second and third priority categories." *Id.*

[15] *Id.* at 9.

serve "important federal interests"—whatever that may mean. The fact that Congress, through the INA, has classified these illegal immigrants as "deportable" is apparently not, in the view of the OLC or Obama Administration, enough to classify their removal as an "important federal interest." Indeed, it is fair to say that, pursuant to DACA, DAPA and the global "prioritization" policy, the vast bulk of individuals deemed "deportable" by the plain language of the INA are no longer deportable at all, but categorically exempted from deportation.

President Obama's various executive actions on immigration have thus had the magical effect of transforming millions of "deportable" individuals into "not deportable" individuals, for a minimum period of three years, subject to indefinite renewal at the option of the executive branch.[16] So long as these deportable individuals satisfy the criteria unilaterally created by the executive, they simply are no longer "deportable."

As President Obama stated in televised speech to the nation announcing DAPA on November 20, 2014, he was going to offer a "deal" to the individuals he decided where entitled to an exemption from the operation of existing immigration law: "You'll be able to stay in this country temporarily, without fear of deportation. You can come out of the shadows and get right with the law." These individuals can thus "get right with the law," pursuant to President Obama's executive actions, even though the actual law—the Immigration and Naturalization Act—says otherwise. How can an individual "get right with the law" when the law itself declares them to be violating the law? Is President Obama claiming the power to make law, in contradiction to Article I, section one of the Constitution?[17]

The President made these individuals' new legal status abundantly clear, telling them, "All we're saying is we are not going to deport you." These individuals are no longer deportable, although Congress has unambiguously declared them so. The President's policies thus transform a large category of aliens deemed deportable—those who've entered illegally—into two different categories, whereby some are deportable and some are not. This is a shift in kind, not merely degree.

These policies thus attempt to effectuate a change in legal status at variance with congressional will as expressed in the INA. As the Supreme Court recently reaffirmed in *Utility Air Regulatory Group v. EPA*, "Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always " 'give effect to the unambiguously expressed intent of Congress."[18] Moreover, "An agency confronting resource constraints may change its own conduct, but it cannot change the law."[19] Because the EPA had adopted a regulation contrary to the plain language of the Clean Air Act, the *UARG* Court concluded that it had violated separation of powers, declaring, "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise

[16] OLC Memo at 2.

[17] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[18] 134 S. Ct. 2427, 2445 (U.S. 2014).

[19] *Id.* at 2446.

during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."[20] In short, the executive branch does not possess the constitutional power to act in ways that contradict congressional will; doing so is an unfaithful execution of the law that violates separation of powers.

The specious argument that this legal status alternation is somehow justified as an exercise of "prosecutorial discretion" will be addressed extensively in section IV.

II. REMEDY: PRESIDENT OBAMA'S IMMIGRATION ORDERS PROVIDE LARGE CATEGORIES OF ILLEGAL IMMIGRANTS A REMEDY—DEFERRED ACTION—THAT HAS NOT BEEN AUTHORIZED BY CONGRESS

President Obama's immigration policies provide a form of relief—a remedy—for a category Congress has not allowed. Specifically, the President's policies confer the remedy of "deferred action" upon populations identified solely by the executive branch, not Congress. Deferred action is not defined in the U.S. Code, but the OLC has defined it as "an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States."[21]

The OLC memo blithely lumps deferred deportation together with various other kinds of deportation relief—such as parole, temporary protected status, voluntary departure and deferred enforced departure—labeling them all permissible "forms of discretionary relief" available to immigration officials.[22] But each of these other types of relief have been specifically authorized by Congress, or—in the case of deferred enforced departure—is supported by the President's independent foreign affairs power. Indeed, the OLC memo makes this abundantly clear in footnote 5, wherein OLC catalogues the specific statutory provisions that support the use of parole, temporary protected status, and voluntary departure.[23] OLC then notes that only one of these forms of relief—deferred enforced departure—lacks a statutory basis, but then goes on to explain that this is nonetheless permissible because it "is an exercise of the President's constitutional power to conduct foreign relations."[24] Deferred enforced departure, in other words, is grounded in the President's independent Article II authority to conduct foreign relations,[25] and thus does not require any authorization from Congress.

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[20] *Id.*

[21] OLC Memo at 12 (*citing* Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 484 (1999), which in turn cites an immigration law treatise by Charles Gordon et al.). *Cf.* Deferred Action for Childhood Arrivals, USCIS, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (defining deferred action as "a use of prosecutorial discretion to defer removal action against an individual for a certain period of time.").

[22] OLC Memo at 12.

[23] *Id.* at 12 n.5.

[24] *Id.*

[25] *See* U.S. CONST. art. II, § 2-3 (specifying the power to make treaties and receive foreign diplomats).

While Congress has authorized deferred action for specific categories, it has not authorized it for those to whom President Obama wishes to extend it—namely, the DACA and DAPA beneficiaries. OLC claims this is not important because, although the President lacks statutory authorization to grant deferred action to these individuals, deferred action "has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court."[26] In support, it cites the Supreme Court decision, *Reno v. American-Arab Anti-Discrimination Committee* (1999). But the *AAADC* decision did not, in any way, endorse the power of the executive to grant deferred action.

Specifically, in *AAADC*, members of the Palestinian Liberation Front asserted that the INS's *refusal to defer* their deportation constituted discrimination—that they had been "target[ed] for deportation based on their affiliation with an unpopular group."[27] The Court disagreed, ruling that a statute Congress had recently enacted was "clearly designed to give some measure of protection to 'no deferred action' decisions" and deny adjudication of such discrimination claims.[28] Thus, *AAADC* merely acknowledged that Congress did not want federal courts getting tied up in adjudicating "discrimination" lawsuits every time immigration officials refused to grant deferred action. *AAADC* simply did not consider or endorse the legality of deferred action, and accordingly does not aid OLC's attempt to justify the legality of its DACA and DACA programs.

Deferred action is legal only when: (1) it has been explicitly authorized by Congress via statute; or alternatively, (2) it has been authorized by the executive branch in a situation consonant with congressional intent. Deferred action is not legal, however, when it is granted to a population in a situation that is contrary to congressional intent. OLC's memo on DAPA acknowledges this, concluding "any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute."[29] OLC even went further, warning that deferred action programs require "careful examination" to ensure that they do not "cross the line between executing the law and rewriting it."[30] It then concluded that "in the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the possible uses of deferred action."[31]

Given that OLC seems to agree with the notion that congressional will is controlling as to the legality of any grant of deferred action, I will now proceed to explore the prior instances in which deferred action has been either statutorily or administratively granted, and examine whether those prior instances were, in fact, consonant with congressional intent.

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[26] OLC Memo at 13.

[27] *Reno v. Arab-Am. Anti-Discrim. Comm.*, 525 U.S. 471, 472 (1999).

[28] *Id.* at 485.

[29] OLC Memo at 24.

[30] *Id.*

[31] *Id.*

A. Statutory Grants of Deferred Action

The OLC tries to justify the Administration's grant of deferred action in DACA and DAPA based upon an outlandish claim that Congress has "acquiesced" to deferred deportation, because "it has never acted to disapprove or limit the practice."[32] In support of this extraordinary claim—that a failure by Congress to enact a statute banning deferred action constitutes "acquiescence" to the executive's ability to grant it *sua sponte* whenever it wants—OLC ironically cites "several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens."[33]

OLC then proceeds to discuss three instances of explicit statutory authorization and two instances in which OLC believes Congress was "aware" of the executive branch's decision to permit deferred action. I will address the two instances of congressional "awareness" of administratively granted deferred action in the following subsection. For present purposes, I will survey the instances in which Congress has statutorily specified the availability of deferred action as a remedy.

Congress has explicitly authorized deferred action only for certain children,[34] and for certain immediate family members of either LPRs killed in the 9/11 attacks[35] or U.S. citizens killed in combat.[36] It would be absurd to assert that explicit congressional authorization for deferred action in these instances somehow implies implicit congressional authorization for deferred action in other instances. Indeed, the maxim of statutory construction, *expression unius est exclusion alterius*—the expression of one thing is the exclusion of the other—rather strongly suggests that, since Congress has expressly provided for deferred action in specific instances, courts should be loathe to imply the availability of deferred action in other instances.[37] Thus, if

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[32] *Id.* at 18.

[33] *Id.*

[34] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV).

[35] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (2001).

[36] National Defense Authorization Act of 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694 (2004). Congress has also explicitly acknowledged that some of the individuals who have lawfully been granted deferred action status may, in some states, be issued driver's licenses or other identification cards that are acceptable for federal purposes. *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 301, *codified at* 49 U.S.C. § 30301 note). Specifically, the REAL ID Act merely stated that, evidence of "lawful status" for issuance of ID cards could include, among other things "approved deferred action status." REAL ID Act, § 202(c)(2)(B)(viii), *available at* https://www.dhs.gov/xlibrary/assets/real-id-act-text.pdf. The fact that Congress specifically mentioned "approved deferred action status" for purposes of the REAL ID Act does not in any way suggest that Congress believes the executive branch possesses a generic power to grant deferred action status to whomever it wishes. It is far more logical to assume that this language evinces congressional recognition that deferred action is sometimes lawfully available—e.g., in the statutes where it has authorized it explicitly—and that, in such circumstances, deferred action status is indeed "lawful status" for purposes of issuing an ID card in some states.

[37] *See* Leatherman v. Tarrant Co., 508 U.S. 223 (1993) (unanimously holding that Federal Rule of Civil Procedure's heightened pleading requirement for fraud and mistake allegations should be interpreted to exclude the application of a heightened pleading standard in any other instances).

anything, the existence of statutes explicitly authorizing deferred action suggest that any administrative grant of deferred action should be presumptively unavailable, and judicially tolerated only in those instances where an administrative grant of deferred action is clearly consonant with congressional intent.

B. Administrative Grants of Deferred Action

There have been a handful of instances in which deferred action has been granted by the executive branch *sua sponte*. OLC tries to justify the legality of President Obama's deferred action grants by citing four such instances—all of which occurred since 1997—in which immigration officials have administratively granted deferred action prior to DACA in 2012:

(1) 1997 Deferred Action for Abused Spouses of U.S. citizens or LPRs (VAWA):

In 1997, Congress enacted the Violence Against Women Act of 1994 (VAWA). As part of that statute, individuals who have been abused by an LPR or US-citizen spouse are authorized to self-petition to adjust their legal status to remain in the U.S., as well as receive work authorization, even after termination of their marriage.[38] Based upon this statutory enactment, the Immigration and Naturalization Service (INS) determined that a grant of deferred action would be consistent with congressional intent.[39] Deferred action in the VAWA situation was thus an administrative "bridge" that allowed VAWA-eligible individuals to remain in the country lawfully until their status could be formally adjusted.

(2) 2001 Deferred Action for T and U Visa Applicants (VTVPA):

Beginning in 2001, the INS began granting deferred action, parole and other mechanism to prevent the removal of individuals whom Congress had decided to grant two new types of visas under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). Specifically, pursuant to the VTVPA, "T visas" were made available to victims of human trafficking and certain family members, and "U visas" were made available to victims and certain family members of crimes specified in the statute.[40] Because these individuals had been deemed eligible for lawful status by the VTVPA, the INS granted them deferred action as a "bridge" until such time as their visas could be processed.[41] The INS and DHS subsequently promulgated regulations embodying the deferred action policy for T and U visa-eligibles.[42]

(3) 2005 Deferred Action for Foreign Students Affected by Hurricane Katrina:

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[38] *See* 8 U.S.C. § 1154.

[39] *See* OLC Memo at 15 ("INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994.").

[40] *See* 8 U.S.C. § §1101(a)(15)(T), 1101(a)(15)(U).

[41] *See* OLC Memo at 15-16.

[42] *Id.* at 16 (citing 8 C.F.R. §§ 214.11(k)(1), -(k)(4), and -(m)(2)).

After Hurricane Katrina devastated large portions of the Gulf coast in 2005, several thousand foreign students, who possessed F-1 student visas, became temporarily unable to complete the "full course of study" requirement of those visas, when the schools they were attending were forced to close for extended periods of time. Consequently, DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina."[43]

Once again, the executive branch's decision to defer action against the students affected by Hurricane Katrina was a temporary "bridge," allowing them to remain lawfully in the U.S. until their schools could reopen. These students' presence in the U.S. was initially lawful, and their legal entitlement to an F-1 student visa undoubtedly evinced a congressional desire that they be permitted to remain in the U.S. until they could resume their course of study. The intervention of an unforeseeable Act of God made it impossible to continue, and the grant of deferred action for these individuals in no way undermined congressional intent.

(4) 2009 Deferred Action for Widows/Widowers of U.S. Citizens:

In 2009, DHS officials granted deferred action to a group of individuals in a much more aggressive manner than the three prior instances elaborated above. Specifically, they announced the availability of deferred action for certain widows and widowers of U.S. citizens whose citizen-spouse had died prior to the expiration of two years of marriage.[44] Under the then-existing provision of the INA, individuals were not permitted to adjust to legal status based upon a marriage that had not lasted at least two years.[45]

I say this 2009 use of deferred action is "much more aggressive" than prior instances because unlike those prior instances, in which deferred action served as a temporary "bridge" to effectuate congressional intent, the executive branch's decision to grant deferred action for these widows/widowers was *inconsistent with the existing law*, which required a minimum two-year marriage before status could be adjusted.

Despite the shady legal underpinnings of the 2009 widow/widower executive action, its legality was never tested. And it never will be tested, because several months after DHS announced it, Congress altered the statutory two-year waiting period for adjustment of status,[46] thus mooting any possible legal challenge. Congress, in other words, shortly thereafter blessed the adjustment of lawful status for individuals whose marriage had not lasted two years. DHS then determined

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[43] *Id.* at 16.

[44] *Id.* at 17.

[45] *See* Widow(er): Green Card of a Widow(er) of a U.S. Citizen, USCIS, *available at* http://www.uscis.gov/green-card/green-card-through-family/green-card-through-special-categories-family/widower ("Until October 28, 2009, you had to have been married to the deceased citizen for at least two years at the time of the deceased citizen's death, in order to immigrate as the widow(er) of a citizen. Congress removed this requirement, effective October 28, 2009.").

[46] Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009).

that the new law rendered its policy "obsolete" and withdrew it, opting to treat all pending deferred action applications as applications for visas under the new statute.[47]

As the foregoing discussion shows, these four prior precedents cited by OLC to support the legality of the DACA and DAPA deferred actions do not, in fact, support their legality at all. The first three involve temporary "bridges" to allow individuals who were *otherwise statutorily entitled to visas* to remain until such time as their visas could be obtained, or their purposes fulfilled (in the case of the Hurricane Katrina situation). Unlike the DACA and DAPA situations, none of the individuals in these first three situations had entered the country illegally, nor were they rewarded with a remedy inconsistent with congressional directive.

Indeed, except the situation where Congress may expressly ban the availability of using deferred action as such a temporary "bridge," an administrative grant of deferred action creating such a bridge is inherently an administrative action designed to *effectuate congressional intent* that a given population be allowed to remain in the country. In these first three situations discussed above—VAWA, VTVPA and Hurricane Katrina—the executive branch's administrative issuance of deferred action provided such a bridge, facilitating the achievement of congressional desires for these populations. These three instances were, in other words, a classic instance in which the executive branch exercised its administrative discretion in a lawful manner, to administratively assist in a manner consonant with congressional will and thus faithfully execute the statutes Congress had passed.

The 2009 widow/widower policy proposed by the Obama Administration, by contrast, was directly contradictory of the then-existing statutory requirements for adjustment of status based on marriage to a U.S. citizen. As such, it cannot be classified as a legitimate exercise of agency discretion. Agencies may do many things in the exercise of their administrative discretion, but they surely cannot act in a manner that contradicts or undermines congressional intent. Because Congress amended the applicable statute only months after the 2009 widow/widower administrative policy was issued, however, any judicial scrutiny of its legality was mooted, and its utility as a precedent to support the legality of deferred action under DACA or DAPA is zero.

C. What about the 1990 Bush Family Fairness Policy?

As a last-ditch effort to save the legality of DACA/DAPA, the OLC memo resorts to an argument that essentially asserts, "Bush did it, too!" Specifically, when addressing the argument about the sheer size and scope of DACA/DAPA programs makes them qualitatively different—suggesting an inherent contradiction of congressional intent—OLC concedes that "In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion."[48] OLC then quickly concludes, however, that "although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens---approximately four in ten—

[47] OLC Memo at 17 n.7.

[48] *Id.* at 30.

potentially eligible for discretionary extended voluntary departure relief."[49] And the existence of the 1990 Family Fairness Policy (FFP) leads OLC to conclude that "DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context."[50]

OLC's understanding and analysis of the FFP is pitiful and sloppy. The FFP is not legally analogous, in any good faith way, to DACA/DAPA. Unlike the DACA/DAPA orders, the FFP did not grant the remedy of deferred action. Instead, the FFP granted the remedy of "voluntary departure" for a maximum one-year period to the immediate family members of individuals granted amnesty by the Immigration Reform and Control Act of 1986 (IRCA).[51] Voluntary departure is a remedy that allows deportable individuals a period of time in which to self-deport, at their own expense, in lieu of forced deportation by the government. [52]

The FFP was *consistent with then-existing law*. Specifically, the voluntary departure statute existing at the time stated, "The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation . . . ."[53]

By the plain language of this statute, Congress granted unfettered discretion to the Attorney General to grant voluntary departure in lieu of deportation. It imposed no time limits whatsoever. The one-year period provided by the FFP was well within the boundaries of the expressed will of Congress. As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended the voluntary departure to tighten its availability in significant ways, including limiting the award of voluntary departure to a maximum of 120 days.[54] But the statute under which the Bush Administration operated in 1990 authorized discretionary allowance of voluntary departure for *any* period of time. By granting voluntary departure for a one-year period to immediate family members of those granted asylum by the 1986 immigration reform law, the 1990 FFP grant of voluntary departure was a remedy that comfortably fell within existing statutory authority.

Equally important, the FFP—unlike DACA and DAPA—did not alter the legal status of the FFP's beneficiaries. Beneficiaries of the FFP were still "deportable," but merely allowed to self-deport. Nothing in the FFP purported to alter their deportability. Moreover, FFP beneficiaries—

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[49] *Id.* at 31.

[50] *Id.*

[51] Memorandum, Gene McNary, Commissioner, INS, Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242 for the Ineligible Children and Spouses of Illegal Aliens (Feb. 2, 1990), *available at* http://cdn.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf.

[52] *See* 8 U.S.C. § 1229c.

[53] 1952 McCarran-Walter Immigration and Nationality Act § 244(e), Pub.L. 82–414, 66 Stat. 163 *available at* http://library.uwb.edu/guides/usimmigration/66%20stat%20163.pdf.

[54] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(a)(3), Pub. L. 104-208, 110 Stat. 3009, *available at* http://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html.

unlike DACA and DAPA beneficiaries—did not obtain any extra-statutory benefits as a result of the executive action.

In short, the 1990 FFP was qualitatively different from DACA and DAPA because it (1) did not alter legal status; (2) did not provide a remedy unauthorized by Congress; and (3) did not confer benefits upon a population unauthorized by Congress. The FFP was consonant with the then-existing voluntary departure statute, and as such was a faithful execution of the law.

III. BENEFITS: PRESIDENT OBAMA'S IMMIGRATION ORDERS CONFER BENEFITS UPON NEW CATEGORIES OF ILLEGAL IMMIGRANTS WHICH HAVE NOT BEEN AUTHORIZED BY CONGRESS

As discussed in the previous section, the President's DACA and DAPA policies grant "deferred action" to the policies' beneficiaries. The OLC memo concludes that the President's immigration actions "would not 'legalize' any aliens who are unlawfully present in the United States" because deferred action "does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship."[55]

Yet OLC acknowledges that granting the remedy of deferred action automatically triggers a regulation that grants work permits to deferred action recipients[56]—a rather significant benefit for DACA and DAPA recipients. This conferral of benefits makes DACA/DAPA a uniquely aggressive exercise of executive power. Indeed, in a July 2000 memo from the INS General Counsel, Bo Cooper, he concluded that the INS did not have discretion "to provide any immigration benefit to any alien ineligible to receive it."[57] Mr. Cooper noted that "an enforcement act must be distinguished from an affirmative act of approval, or a grant of a benefit, under a statute or other applicable law that sets guidelines for determining when approval should be given. . . . The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions."[58]

A decision to confer benefits upon a given population, in other words, is not a discretionary matter left to the executive branch (a matter discussed thoroughly in section IV below), but rather a matter left exclusively to Congress. Whether an individual is entitled to a particular benefit, therefore, can only be answered by reference to the applicable statutes and implementing regulations.

The regulation that OLC cites to support the conferral of a work permit upon DACA/DAPA recipients is 8 C.F.R. § 274a.12(c)(14) which states that those eligible to apply for a work permit includes "An[y] alien who has been granted deferred action, an act of administrative convenience

[55] OLC Memo at 2.

[56] *Id.*

[57] Memorandum from Bo Cooper, Gen. Counsel, Immigration and Naturalization Service, INS Exercise of Prosecutorial Discretion 1 (July 11, 2000), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf.

[58] *Id.* at 4.

to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment."[59]

OLC asserts that this executive branch regulation authorizing work permits for deferred action recipients was promulgated "pursuant to authority delegated by Congress," citing 8 U.S.C. § 1103(a)(3) and 8 U.S.C. § 1324a(h)(3). Frankly, this is a questionable conclusion. Section 1103(a)(3) is the general rulemaking authority of the Department of Homeland Security, declaring that the DHS Secretary "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems *necessary for carrying out his authority under the provisions of this chapter*."[60] And Section 1324a(h)(3) adds nothing of any substance, merely stating that in determining who is an "unlawful alien" ineligible to work in the U.S., the term does *not* include any alien who is either an LPR or "who is authorized to be so employed by this chapter or by the Attorney General."[61]

The salient legal question, therefore, is whether granting work permits to deferred action recipients is "necessary for carrying out" the provisions of the Immigration and Nationality Act. This is debatable, since (1) deferred action (as discussed extensively in section II) has been explicitly sanctioned by Congress in only a handful of instances; and (2) even in those few instances where Congress has blessed deferred action as a remedy, there is no "necessary" logical relationship between being granted deferred action and obtaining work authorization. It is one thing to allow an individual illegally present to remain for a bit longer, but quite another to grant such individual the legal permission to work. It is doubtful, therefore, that the underlying regulation that allows deferred action recipients to legally work—8 C.F.R. § 274a.12(c)(14)—is "necessary for carrying out" the INA as required by the authorizing statute, 8 U.S.C. § 1103(a)(3).

Concededly, an argument can be made that once certain illegal immigrants' legal status has been administratively altered—from "deportable" to "not deportable"—and they are further granted the remedy of deferred action, it then becomes "necessary" to grant most/virtually all of the affected population a work permit so that they will not become public charges. As an initial matter, the bootstrapping nature of this argument—and its implications for the breadth of executive power—should be noted with a keen and nonpartisan eye. The logic essentially looks like this:

(1) We have the power to alter legal status (from deportable to non-deportable), even when it contradicts a statute;

(2) Once we have altered legal status, we have the further power to grant a remedy for the favored population, even if Congress has not sanctioned our chosen remedy for this population; and

(3) Once we accomplish (1) and (2), we can invoke a provision of statute authorizing regulations

[59] 8 C.F.R. § 274a.12(c)(14).

[60] 8 U.S.C. § 1103(a)(3) (emphasis supplied).

[61] 8 U.S.C. § 1324a(h)(3).

for any action "necessary" to carry out our authority.

If predicate arguments (1) and (2) are incorrect, however (as I have argued they are), then argument (3) is obviously incorrect as well. Indeed, if arguments (1) and (2) are incorrect, argument (3) becomes an obvious example of egregious bootstrapping, thus stretching the boundaries of executive power beyond anything seen before. Pursuant to the the Obama Administration's argument of executive power, the executive branch has virtually unlimited power to act in ways that are contrary to congressional will.

If Congress has not provided an explicit authorization for a benefit such as work authorization, or if providing such authorization cannot be administratively granted in a manner consistent with congressional intent, then granting work authorization is simply beyond executive power. While administrative agencies have broad administrative discretion when carrying out their duty to "faithfully execute" the laws written by Congress, their discretion is not so broad as to allow them to act in ways that fundamentally contradict or undermine those laws.
Granting work permits for the DACA/DAPA recipients fundamentally contradicts the INA, which classifies these individuals as "deportable" aliens who are not eligible for deferred action.

A. Work Permits for DACA/DAPA Recipients Undermines Obamacare

Beyond this obvious point, however, is a subtler, but equally pernicious example of how granting work permits to the DACA/DAPA population undermines federal law. Specifically, granting work permits to this population will undermine key provisions of the Affordable Care Act (ACA) by encouraging employers to hire individuals with DACA/DAPA status rather than U.S. citizens or other individuals lawfully present in the country.[62] At a recent hearing of the House Homeland Security Committee, DHS Secretary Jeh Johnson conceded that "Those who are candidates for and are accepted into the Deferred Action Program will not be eligible for comprehensive health care, ACA."[63]

This is a potentially significant consequence for employers under the ACA. Under the Act, employers with 50 or more full-time employees are potentially subject to an "employer responsibility" penalty/tax.[64] More precisely, the employer responsibility penalty/tax is triggered when just *one* full-time worker obtains a premium tax credit after purchasing qualifying health insurance on an exchange.[65] Because illegal aliens (including DACA/DAPA recipients) are not eligible to obtain tax-subsidized insurance on an exchange, the more illegal aliens an employer

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[62] *See* David North, Center for Immigration Studies, *ACA Gives Employers Even More Incentives to Hire Alien Workers*, Jan. 7, 2015, *available at* http://cis.org/north/aca-gives-employers-even-more-incentives-hire-alien-workers.

[63] *See* Melanie Hunter, *Jeh Johnson: Legalized Illegals Don't Need to Comply With Obamacare*, CNSnews.com, Dec. 2, 1014, *available at* http://cnsnews.com/news/article/melanie-hunter/jeh-johnson-legalized-illegals-dont-need-comply-obamacare [hereinafter Hunter].

[64] Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act, IRS, Q.1, *available at* http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act.

[65] *Id.* at Q.18.

hires, the more likely he will be able to evade the employer responsibility penalty. Expressed mathematically, it looks like this:

> illegal (DAPA/DACA) employees with work permits =

> employees who are not eligible for tax credits =

< employees who can trigger the ACA ER responsibility penalty/tax

Recent reports suggest that some three to five million individuals are who are eligible for ACA tax credits (by purchasing qualifying health insurance) are opting not to do so—choosing instead to pay the relatively small penalty/tax rather than the larger annual health insurance premiums.[66] It thus seems logical to conclude that granting work permits to the DACA/DAPA populations will encourage the hiring of these illegal aliens over U.S. citizens and other lawful residents, by further reducing the number of workers eligible to trigger the employer responsibility payment.

If this is the case, the Obama Administration's decision to grant work permits to DACA/DAPA recipients *will undermine the effectiveness of the ACA itself*, one of the primary goals of which is to extend health insurance coverage to the workforce.[67] If employers find ways to "game the system" and avoid the ACA employer responsibility payment by hiring DACA/DAPA recipients—who are not eligible for ACA-subsidized insurance—then by definition, the ACA's goal of expanding health insurance coverage via the workplace has been undercut. This is a instance, in other words, in which an Article II (executive branch) policy—granting work permits to DACA/DAPA recipients—has the effect of undermining the goal of Article I (Congress), as expressed through legislation (the ACA).

It is not permissible, in our constitutional regime, to allow the President to take an administrative action that undercuts the stated goal of a statute enacted by Congress. And it is no small irony that, by granting work permits to DACA/DAPA recipients, President Obama has done exactly this, undermining his own signature legislative achievement.

B. Work Permits for DACA/DAPA Recipients Provides a Potential Path to Citizenship

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[66] *See* Tami Luhby, Millions to Owe Obamacare Tax Penalty, CNN Money, Jan. 28, 2015, *available at* http://money.cnn.com/2015/01/28/news/economy/obamacare-tax-penalty/.

[67] *See* U.S. Dep't of Health and Human Serv., Strategic Goal One: Strengthen Health Care, Objective A (stating that one of the goals of the ACA is to "Make coverage more secure for those who have insurance, and extend affordable coverage to the uninsured.").

OLC's assertion that DACA/DAPA's grant of deferred action "does not provide a path to obtaining permanent residence or citizenship" is highly misleading.[68] A similar assertion was made by President Obama in his November 20, 2014, televised statement announcing DAPA, "Now, let's be clear about what it isn't. This deal . . . does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive -- only Congress can do that."[69]

These assertions are misleading because USCIS concedes that DACA recipients are eligible to apply for "advance parole,"[70] which in turn can lead to an adjustment of status to LPR and eventually, citizenship. There is no reason to believe that DAPA recipients—who are also entitled to deferred action—will not likewise be considered eligible for advance parole and hence, a potential pathway to citizenship.

Advance parole is an advance permission granted by USCIS, authorizing an individual to leave the U.S. for broadly defined humanitarian, employment, or educational purposes, and then re-enter within a relatively short period of time.[71] Pursuant to a recent decision by the Board of Immigration Appeals (BIA), *Matter of Arrabally and Yerrabelly*, individuals who depart the U.S. pursuant to a grant of advance parole are not considered to have "departed" the U.S., and meaning that he or she isn't subject to the three- or 10-year bar on lawful readmission.[72] Those bars require that immigrants wait either three or 10 years (depending on how long they were illegally present in the U.S.) before being able to come back lawfully. Although *Matter of Arrabally and Yerrabelly* did not explicitly decide the applicability of advance parole for DACA recipients, a November 20, 2014 memo from DHS Secretary Jeh Johnson subsequently made it clear that, "in *all cases* where an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a departure within the meaning of . . . the INA."[73]

The primary implication of this interpretation of *Arrabally* is that because DACA and DAPA recipients may apply for advance parole, they are considered to be "paroled" into the country when they return—entering with permission—and hence are potentially eligible to adjust their

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[68] OLC Memo at 2.

[69] Remarks by the President in Address to the Nation on Immigration, Nov. 20, 2014, *available at* http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[70] DACA Frequently Asked Questions, USCIS, Q.57, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

[71] *See* 8 C.F.R § 212.5(f); USCIS Adjudicator's Field Manual, § 54.1(c). "Advance" parole is derived from language relating to parole in the INA. 8 U.S.C. § 1182(d)(5).

[72] Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771(BIA 2012).

[73] Jeh Charles Johnson, Secretary, Dep't of Homeland Security, *Directive to Provide Consistency Regarding Advance Parole*, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf (emphasis supplied).

status and become lawful permanent residents.[74] Once an individual has obtained LPR status, they are eligible—after a potential waiting period—to apply for U.S. citizenship.[75]
Indeed, in the first two years of DACA implementation (2012-2014), more than 6,400 DACA recipients requested advance parole. Of the 4,566 cases adjudicated thus far, only 566 were denied, yielding an approval rate of 88 percent.

Table 1: Advance Parole for DACA Recipients (2012-2014)

# of DACA recipients requesting advance parole (2012-2014)	# of advance parole requests decided (as of end of 2014)	outcome	Net approval rate of advance parole requests by DACA recipients
6,400	4,566	566 denied 4,000 granted	88%

It is not known how many of the 4,000 DACA individuals granted advance parole have applied for an adjustment of status upon re-entry to the U.S. The USCIS has told members of Congress that it does "not have a way to track electronically" this information.[76]

While the number of DACA recipients requesting advance parole was relatively small in 2012-2014, the number can be expected to grow substantially pursuant to a newly announced USCIS policy. Specifically, at a "Congressional Update and Teleconference" sponsored by USCIS on February 12, 2015, the agency reported to Congress that, under the recently expanded DACA program, applicants will be allowed to file advance parole applications simultaneously with their DACA applications.[77] The simultaneous filing of DACA (and presumably, DAPA) and advance

[74] 8 USC 1255(a) provides that "The status of an alien who was . . . paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if
(1) the alien makes an application for such adjustment,
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
(3) an immigrant visa is immediately available to him at the time his application is filed."
Id. Paroled individuals eligible for adjustment of status could include, for example, children or spouses of U.S. citizens, or individuals who have an employer willing to sponsor them and are thus "eligible to receive an immigrant visa" within the meaning of subsection (2) above.

[75] *See Citizenship Through Naturalization*, USCIS, *available at* http://www.uscis.gov/us-citizenship/citizenship-through-naturalization. The waiting period varies. The default waiting period is five years of LPR status, though spouses of U.S. citizens only have to wait three years. Children of U.S. citizens and active duty military personnel do not face a waiting period.

[76] *See* Letter from Bob Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Representatives, to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Security 2 (Feb. 13, 2015), *available at* http://judiciary.house.gov/_cache/files/fede258e-55c4-45e1-885f-9ed9eefdcd00/021315-daca-letter.pdf.

[77] *Id.* at 1-2.

parole applications would ineluctably encourage a greater number of advance parole applications and, consequently, a pathway to U.S. citizenship.[78]

I think it is important to emphasize that regardless of the number of DACA/DAPA individuals who obtain advance parole and consequently adjust their status, *if even one DACA/DAPA recipient does this, DAPA/DACA will have infringed on Congress's core constitutional power.*

To be precise, if only one DACA/DAPA recipient obtains advance parole and subsequently adjusts his/her status to LPR, they will be placed on a path to U.S. citizenship—all because of a series of executive orders unilaterally imposed by President Obama. Whatever one thinks about Congress's constitutional power to legislate on matters of immigration,[79] it is undeniable that Congress possesses the power under Article I, section eight to "establish a uniform rule of naturalization." Congress possesses the sole constitutional authority to decide who should be granted U.S. citizenship,[80] and any executive action that interferes with this decision violates the very core of congressional authority. Because DACA and DAPA appear to allow some beneficiaries to obtain a path to citizenship (via advance parole), they have fundamentally altered the ability of Congress, and Congress alone, to determine who qualifies for U.S. citizenship.

IV. PRESIDENT OBAMA'S IMMIGRATION ORDERS ARE NOT AN EXERCISE OF "PROSECUTORIAL DISCRETION"

Prosecutorial discretion is a doctrine that allows the executive branch wide discretion regarding decisions as to which transgressions of criminal law should be prioritized for prosecution. It is a doctrine that speaks of "prosecutors" and "prosecution"—and hence, criminal law violations. It grants discretion to prosecutors based upon pragmatic considerations such as limited resources and strength of evidence. It is most decidedly *not*, however, a doctrine that gives the executive unfettered discretion to not enforce wholesale swaths of civil law with which the executive disagrees.

As an initial matter, deportation is a civil remedy, not a criminal punishment.[81] The President's order to defer deportation for some illegal immigrants, therefore, does not involve a "prosecutorial" decision as a fundamental matter. Instead, it is a *non-enforcement* decision.

A. Judicial Deference to Non-enforcement Decisions

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[78] *Id.* at 2.

[79] *See* Ilya Somin, *Obama, Immigration and the Rule of Law*, WASHINGTON POST, Volokh Conspiracy, Nov. 20, 2014 (arguing that Congress's Article I, section eight power to "establish a uniform rule of naturalization" does not include the power to legislate on immigration). *But see* Sale v. Haitian Council, Inc., 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters.").

[80] Chirac v. Lessee of Chirac, 15 U.S. (1 Wheat) 259, 269 (1817) (Chief Justice John Marshall, writing for the Court asserted, "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted . . . .").

[81] Flemming v. Nestor, 363 U.S. 603 (1960). *See also* Galvan v. Press, 347 U.S. 522 (1954) (Ex Post Facto Clause does not apply to deportation proceedings as they are not criminal in nature).

Non-enforcement decisions by the executive are indeed entitled to judicial deference in certain circumstances. But non-enforcement decisions are not immune from judicial review generically, without regard to context. As the Supreme Court recently reaffirmed in *Utility Air Regulatory Group v. EPA*, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference."[82]

Indeed, in *UARG*, the Supreme Court rejected the EPA's elaborate carbon tailoring rule, holding that it violated separation of powers because it was contrary to congressional intent. The Solicitor General had asserted that a prior decision in *Morton v. Ruiz*[83] supported its position, but the *UARG* Court rejected this, saying,

> In *Ruiz*, Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to " 'Indians throughout the United States' " and had not "impose[d] any geographical limitation on the availability of general assistance benefits. Although we held the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria, we stated in dictum that the Bureau could, if it followed proper administrative procedures, "create reasonable classifications and eligibility requirements in order to allocate the limited funds available." That dictum stands only for the unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*. Nothing in *Ruiz* remotely authorizes an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law.[84]

UARG thus emphasizes that the executive branch's resource constraints may indeed allow it to "create reasonable classifications and eligibility requirements in order to allocate the limited funds available" when Congress has exercised its spending power to broadly assist, without any textual limitation, "Indians throughout the United States." But an agency may not, under *UARG*, adopt policies to prioritize its expenditures *outside the bounds established by Congress*. If Congress has provided an "unambiguous requirement" in a statute, the executive branch must faithfully execute the statute. The executive may "change its own conduct, but it cannot change the law."

Similarly, OLC tries to glean support for President Obama's immigration orders from the Supreme Court's 1985 decision in *Heckler v. Chaney*,[85] asserting that *Chaney* supports the conclusion that the President's orders are a legitimate exercise of "prosecutorial discretion."[86]

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[82] 134 S. Ct. 2427, 2442 (U.S. 2014) (internal citations and quotation marks omitted).

[83] 415 U.S. 199 (1974).

[84] *UARG*, 134 S. Ct. at 2445-46 (emphasis in original) (internal citations omitted).

[85] 470 U.S. 821 (1985).

[86] *See* OLC Memo at 4-5.

But OLC reads *Chaney* far too aggressively. *Chaney* involved an attempt by death penalty opponents to ban a drug cocktail used for lethal injection. The drugs used had been approved by the FDA, but were being used in combination, for an "off-label" use (lethal injection) other than the intended use specified at the time of FDA approval.[87] Such off-label use of drugs is very common, and is not banned by the Federal Food, Drug and Cosmetic Act (FFDCA).[88] Once the FDA approves a drug for any purpose, it is perfectly legal to use the drugs for other, off-label, purposes. Nonetheless, the plaintiffs in *Chaney* argued that the drug was "misbranded" under the FFDCA and should have been considered by the FDA as a "new drug" requiring an elaborate pre-market approval process.[89] The FDA Commissioner disagreed that the drug cocktail was a "new drug" under the meaning of the FFDCA, and further concluded that because the imposition of the death penalty by a State was a matter of state sovereignty, the FDA should decline any invitation to interfere with states' rights absent some compelling evidence that the drug posed a serious danger to the public.[90]

The Supreme Court unanimously ruled in favor of the FDA, concluding that the agency's decision not to initiate misbranding or adulteration proceedings against the drug manufacturer was presumptive unreviewable by courts because of section 701(a)(2) of the Administrative Procedure Act (APA), which states "agency action is committed to agency discretion by law."[91] Nothing in the FFDCA, furthermore, indicated that Congress desired courts to limit FDA's discretion to initiate adulteration or misbranding proceedings.[92]

As an initial matter, it should be noted that *Chaney* is a decision grounded solely on the APA. It did not involve, in any way, a constitutional challenge based on executive non-enforcement. To be succinct, *Chaney* involved:

(1) an APA challenge;
(2) against the executive (FDA);
(3) for failure to initiate misbranding provisions;

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[87] *Chaney*, 470 U.S. at 823.

[88] As the FDA's website explains it:

> If physicians use a product for an indication not in the approved labeling, they have the responsibility to be well informed about the product, to base its use on firm scientific rationale and on sound medical evidence, and to maintain records of the product's use and effects. Use of a marketed product in this manner *when the intent is the "practice of medicine"* does not require the submission of an Investigational New Drug Application (IND), Investigational Device Exemption (IDE) or review by an Institutional Review Board (IRB).

"Off-Label" and Investigational Use Of Marketed Drugs, Biologics, and Medical Devices - Information Sheet, U.S. Food and Drug Admin., *available at* http://www.fda.gov/RegulatoryInformation/Guidances/ucm126486.htm.

[89] *Chaney*, 470 U.S. at 823-24.

[90] *Id.* at 824-25.

[91] Codified at 5 U.S.C. § 701(a)(2). The *Chaney* Court concluded that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been "committed to agency discretion," and we believe that the Congress enacting the APA did not intend to alter that tradition." *Chaney*, 470 U.S. at 832.

[92] *Chaney*, 470 U.S. at 835-37.

(4) against a specific drug manufacturer.

Chaney involved a single, discrete instance of FDA non-enforcement—failure to initiate misbranding enforcement against a specific drug manufacturer, based upon the specific facts and circumstances. It did not involve an executive decision—like the ones made by President Obama regarding immigration—to cease enforcing a statute against an entire category of individuals, who were singled out for special legal exemption by the executive.

To be relevant and analogous to President Obama's immigration orders, *Chaney* would need to have involved a constitutional challenge to an FDA decision not to enforce the Federal Food, Drug and Cosmetic Act at all against a class of drug manufacturers who satisfied some criteria unilaterally established by the FDA, and inconsistent with the FFDCA itself.

For comparative purposes, the legal challenges against President Obama's executive orders on immigration involve:

(1) constitutional, separation of powers challenges;
(2) against the executive (DHS);
(3) for reclassification of status contrary to the INA
(4) for provision of a remedy (deferred deportation) contrary to the INA
(5) for conferral of benefits (work permits; LPR/citizen status) contrary to the INA
(6) granted to an entirely new category of people unilaterally identified by the executive

So while there is some surface similarity between *Chaney* and the legal challenges to the President's immigration actions, as a legal matter the similarity merely involves the fact that both situations involved a non-enforcement decision by the executive branch. But as OLC's memo conceded, "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering."[93]

OLC feebly attempts to make a case that the President's immigration orders are consonant with congressional desires. It asserts that the "principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration" because "the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to 'establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the [INA]."[94]

But this statute—8 U.S.C. § 1103(a)(3)—does not give the DHS Secretary authority to do anything he deems "necessary." Instead, it grants him authority to do what is necessary "for carrying out his authority" under the law. It does not grant the Secretary authority to act in a manner that is directly contradictory of the statutes enacted by Congress. OLC next cites the statute creating the Department of Homeland Security, which expressly charged the DHS Secretary with the responsibility to "establish[] national immigration enforcement policies and

[93] OLC Memo at 6.

[94] *Id.* at 4.

priorities."[95] And while undoubtedly DHS must set "priorities" within its budgetary constraints, those priorities cannot conflict with the will of Congress, reflecting a desire to achieve different policy goals than those specified in the statutes it has enacted. Any administrative "priorities" that undermine the purpose of existing statutes is not an exercise of enforcement discretion, it is an unfaithful execution of the law and thus a violation of the Constitution's separation of powers.

B. The Importance of Case-by-Case Enforcement Consideration

The OLC memo makes it clear that genuine case-by-case consideration is a necessary component of any exercise of prosecutorial discretion. Specifically, in advising President Obama on the constitutionality of DACA, OLC "orally advised" that its "preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis."[96] OLC stated further, "We explained, however, that extending deferred action to individuals who satisfied . . . specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program *require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria*."[97]

While the Obama Administration clearly knows the importance of giving lip service to "case-by-case" consideration, its regurgitation of important legal words cannot camouflage the reality of DACA implementation to date, which belies any meaningful case-by-case discretion. Indeed, USCIS's own website describing DACA states that "Under the direction of the Secretary of Homeland Security, if an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. *If individuals believe that, in light of this policy, they should not have been apprehended or placed into removal proceedings, contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).*"[98] This rather strongly suggests that the Obama Administration has gone to unprecedented lengths to ensure that individuals who meet the DACA (and presumably DAPA) criteria are not apprehended or removed under any circumstances. Indeed, if an immigration officer in the field should happen to apprehend a DACA (or DAPA) qualifying individual, the existence of a 24/7 toll-free number will inevitably mean that a call will be made, and a decision to release will follow.

In addition, the DACA applications processed to date strongly indicate that, far from case-by-case consideration, DACA is being implemented as a rubberstamp. As of the end of 2014,

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[95] *Id.* at 4-5. The current statute is codified at 6 U.S.C. § 202(5).

[96] *Id.* at 18 n. 8.

[97] *Id.*

[98] DACA Frequently Asked Questions, USCIS, Q.9, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (emphasis supplied).

USCIS reports that it had received and accepted 685,544 requests for DACA status.[99] Of these accepted applications, 580,946 had been approved, 80,715 were still pending, and only 23,833 were denied.[100] Of the DACA applications processed thus far, this yields a *rejection rate of only 3.5 percent.*

It is absurd to assert that a mere theoretical possibility that a small percentage of applicants may be rejected constitutes meaningful "prosecutorial discretion. Instead, with an approval rate of almost 97 percent, USCIS's so-called "case-by-case" evaluation of DACA applications has, in reality, been a rubberstamp. Indeed, in the 26-state lawsuit led by Texas, an affidavit submitted by Kenneth Palinkas, President of the National Citizenship and Immigration Services Council (NCISC)—a union representing 12,000 employees of the USCIS—declared that "The approval rate is that high because USCIS leadership has prevented immigration officers from conducting case-by-case investigations of DACA applications. Leadership has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."[101] Palinkas further avers that USCIS has decided to route DAPA applications through service centers rather than field offices, "intentionally creat[ing] an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers. That management decision prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped."[102]

The characterization of DACA as a categorical, rubberstamping legal exemption rather than a case-by-case exercise of prosecutorial discretion is also reflected in the answers submitted by Leon Rodriguez, Director of USCIS, in a letter submitted to Senator Charles Grassley dated October 9, 2014. In this letter, Director Rodriguez reveals that of the DACA rejections, the top four reasons for rejection have been:

(1) using an expired version of the required Form I-821D;

(2) failure to provide a valid signature;

(3) failure to file the form I-765 (application for employment authorization), failure to pay the correct fee associated with that form, or filing an incomplete form I-765; and

(4) filing while under the age of 15.[103]

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[99] Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014, USCIS, *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr3.pdf.

[100] *Id.*

[101] Declaration of Kenneth Palinkas at ¶ 8, Texas v. U.S (N.D. Tex., Dec. 31, 2014) (No.1:14-cv-00254).

[102] *Id.* at ¶ 10.

[103] Letter from Leon Rodriguez, Director, USCIS, Dep't of Homeland Security to U.S. Senator Charles Grassley, Oct. 9, 2014, Enclosure 1, Q.1(c).

The information provided by Director Rodriguez strongly suggests that, of the 3.5 percent of DACA applications that are rejected, the vast bulk of them are being rejected because of technical glitches, not because the USCIS is using "case-by-case discretion" to determine whether to grant DACA status. In other words, *DACA is being operated as a categorical exemption from law*: If applicants properly fill out the correct forms, provide the right fee and meet the criteria established unilaterally by the executive branch, they will be granted an alteration of their legal status (deportable to non-deportable), a special remedy not endorsed by Congress (deferred deportation), and benefits not endorsed by Congress (work permit and advance parole, creating a pathway to citizenship).

C. Public Announcement and Resource Demands Negate Prosecutorial Discretion

Another strong indication that President Obama's immigration orders are an attempt to rewrite existing law rather than an exercise of prosecutorial discretion consistent with existing law is the very fact that he has stated, on numerous occasions, that he does not possess the constitutional authority to do what he has subsequently done.

For example, on May 5, 2010, when speaking at a Cinco de Mayo celebration, President Obama told the audience that he wanted Congress to pass comprehensive immigration remark and denied that he had the constitutional authority to go it alone, "Anybody who tells you . . . that I can wave a magic wand and make it happen hasn't been paying attention to how this town works. We need bipartisan support. But it can be done, and it needs to be done."[104] Similarly, in his October 25, 2010 interview with Univision, President Obama said, "I'm president, I'm not king. If Congress has laws on the books that says that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. *But there's a limit to the discretion that I can show because I am obliged to execute the law*. That's what the Executive Branch means. I can't just make the laws up by myself."[105] In a Univision town hall on March 8, 2011, the President similarly declared, "*With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed* -- and I know that everybody here at Bell [High School] is studying hard so you know that we've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. . . . *There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.*"[106] In a July 25, 2011 speech to the National Council of La Raza,

[104] U.S. President Barack Obama, Remarks at a Cinco de Mayo Celebration (May 10, 2010), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=87844&st=immigration&st1=obama.

[105] Barack Obama, Interview with Eddie Sotelo, Univision (Oct. 25, 2010), *available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html (emphasis supplied).

[106] U.S. President Barack Obama, Remarks at Univision Town Hall, Bell Multicultural High School, Washington, D.C. (Mar. 28, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall (emphasis supplied).

President Obama again lamented his constitutional inability to unilaterally act, stating, "Now, I know some people want me to bypass Congress and change the laws on my own. . . . Believe me -- believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's no how -- that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."[107] In a Google+ Hangout interview on February 14, 2013—after implementing DACA—President Obama stated, "The problem is that I'm the president of the United States, I'm not the emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic. ... [W]e've kind of stretched our administrative flexibility as much as we can[.]"[108]

Once it became clear to President Obama that Congress was not going to pass the kind of legislation he desired, he began publicly stating his intention to bypass Congress altogether. In January 2014, the President famously announced his "pen and phone" strategy for bypassing Congress, announcing, "We are not just going to be waiting for legislation . . . I've got a pen, and I've got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward . . ."[109] Shortly thereafter, in his State of the Union address on January 28, 2014, the President again warned, "America does not stand still, and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do."[110] In late June 2014, President Obama was ready to take further unilateral immigration action, declaring in the Rose Garden, "Today, I'm beginning a new effort to fix as much of our immigration system as I can on my own, without Congress."[111] And most recently, in response to a heckler during an immigration speech on November 26, 2014 (shortly after announcing DAPA), President Obama tellingly quipped, "What you're not paying attention to is, *I just took an action to change the law*."[112]

These various public pronouncements from the President make it clear that he believes Congress does not support his vision of immigration reform, and he will accordingly take his own, unilateral action to effectuate the change he believes is desirable. These are not comments of a President who believes that Congress and existing law support his executive actions—to the

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[107] U.S. President Barack Obama, Remarks to the National Council of La Raza, Washington D.C. (July 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza.

[108] U.S. President Barack Obama, Video Remarks on Google+ Hangout (Feb. 14, 2013), *available at* https://www.youtube.com/watch?v=-e9Imy_8FZM&feature=youtu.be.

[109] Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBSNews.com (Jan. 14, 2014), *available at* http://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress/.

[110] U.S. President Barack Obama, State of the Union Address (Jan. 28, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address.

[111] Stephen Dinan, *Obama: I Will Bypass Congress to Fix Immigration*, WASHINGTON TIMES (June 30, 2014), *available at* http://www.washingtontimes.com/news/2014/jun/30/obama-i-will-bypass-congress-fix-immigration/?page=all.

[112] Eric Bradner, *Obama to Immigration Hecklers: "I Just Took an Action to Change the Law,"* CNN.com (Nov. 26, 2014), *available at* http://www.cnn.com/2014/11/25/politics/obama-hecklers-immigration-chicago/.

contrary, they evince a belief that, despite congressional opposition, the President is determined to go it alone and defy Congress to achieve his desired ends.

The Obama Administration has repeatedly tried to explain its unilateral immigration orders as a run-of-the-mill means of prioritizing limited enforcement resources.[113] But it is clear that DACA and DAPA are *adding* to the resource burden of DHS, not easing it. In OLC's memo it admitted, "The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources."[114] DACA, for example, required DHS to hire around 900 new employees and spend an additional $280 million over a three-year period.[115] Indeed, DACA applications so overwhelmed USCIS that it had to divert workers from other agency priorities to process the backlog.[116] As for DAPA, DHS has admitted that it plans to hire over 1,000 new federal workers to process the DAPA applications alone, at a cost of around $48 million per year.[117]

Despite these increased resource demands, OLC noted that "DHS as informed us that the costs of administering the proposed program would be borne *almost entirely* be USCIS through the collection of application fees."[118] It further noted that "DHS has indicated that the costs of administering the deferred action program would therefore not detract *in any significant way* from the resources available to ICE and CBP—the enforcement arm of DHS—which rely on money appropriated by Congress to fund their operations."[119] OLC thus concluded, "The proposed program, in short, might help DHS address its severe resource limitations, and at the very least *likely would not exacerbate* them."[120]

It is difficult to know what to make of OLC's qualified language. What does it mean when DHS informed OLC that DAPA's costs would be borne "almost entirely" from application fees? Similarly, what does it mean when DHS informed OLC that DAPA would not detract "in any significant way" from ICE and CBP resources? And what does OLC mean when it says the program "likely would not exacerbate" the agency's resource constraints? The answers are not

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[113] *See* OLC Memo at 10 ("[A]n agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion").

[114] *Id.* at 26.

[115] Josh Gerstein, *Bureaucratic Nightmare on Immigration?*, POLITICO (Nov. 21, 2014), *available at* http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html.

[116] *Id.* ("One widely-reported effect of the DACA rollout was an increase in delays for other kinds of immigration applications. In some instances, waits for green cards for immigrant spouses of U.S. citizens jumped from about five months to 15 months — a delay attributable at least in part to personnel being diverted to handle the deferred action program.").

[117] Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES (Dec. 25, 2014), *available at* http://www.nytimes.com/2014/12/26/us/politics/little-noticed-in-immigration-overhaul-a-government-hiring-rush.html?_r=0.

[118] OLC Memo at 26 (emphasis supplied).

[119] *Id.* (emphasis supplied).

[120] *Id.*

clear. The waffling language employed, and the reliance on DHS's "word" as to the resource demands should raise some congressional eyebrows and warrant follow-up.

A unilateral executive action that costs millions of extra dollars, requires the hiring of thousands of additional workers, and causes resources to be diverted from other legitimate activities is not, by any fair construction of the term, an exercise designed to "prioritize limited resources." To the contrary, such an action may amplify resource limitations, result in greater inefficiency and erect an expensive, long-term bureaucracy.

A President merely "prioritizing resources" would do what prior Presidents have done: enforce the entirety of immigration law, while allowing prosecutors to make case-by-case determinations about which cases to pursue first. By publicly announcing a global policy of non-enforcement against certain categories after repeatedly saying that he does not have the authority to implement such changes, President Obama is willfully bypassing the democratic process in order to achieve results he (and his political base) wants. In so doing, the President is also condoning unlawful behavior, weakening the force of existing immigration law, and allowing lawbreakers to remain without fear of legal consequences. This is not "prosecutorial discretion" as that term has ever been understood before.

D. The Implications of Endorsing President Obama's Immigration Actions as "Prosecutorial Discretion"

Prosecutorial discretion recognizes the reality of finite executive resources. But it does not mean that the executive branch may alter a law, transforming an act from illegal behavior (with certain consequences, such as deportability) into legal behavior (ignoring congressionally specified remedies, such as deportation, and even rewarding such behavior with benefits). Such transmogrification is simply not prosecutorial discretion at all; it is the suspension of law, and a violation of the President's constitutional duty to "take Care that the Laws be faithfully executed."

A couple of simple hypotheticals will help illustrate the distinction between genuine prosecutorial discretion versus suspension of the laws.

First, assume the Attorney General issues a memo instructing U.S. Attorneys that they generally should not initiate prosecutions of marijuana offenses involving less than one kilo of marijuana, reasoning that there are not enough DOJ resources to prosecute marijuana offenses involving lesser amounts, and that state prosecutors could be expected to pick up the slack and prosecute these lesser amounts if so desired. Is this a legitimate exercise of prosecutorial discretion? Yes.

The legitimacy of such a decision hinges upon 5 factors that make it distinguishable from President Obama's immigration executive actions. First, the AG in this hypothetical has made his non-enforcement decision based upon true resource constraints. There is no evidence that the AG disagrees with the enforcement of the Controlled Substances Act's classification of marijuana as an illegal Schedule I substance and that his decision is based upon a policy disagreement with Congress. He is simply acknowledging that, given the raw number of

marijuana offenses, his offices only have sufficient resources to prioritize the most pressing, large-scale offenses.

Second, the AG would presumably not publicly pronounce this non-enforcement policy, much less go on national television to explain it, since doing so would send a clear signal to marijuana dealers and users that they now have carte blanche to violate the CSA, so long as they stay under one kilo. Third, presumably under the AG's memo, U.S. Attorneys throughout the country would be perfectly free to continue prosecuting marijuana offenses involving less than one kilo, and would not be punished for doing so, as the illegal status of possessing marijuana would not be altered. Fourth, in the event of a prosecution involving less than one kilo, the AG's memo would not alter the remedies provided by the CSA and applicable sentencing guidelines. It would not, in other words, purport to specify some new, "better" remedy than the ones specified by Congress. Fifth, under the AG's memo, there is no indication that marijuana offenses of less than one kilo will be rewarded in any way. Users or dealers of marijuana would not suddenly qualify for new government benefits that Congress had not decided to convey.

A closer analogy to President Obama's executive actions on immigration would be as follows: Suppose the U.S. Attorney General issues a memo directing U.S. Attorneys that they should not prosecute any marijuana offenses at all, if the offender is less than 30 years old, has completed high school, and has no other criminal record. The AG's memo is the result of a public crusade by the President to get Congress to amend the CSA and exempt marijuana offenses for such individuals. After much debate and deliberation, Congress decided not to amend the CSA in this fashion, angering the President and his political base. Consequently, the President took to the airwaves, declaring that if Congress will not enact needed CSA reforms, he would "work around" Congress to achieve his goals. He blames Congress for being to "harsh" in its marijuana law, and promises his political base of young people that he will find a way to exempt many of them from the CSA anyway.

When the AG issues his memo exempting this new category of young people from the operation of the CSA's marijuana prohibition, he simultaneously announces that individuals in this category will be eligible for a new, civil remedy, and this, in turn will allow them to qualify for federal disability benefits. Does anyone honestly believe that this hypothetical situation is properly characterized as "prosecutorial discretion"? I doubt it. It patently involves presidential defiance of congressional will, a failure to faithfully execute the laws written by Congress, and a dangerous violation of separation of powers.

Second, consider the hypothetical *du jour* of those who support President Obama's immigration orders: Suppose a local police chief instructs his officers not to bother pulling over any speeders going less than 5 mph over the speed limit. Is this a legitimate exercise of enforcement discretion and, if so, why is it any different from President Obama's immigration orders?

As an initial matter, the speeding hypothetical is, indeed, a classic case of the proper exercise of enforcement discretion. This is so for three reasons. First, the police chief's instructions do not alter the legal status of any speeder. They are still "speeders" under the law, and have not been transmogrified into "non-speeders" by the policy. Unlike President Obama's immigration orders, the police chief 's policy is not publicly and proudly announced so that all speeders know

realize that they will not longer be pulled over so long as they keep it within 5 mph of the posted speed limit. The police chief in the hypothetical merely instruct his officers that, as a general matter, these speeders are not a high priority. But the police chief's policy, unlike President Obama's immigration orders, would allow each police officer in the field to decide, on a case-by-case basis, whether any speeders should be pulled over.

Second, unlike President Obama's immigration orders, the police chief's policy is not providing an alternate punishment/remedy for speeders' behavior. The police chief is not unilaterally defying a statute, declaring that affected speeders can now perform community service or pay a fine of only $1.00, when the applicable statute mandates a fine of at $100, and does not allow community service. And finally, unlike President Obama's immigration actions, the police chief's action does not confer any affirmative benefits on the affected speeders and thus reward them for speeding. He does not instruct his field officers to give the affected speeders a gift card or arrogate onto himself the unilateral power to grant them government benefits.

If "prosecutorial discretion" grants the President a Bermuda Triangle power to alter legal status, alter legal remedy, and confer benefits, the implications are vast and unacceptable in a republic such as ours. The President would have the power to refuse to enforce (or delay enforcement of) any provision of law with which he disagrees. This, in turn, would essentially give the President a "dispensing power" such as that possessed by the monarchs of England.

It would give the President the power to grant "privileges" exempting from various laws categories of individuals—perhaps wealthy donors or other important members of the President's political base. A President with the power to grant such privileges will inevitably invite supplication by other groups, who would beg for a similar opportunity to suck at the presidential teat.

If the President has the further authority to not only define and grant such categorical exemptions from law but also to confer affirmative benefits upon those within the defined category (e.g., work permits, drivers' licenses, LPR status, citizenship and other benefits), there would be massive distortion of the rule of law, encouraging willful disregard by "favored" groups of the President. There would be, in other words, a permanent invitation to lawlessness and corruption.

If allowed to stand, therefore, President Obama's unilateral executive actions on immigration would destroy the relevance of Congress as in institution, undermine the rule of law, and destroy democracy itself. It would be the very antithesis of the "faithful" execution of our laws.

V. PRESIDENT OBAMA'S IMMIGRATION ORDERS VIOLATE FEDERALISM

The President's various executive actions on immigration—particularly DAPA because it is the largest in scope—violates the Constitution's vertical separation of powers, or federalism. It profoundly harms the States, as they must bear the costs of educating, providing health care and various other state benefits to millions of illegal immigrants now allowed to remain.

But beyond these palpable financial harms, the President's immigration executive actions injure state sovereignty by occupying a field and preempting state law—and hence, state police power—when the executive lacks constitutional power, acting alone, to occupy this field. To put it another way, while a duly enacted immigration law of Congress may occupy the field of immigration and preempt state power, there can be no constitutionally valid preemptive scope given to immigration policies unilaterally designed by the President, as he lacks any constitutional power to impose such policies in the first place.

In *Arizona v. United States*, the Supreme Court ruled that federal immigration law field preempts much of States' power over immigration.[121] But when a President unilaterally acts, it deprives States of both their police power and representation in Congress, imposing changes without democratic deliberation. All of the States exercise their police power in the shadow of the Supremacy Clause.[122] But when the President becomes a lawmaker, his actions are not entitled to preemptive scope because they are not legitimate exercises of constitutional power. By taking these unilateral executive actions on immigration, President Obama has not merely bypassed Congress and the people, but in so doing, he has deprived the States of their representative voice in the national political process.

In the words of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, "The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure of the Federal Government itself*."[123] By giving the States a role in the selection of membership in Congress, they provided a means by which States could help shape federal policy emanating from the national legislature. When a President acts unilaterally to formulate policy, by contrast, the States' ability to shape national policy is significantly thwarted, forcing States to negotiate with one person, elected by a nationwide population, rather than 535, elected from within each of the fifty States. This dilutes the States' input and leverage in policy formation, depriving them of the opportunity that our federalist regime originally contemplated. So while unilateral executive action deprives *individuals* of their ability to have their voice heard—via their elected representatives in Congress—in the formulation of important policies such as immigration, it also equally deprives *States* of their ability to have their voice heard through the deliberative legislative process as well. As such, President Obama's unilateral orders on immigration not only violate the horizontal separation of powers, by trenching on the lawmaking prerogative of Congress, but also the vertical separation of powers, by undermining the principle of federalism.

VI. CONCLUSION

President Obama's unilateral executive actions on immigration advance a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future Presidents will have the authority to unilaterally gut tax, environmental, labor or securities laws, by enforcing only those portions with which they agree. As President Obama

[121] 567 U.S. _____ , 132 S. Ct. 2492 (2012).

[122] U.S. CONST. art. VI.

[123] 469 U.S. 528, 552 (1986) (emphasis supplied).

acknowledged in his commencement remarks at Miami-Dade College on April 29, 2011, unilateral executive action on immigration reform sets a dangerous precedent for our democracy, "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one."

President Obama was right. Democracy *is* sometimes hard. It is not easy to get a diverse country to agree on highly controversial matters such as immigration reform. It may well be that, in the end, We the People, represented by our elected members of Congress, do not wish to change the existing immigration law in a comprehensive way. Or perhaps we believe change should come incrementally, not all at once. Whatever our reason for not enacting "comprehensive" immigration reform of the type desired by President Obama, our collective inaction as a people does not give the President the constitutional authority to bypass Congress. Indeed, by their very nature, the unilateral immigration reform policies enacted by President Obama have done the opposite of what he recognized was important in this speech: Unilateral executive action does not do the "hard work" of "changing minds and changing votes, one by one," but instead hastily imposes the will of one man over the will of many. This is not how our constitutional republic is supposed to work.

Mr. GOODLATTE. Thank you, Professor.

Professor Legomsky, welcome.

TESTIMONY OF STEPHEN H. LEGOMSKY (TESTIFYING IN HIS PERSONAL CAPACITY), PROFESSOR, WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. LEGOMSKY. Thank you very much, Mr. Chairman, Ranking Member Conyers, and honorable Members of this Committee, for the privilege of testifying at this important hearing.

I appreciate that reasonable minds can and do differ about the policy decisions, but I want to respectfully share my opinion that the President's actions are clearly within his legal authority. That is not just my opinion, by the way. This past November, 135 immigration law professors and scholars joined in a letter expressing their views that these actions are "well within the legal authority of the executive branch."

We are people who have spent years and, in some cases, including mine, decades studying, teaching, researching, and writing on immigration law, and we are very familiar with what the statute allows and what it forbids.

The President has not just one, but multiple sources of legal authority for these actions, and I have submitted a detailed written statement that documents each of them. I also identify there every legal objection I could think of that the President's critics have offered, and I explain why, in my view, none of them ultimately withstand scrutiny.

So with limited time, I will hit just a few key points and refer you, please, to the written statement.

Deferred action has been standard agency practice for many decades, and it has been expressly recognized by Congress in several provisions and in many court decisions. Furthermore, every lawyer knows that statutes are not the only source of law. The most explicit legal authority for deferred action, but not the only authority, is in the formal agency regulations, which have authorized it since the earliest days of the Reagan administration. These regulations, by the way, were adopted through notice and comment procedures, and they do have the force of law.

None of these laws, not one of them, says or even remotely implies that deferred action is per se illegal whenever the number of recipients is large.

The most vocal critics, including Judge Hanen in Brownsville, have misunderstood what deferred action is. They have confused deferred action itself with certain things you can apply for if you get deferred action. Deferred action itself is just one form of prosecutorial discretion. It is a decision not to prioritize a person's removal, at least for the moment. The only thing affirmative about it is that the agency is giving the person a piece of paper, letting them know that that is the case.

Every immigration scholar and practitioner knows that deferred action can be revoked at any time for any reason, and the Government can bring removal proceedings at any time. Contrary to what my new friend Professor Foley has said, there is nothing in any law that says that this makes a person who is deportable not deport-

able or that it gives them some kind of status. That is simply not true.

It is true that existing laws allow deferred action recipients to apply for certain other things, including work permits, and if they are granted, Social Security cards.

But the executive actions do not touch any of those laws. So my feeling is, if you object to them, then by all means, argue for challenging them. But there is nothing wrong with deferred action itself, or this particular use of it.

Importantly also, DACA and DAPA applications——

Mr. KING. Mr. Chairman? Can we ask the witness to speak into the microphone, please?

Mr. LEGOMSKY. I am sorry.

Mr. GOODLATTE. Pull it a little closer to you.

Mr. KING. Thank you.

Mr. LEGOMSKY. Sure.

DACA and DAPA applications do not create binding rules or create substantive rights or statuses. The Secretary's memo says this explicitly. They are discretionary, both on paper and in actual practice. As for the latter, I hope there is a chance to expand on that subject during the question period.

Finally, there have been some melodramatic claims that if these executive actions are legal, why then there must not be any limits at all on what future Presidents can do. My written statement identify at least four significant, concrete, realistic limits. I have time now just to whiz through them.

In a nutshell, one, the President cannot simply refuse to spend resources Congress has appropriated for enforcement, as President Nixon famously discovered. But that is not a problem here because President Obama has spent every penny Congress has given him for immigration enforcement, and he has used it to remove 2 million people. Nothing in these executive actions will prevent him from continuing to do the same.

Two, the governing statutes impose limits. They will generally indicate how broad the executive discretion is in a particular area. In this case, Congress has given the Secretary of Homeland Security especially broad responsibility for, and I quote, "establishing national immigration enforcement policies and priorities."

Now nobody claims that power is limitless. It is, of course, subject to any specific statutory constraints. But to date, none of the critics have identified any specific statutory provisions that they can credibly say DACA or DAPA violate.

Three, the particular priorities can't be arbitrary or capricious. These particular executive actions set three priorities: national security, public safety, and border security. I doubt many would say those are irrational.

And fourth and finally, even if the priorities are rational, they can't conflict with any enforcement priorities that Congress has specifically mandated. But here it is just the opposite. Congress has expressly mandated exactly these very same three priorities.

So there are serious limits, and these actions fully respect them.

Thank you very much again for the opportunity to testify.

[The prepared statement of Mr. Legomsky follows:]

Written Testimony of

Stephen H. Legomsky
The John S. Lehmann University Professor
Washington University School of Law
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Before the

United States House of Representatives
Committee on the Judiciary

February 25, 2015

Mr. Chairman and Honorable members of the committee, thank you for the opportunity to testify before you. My name is Stephen H. Legomsky. I am the John S. Lehmann University Professor at the Washington University School of Law. I have taught U.S. immigration law for more than 30 years and am the author (co-author starting with the fifth edition) of the law school textbook "Immigration and Refugee Law and Policy." This book is now in its sixth edition and has been the required text for immigration courses at 183 U.S. law schools since its inception. From 2011 to 2013 I had the honor of serving as the Chief Counsel of U.S. Citizenship and Immigration Services, in the Department of Homeland Security. I have had the privilege of advising both Democratic and Republican administrations and several foreign governments on immigration policy. I have held visiting academic appointments at universities in twelve countries.

The issues that are the subject of today's hearing are ones that I have studied carefully. While I appreciate that reasonable minds can and do differ about the *policy* decisions, I take this opportunity to respectfully share my opinion that the President's actions are well within his *legal* authority. This conclusion is shared not only by the Justice Department's Office of Legal Counsel, but also by the overwhelming majority of our country's immigration law professors and scholars. On November 25, 2014, some 135 scholars and teachers of immigration law joined in a letter expressing their view that the recent executive actions are "well within the legal authority of the executive branch of the government of the United States."[1] The signers are people whose years and often decades of studying, teaching, and writing on immigration law have immersed them in the intricacies of the governing statute and related law. They are very familiar with what the statute allows and what it forbids.

The principal executive actions at the heart of the debate are those announced by President Obama, and set forth in official memoranda from Secretary of Homeland Security Jeh Charles Johnson, on November 20, 2014. One memorandum, which I'll refer to here as the "Prosecutorial Discretion Memo," lays out the Secretary's priorities for the apprehension,

[1] See https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf . The quoted conclusion appears on page 7 of the letter.

detention, and removal of aliens.[2] Generally, this memorandum continues the Department's prioritization of removals that contribute to national security, public safety, and border security. The other memorandum at the center of the debate,[3] issued on the same date (and referred to here as the "DACA/DAPA Memo") does two things. First, it expands the "DACA" program, which was originally announced on June 15, 2012.[4] DACA allows deferred action for certain individuals who arrived in the United States as children. Second, this latter memorandum establishes a program (informally known as "DAPA") that allows deferred action for certain parents of U.S. citizens or lawful permanent residents.

The critics of these actions have charged that they violate the President's duty, imposed by article II, section 3 of the Constitution, to "take Care that the Laws be faithfully executed" -- in this case, the immigration laws. The district court for the District of Columbia concluded that that argument is unlikely to succeed. *Arpaio v. Obama*, Civ. Action No. 14-01966 (BHH) (Dec. 23, 2014). In contrast, the district court for the Southern District of Texas hinted that that argument might prevail but at this writing has not yet decided, electing instead to issue a preliminary injunction on a different ground – that the plaintiffs were likely to succeed with their argument that the Administrative Procedure Act (APA) required a notice-and-comment procedure. *State of Texas v. United States*, Civ. No. B-14-254 (S.D. Tex. Feb. 16, 2015) [hereinafter cited as *Texas 2015*].[5]

This testimony focuses mainly on the constitutional issue. That discussion appears in section I below and turns heavily on both general principles of public law and the interpretation of the Immigration and Nationality Act. Because the pending Texas litigation raises additional issues concerning (a) the standing of states to challenge DACA and DAPA and (b) the interpretation of the APA, I comment on those issues as well, in sections II and III respectively. The opposing briefs in the Texas case lay out the legal arguments on both standing and the APA in great detail; in sections II and III, therefore, I merely highlight a few key points.

I
THE RECENT EXECUTIVE ACTIONS ARE WELL WITHIN THE ADMINISTRATION'S LEGAL AUTHORITY

Attempts to find legal flaws in these executive actions have tended to fall into two categories.

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[2] Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014).

[3] Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014).

[4] Memorandum from Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

[5] For a powerful criticism of Judge Hanen's opinion in *Texas 2015*, 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 (observing that the opinion is chock full of factual exaggerations, false statements of the evidence, selective citation of evidence, and distortions of the government's legal arguments).

Some of the arguments are meant to show that there is no affirmative legal authority for either the Prosecutorial Discretion Memo or the DACA/DAPA memo. Other arguments are meant to show that these policies actually conflict with either the letter or the spirit of the Immigration and Nationality Act. In this section I consider each of those concerns in turn and then briefly discuss a few miscellaneous arguments that some of the President's critics have offered.

A. There is ample affirmative legal authority for both the Prosecutorial Discretion Memo and the DACA/DAPA Memo.

1. Prosecutorial Discretion

Prosecutorial discretion is a long-established, and unavoidable, practice in every area of law enforcement today, both civil and criminal. The basic idea is straightforward: When a law enforcement agency has only enough resources to go after a fraction of the individuals whom it suspects of violating the relevant law, it has to make choices. There is no alternative.

In the specific context of immigration, Congress has explicitly authorized – arguably, in fact, *required* – the Department of Homeland Security to exercise prosecutorial discretion. In 6 U.S.C. § 202(5), Congress expressly makes the Secretary of Homeland Security "responsible" for "establishing national immigration enforcement policies and priorities." Establishing enforcement policies and priorities is the very definition of prosecutorial discretion.

If any further support were needed, the congressional intent can be conclusively inferred from the annual congressional appropriations Acts. Year after year, Congress gives the Administration only enough money to pursue a small fraction of the undocumented population. No one seriously disputes Congress's conscious awareness that its appropriations for immigration enforcement fall far short of what the Administration would need for 100% enforcement. Congress knows that there are about 11 million undocumented immigrants living in the U.S., and it knows that the resources it is appropriating enable the Administration to go after fewer than 400,000 of them per year, less than 4% of that population. In practice, DHS resources are stretched even thinner than that, because (a) a large portion of the resources must be allocated to border apprehensions; and (b) an increasingly higher percentage of unauthorized entries are by nationals of countries other than Mexico; removal of those individuals is far more resource-intensive. This means more than that prosecutorial discretion is unavoidable; it is also the clearest evidence possible that Congress *intends* for the Department of Homeland Security, like practically every other law enforcement agency in the country, to use its discretion to decide how those limited resources can be most effectively deployed.

The appropriations Acts, in fact, do more than simply evidence Congress's intent that the Administration formulate enforcement priorities. They actually mandate a specific priority on the removal of criminal offenders and, within that group of individuals, sub-priorities that depend on the severity of the crime. These mandates have been included in every annual DHS appropriations Act since the one for fiscal year 2009.[6] As discussed at the end of section B

[6] E.g., Consolidated Appropriations Act 2014, Pub. L. 113-76, Div. F, title II, 128 Stat. 5, 251 (2014); Consolidated

below, the President's recent executive actions adopt precisely these crime-related and other public safety priorities.

For still more support, one need only turn to the decision of the U.S. Supreme Court in *Arizona v. United States*, 132 S.Ct. 2492 (2012). There the Court struck down most of Arizona's immigration enforcement statute, precisely because it would interfere with the broad enforcement discretion of the federal government. On that point the Court was emphatic:

> A principal feature of the removal system is the broad discretion exercised by immigration officials. ... *Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.* ...
>
> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Id. at 2499 [emphasis added].

These authoritative recognitions of broad prosecutorial discretion – 6 U.S.C. § 202(5), the annual congressional appropriations Acts, and the Supreme Court decision in *Arizona v. United States* – are all specific to immigration law. They are further reinforced by the longstanding judicial endorsements of prosecutorial discretion in law enforcement more generally. One of the leading cases is *Heckler v. Chaney*, 470 U.S. 821 (1985). State prisoners on death row sought to compel the Food and Drug Administration to ban the drug that was to be used for their executions. The Court held that the FDA's decision not to take any enforcement action with respect to that drug was unreviewable because the decision was "committed to agency discretion by law" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). The Court said: "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, *whether through civil or criminal process*,[7] is a decision generally committed to an

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Security, Disaster Assistance, and Continuing Appropriations Act 2009, Pub. L. 110-239, 122 Stat. 3574, 3659 (Sept. 30, 2008). http://www.gpo.gov/fdsys/pkg/PLAW-110publ329/pdf/PLAW-110publ329.pdf.

[7] Emphasis added. I highlight this phrase only because one of the witnesses at a Dec. 2, 2014 House Judiciary Committee hearing asserted that prosecutorial discretion is limited to criminal cases and thus does not apply at all to civil enforcement contexts such as immigration. Testimony of Ronald D. Rotunda, *The President's Power to Waive*

agency's absolute discretion" [citing several cases]. *Heckler*, 470 U.S. at 831.

The Court relied on the breadth of an enforcement agency's prosecutorial discretion in concluding that non-enforcement decisions were ordinarily unreviewable. It explained:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. …

Id. at 831-32.

One other statement in *Chaney* must be acknowledged. In a footnote, the Court added a dictum on which critics of the President's recently-announced decision have sometimes relied: "Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" [quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)]. Such policies, the Court said, "might indicate that such decisions were not 'committed to agency discretion'" (and thus might be judicially reviewable). *Id.* at 833 n.4.

But such is not the case here, because the Administration's recent executive actions do not even approach "an abdication of its statutory responsibilities." The discussion in section A.2.c below elaborates on the limits of prosecutorial discretion. As explained there, even the combination of the Prosecutorial Discretion Memo and the DACA/DAPA Memo will still leave far more undocumented immigrants (and border arrivals) than DHS will have the resources to pursue. Thus, the new policies will not prevent the Administration from continuing to enforce the

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the Immigration Laws, Comm. on the Judiciary, U.S. House of Reps. (Dec. 2, 2014), at 10-11. Professor Rotunda cites no authority for this novel position. To the contrary, the highlighted language in *Chaney*, together with its explicit recognition of prosecutorial discretion in the indisputably civil context of FDA enforcement, is alone enough to debunk it. The previously-discussed decision in *Arizona v. United States*, in the specific context of immigration, further illustrates that prosecutorial discretion extends to civil enforcement. And if it were otherwise, it would be impossible for civil enforcement agencies to comply with the law unless – as would be rare indeed – they were so flush with resources that they could literally afford to prosecute every actor whom they suspect of having violated the relevant law. Professor Rotunda seeks to distinguish *Chaney* by asserting that it was decided on standing grounds, not on prosecutorial discretion grounds. *Id.* at 16. That claim too is both novel and indefensible. First, the word "standing" never appears anywhere in the opinion. Second, it is unimaginable that a court would hold that a person about to be executed – and with a drug that he argued would cause excruciating pain – lacks enough of a personal interest to establish standing. Third, there is no need to speculate, because the Court made its reliance on the broad nature of the agency's enforcement discretion explicit, as the passages quoted above illustrate. Despite these obvious flaws, Judge Hanen effectively credits Prof. Rotunda's novel (and indefensible) theory and turns it into a form of standing that he admits no court has ever recognized.

immigration laws to the full extent the appropriated resources allow. Under those circumstances, as long as the President continues to spend the immigration enforcement resources that Congress has appropriated, then absent some violation of an affirmative congressional mandate (which the next section of this testimony demonstrates does not exist), there is no basis for a claim of abdication.

As the Congressional Research Service has found, "no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause." Kate Manuel & Tom Garvey, Congressional Research Service, *Prosecutorial Discretion in Immigration Enforcement* (January 17, 2013), at 17. In a unanimous opinion, the Court of Appeals for the Fifth Circuit concluded: "We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997). The important takeaway is the standard that the court carefully articulated for finding an abdication: The State of Texas lost because "[t]he State does not contend that federal defendants are doing *nothing* to enforce the immigration laws or that they have *consciously* decided to abdicate their enforcement responsibilities. Real or perceived *inadequate* enforcement of immigration laws does not constitute a reviewable abdication of duty" [all emphases added]. *Id.* No one can credibly claim that an Administration that is spending all the immigration enforcement resources Congress has given it is doing "nothing" to enforce the laws, much less that the Administration has "consciously" decided to abdicate its responsibilities. And if an abdication claim could be "reject[ed] out of hand" even then, when the number of unauthorized entries was greater than today and the number of removals lower, there is even less room to intimate that the government's current policies somehow amount to abdication.

Even *Massachusetts v. EPA*, 549 U.S. 497 (2007), the case most frequently cited by those who seek to narrow the scope of prosecutorial discretion, is perfectly consistent with the recent executive actions. In that case, the EPA had refused to regulate carbon dioxide emissions from motor vehicles. The court found the EPA's explanations for its decision wanting. Even then, the court did not require the EPA to begin regulating those emissions; it merely remanded the case with instructions for the EPA to provide a better-reasoned explanation for its decision. In contrast, the Obama Administration has provided detailed, reasoned explanations for its prosecutorial discretion priorities (national security, public safety, and border security are rational enforcement priorities and in fact coincide with those that Congress itself has mandated; DACA and DAPA together bring people out of the shadows, keep families together, and recognize the moral innocence of those who were brought here as children).

As the above discussion illustrates, there is clear legal authority for prosecutorial discretion in the enforcement of the immigration laws. Even Judge Hanen agrees. See Texas 2015 at 86-87, 92 ("this court finds nothing unlawful about the Secretary's priorities.") But what is the affirmative legal authority for employing deferred action as the specific vehicle for these recent exercises of prosecutorial discretion?

2. Deferred Action

The most important point is that deferred action is nothing more than a tentative, revocable signal to a noncitizen that the government does not intend to initiate removal proceedings, at least for the moment. As the regulations explain, deferred action is simply "an act of administrative convenience to the government which gives some cases lower priority." 8 CFR § 274a.12(c)(14). To be sure, once granted, it can have various consequences. But there is nothing "affirmative" about deferred action itself, other than the act of communicating to the particular individuals that they will not be immediate priorities for removal.

That fact is often lost, since deferred action recipients benefit indirectly in various ways beyond not being immediately placed in removal proceedings. USCIS will exercise its authority under 8 USC § 1182(a)(9)(B)(ii) to authorize a "period of stay" while deferred action is in effect; by the terms of the same statutory provision the recipients are thus treated as "lawfully present" for certain narrow purposes (though deferred action will not erase their prior unlawful presence). Under the regulations, as discussed below, they are eligible for temporary work permits if they demonstrate economic necessity. 8 CFR § 274a.12(c)(14). And those temporary work permits in turn will enable them to obtain temporary social security cards. See Social Security Act, § 205(c)(2)(B)(i)(I) (requiring issuance of social security numbers to noncitizens when there is "authority of law permitting them to engage in employment in the United States").

Judge Hanen relied heavily on those ripple effects. He accepted the recent prosecutorial discretion policy but concluded that DAPA is illegal nonetheless because "[e]xercising prosecutorial discretion and/or refusing to enforce a statute does not also entail bestowing benefits." *Texas 2015* at 87.

But the key is this: The recent executive actions do not change any of those benefit policies. Deferred action recipients have long been deemed not to be unlawfully present (though they do not receive an immigration "status" as Judge Hanen continually implies); they have long been eligible for work permits; and they have long been eligible for social security cards as a result. None of that has changed. The executive actions greatly expand the number of individuals who will receive deferred action, but in no way do they alter the existing policies that govern the legal consequences of deferred action. For that reason, statements that question where the Administration gets the power to grant millions of work permits and social security cards are quite beside the point. The only real legal issue is where the Administration gets the power to grant *deferred action* in the way that it has. If it has that power, then all the other consequences flow from existing authority. If it doesn't, then those benefits will not be awarded.

By way of background, deferred action (originally called "non-priority status") – and similar programs operating under different names – have been integral parts of immigration enforcement for more than 50 years.[8] Congress, well aware of this administrative practice, has never enacted

[8] See, e.g., Office of Legal Counsel, U.S. Dept. of Justice, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014) [hereinafter OLC Opinion], at 13-20; Shoba Sivaprasad Wadhia, *Beyond Deportation – The Role of*

legislation to preclude it or even restrict it.

But the legal authority for deferred action does not rest solely, or even primarily, on congressional acquiescence in a well-known administrative practice. In several statutory provisions, Congress has expressly recognized deferred action by name. For example, 8 USC § 1227(d)(2) says that if a person is ordered removed, applies for a temporary stay of removal, and is denied, that denial does not preclude the person applying for deferred action. In addition, 8 USC § 1154(a)(1)(D)(i)(II,IV) specifically endorses deferred action (and work permits) for certain domestic violence victims and their children. Deferred action also qualifies a person for a driver's license under the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, Div. B, § 202(c)(2)(B)(viii) (May 11, 2005).

In addition to the statute, the formal regulations of the Justice Department (and now the Department of Homeland Security) have also expressly recognized deferred action by name since at least 1982. See 8 C.F.R. § 109.1(b)(7) (1982); 8 CFR § 274a.12(c)(14) (2014). Those agency regulations, adopted via notice-and-comment procedures, have the force of law.

Finally, a long line of court decisions, including at least one Supreme Court decision, explicitly recognize deferred action by name. See, e.g., *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999); *Mada-Luna v Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976).

Writing on behalf of eight Supreme Court Justices, Justice Scalia was emphatic about the broad scope of the executive branch discretion to grant deferred action: "At each stage the Executive has discretion to abandon the endeavor [referring to the removal process], 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." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999). Other courts had expressed the same view: E.g., *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983) (granting or withholding deferred action "is firmly within the discretion of the INS" and therefore can be granted or withheld "as [the relevant official] sees fit, in accord with the abuse of discretion rule when any of the [then] five determining conditions is present"); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) ("The decision to grant or withhold nonpriority status [the former name for deferred action] therefore lies within the particular discretion of the INS").

Prosecutorial Discretion (2015), chap. 4; Shoba Sivaprasad Wadhia, *In Defense of Deferred Action and the DREAM Act*, 91 Texas L. Rev. 59 (2013); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Interest L.J. 243 (2010); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L. Rev. 42 (1976).

Deferred action, then, is well-established, explicitly authorized by multiple sources of legal authority, and extremely broad. Is there, nonetheless, a legal argument that the specific exercises of deferred action in DACA and DAPA are unauthorized? I am aware of at least four attempts to advance such an argument:

a. Some have occasionally suggested that Congress's decision to mention deferred action in a few specific provisions (mainly for domestic violence victims and individuals who had unsuccessfully sought temporary stays of removal orders) indicates that Congress meant to prohibit deferred action in all other circumstances. That theory relies on the statutory interpretation maxim that (translated from Latin) the express mention of one thing excludes all others. But that principle does not apply here. When an administrative practice is as fundamental, as long entrenched, as integral to administrative practice, and as explicitly and frequently recognized as deferred action has been in statutes, regulations, and court decisions, it is inconceivable that Congress would abolish virtually the entire practice by vague inference. Had Congress intended to do something that radical, there would surely have been some mention of the issue in the legislative history, there would have been heated debate, and there would have been some clear language in the statute. There is none of these things.

b. A second claim by critics of these executive actions is that deferred action is legal if it is granted to a small number of people but illegal if granted to a large group. That argument is a non-starter. The number of individuals affected by a given set of deferred action criteria is clearly a relevant *policy* consideration. But none of the *legal* authorities that recognize deferred action – not Congress, not the executive branch, and not the courts – have stated or even remotely implied that deferred action is legal for a small number of people but illegal for a large number. (There are legal limits to the granting of deferred action, and they are discussed below, but there is *no* legal authority for the proposition that deferred action is per se illegal whenever it is extended to a large number of people.)

c. Perhaps the critics' most frequent argument – and the one on which Judge Hanen in *Texas 2015* principally relied – is that deferred action is legal when granted on an individual, case-by-case basis but illegal when granted to an entire class. For the record, I note that nothing in either the statute or the regulations prohibits immigration officials from granting deferred action, or otherwise exercising its prosecutorial discretion, in favor of a class of individuals. As discussed in section C below, previous Presidents have frequently granted either deferred action or some functionally equivalent discretionary relief (for example "deferred enforced departure," "extended voluntary departure," "family fairness") on a class-wide basis to large numbers of undocumented immigrants. As Professor Shoba Wadhia has pointed out,[9] the DC Circuit in *Hotel & Restaurant Employees Union v. Attorney General*, 804 F.2d 1256 (DC Cir. 1986), refused to review a decision of the then-INS to grant "extended voluntary departure" (a non-statutory remedy analogous to deferred action) to Salvadorans. Although the challenged decision was a denial of relief rather than a grant of relief, the takeaway from that case applies equally here. The court held: "Where Congress has not seen fit to limit the agency's discretion

[9] See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Interest L.J. 243, 287-88 (2010).

to suspend enforcement of a statute as to particular groups of aliens, we cannot review facially legitimate exercises of that discretion." *Id.* at 1271-72. The court thus specifically endorsed the authority of the immigration agency to grant non-statutory relief on a group basis.

More important here, even if the law prohibited class-based discretion, both DACA and DAPA expressly require precisely the individualized, case-by-case, discretionary evaluations on which the critics insist – as explained below. Surely, however, that doesn't mean, and to date none of the critics have identified any legal authority that suggests, that it is illegal for the agency to provide general criteria to guide the evaluation of individual cases.

To the contrary, the courts have consistently recognized the Administration's broad discretion to implement deferred action by announcing general categorical criteria. The courts were well aware of those categories; often they quoted them in their opinions. Indeed, there is no other way for an agency to guide its officers as to how to exercise that discretion. For example, the Eleventh Circuit in *Pasquini*, above, 700 F.2d at 661, quoted the 1978 INS Operating Instructions' five criteria for officers to consider: "(1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States -- affect [sic] of expulsion; (5) criminal, immoral or subversive activities or affiliations." The court then noted the discretion of the INS district director. *Id.* at 662. The Ninth Circuit in *Nicholas*, above, 590 F.2d at 806-07, likewise quoted the then five general categorical criteria for deferred action. The Supreme Court in *Reno*, above, similarly quoted a treatise that listed the several general categorical criteria the INS was then instructing officers to consider in deferred action cases. 525 U.S. at 483-84, quoting from 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h]. The fact that the agency had laid out general categorical criteria did not prevent the court from recognizing the agency's use of deferred action.

All of this is consistent with common sense. When an agency sets its enforcement priorities – whether via deferred action or any other vehicle – there are two ways it could proceed. The agency could leave it up to each individual police officer and each individual prosecutor to decide what he or she thinks the agency's enforcement priorities ought to be. Or, as the Secretary of Homeland Security has done here, the agency can formulate those priorities at the leadership level. The latter approach is far preferable. Enforcement priorities are important policy decisions, and important policy decisions should be made by the leaders, who are politically accountable. In addition, only the leadership can disseminate guidance throughout the agency so that the people on the ground know what they are supposed to do, so that these important priorities will be transparent to the public, and so that there will be some reasonable degree of consistency. Consistency in turn is essential to equal treatment. To the extent avoidable, the decision whether to arrest or detain or prosecute should not depend on which officer happens to encounter the person or which prosecutor's desk the person's file happens to land on.

Perhaps most crucial of all, there is nothing inconsistent about adopting general threshold criteria at the front end while still requiring individualized, case-by-case discretion at the back end. On

this issue there has been a great deal of misinformation. As the following discussion will show, both the Prosecutorial Discretion Memo and the DACA/DAPA Memo embody precisely that combination of steps.

The Prosecutorial Discretion Memo lays out three sets of high enforcement priorities but is replete with language that authorizes officers to deviate from the stated priorities in circumstances that either require them to weigh and balance various factors or are defined in such broad terms as to amount to the exercise of discretion. Some language goes further still, explicitly instructing officers to use their "judgment" (often after consultation with a supervisor). See, e.g., section A, priority 1, last paragraph; priority 2, last paragraph; priority 3, last sentence. Conversely, the memo specifically instructs officers that it is not meant to "prohibit" or even "discourage" enforcement actions against individuals who are *not* priorities; such decisions are similarly assigned to ICE field office directors, who are to use their "judgment" to decide whether removal "would serve an important federal interest" – again, language broad enough to make the resulting decisions highly discretionary. If this were not enough, the memo contains a section D, entitled "Exercising Prosecutorial Discretion," which lists numerous factors that officials "should consider." It even adds "These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances."

The DACA/DAPA Memo takes a similar approach. It repeatedly mandates "case-by-case" evaluation, for both DACA and DAPA (as the original 2012 DACA memo did). At least one critic has suggested that that language might mean that the adjudicator's case-by-case evaluation is limited to determining whether the person meets the threshold criteria – as opposed to additionally deciding whether discretion should be favorably exercised. Other language in the memo, however, removes any doubt. Section B, after laying out certain threshold criteria for DAPA, expressly limits DAPA to cases that "present no other factors that, *in the exercise of discretion*, makes the grant of deferred action inappropriate" [emphasis added]. And on page 5, the next-to-last paragraph of the memo reinforces this point. It explains that "immigration officers will be provided with specific eligibility criteria for deferred action [for both DACA and DAPA], *but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis*" [emphasis added]. Meeting the eligibility criteria, in other words, is not enough.

So both memoranda are filled with clear, careful, explicit, repeated commands to officers to make individualized, case-by-case discretionary judgments. How can critics defend their persistent claims that DACA and DAPA lack individualized consideration when the Secretary's memoranda that tell officers how they are to decide these requests say precisely the opposite?

With the actual memoranda directly contradicting their claims, some critics have effectively resorted to accusing the Administration of perpetrating a scam. Judge Hanen in *Texas 2015* called the discretionary factor a "pretext." *Id.* at 109 n. 101. Professor Blackman makes a similar accusation. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 Tex. Rev. of L. & Politics (forthcoming 2015), § IV(A,B,C) [hereinafter cited as

Blackman II]. The charge appears to be that in practice no such individual evaluation – and no such discretionary determination – ever takes place. Given the wording of the memoranda, this claim amounts to saying that DHS employees have been systematically disobeying the Secretary's clear and repeated instructions to exercise discretion in each case. Yet the critics have not offered any credible evidence to support that charge or any other reason to expect such a counter-intuitive result.

They have tried. Judge Hanen, in *Texas 2015* at 11, credited the assertion of USCIS adjudicator and union president Kenneth Palinkas that DHS leadership "has guaranteed that [DACA] applications will be rubber-stamped for approval." *Texas 2015*, Doc. No. 64, Pl. Ex. 23 at 3 (hereinafter "Palinkas Dec."). Mr. Palinkas's sole support for that assertion was that DACA requests are adjudicated by USCIS Service Centers, which do not conduct in-person interviews. The Service Center adjudicators study the documentary record, however, and in addition background checks include submission of fingerprints and consultation of the relevant law enforcement databases. Since USCIS service centers perform the vast majority of all USCIS adjudications, the Palinkas assertion is in effect a wholesale indictment of the bulk of USCIS's work. That the absence of in-person interviews automatically converts the Service Centers' decisions into rubberstamp approvals will come as a surprise to the millions of applicants who have received USCIS denials over the years. It would certainly surprise the more than 38,000 DACA requestors who have been denied on the merits. *Texas 2015*, at 10 (not even counting the more than 40,000 rejections at the lockbox stage for errors such as incomplete applications, failure to enclose the application fee, etc.). At any rate the Service Center adjudicators may refer DACA requestors for field office interviews when they believe that the decision will depend on factors that can best be ascertained in that manner. Neufeld Declaration, para. 20 & App. C.

The judge similarly credited Mr. Palinkas's unsupported, and wildly inaccurate, assertion of "a 99.5% approval rate for all DACA applications." *Texas 2015* at 109 n.101, citing Palinkas Doc., para. 8. Yet the detailed data that USCIS had long posted on its public website shows an approval rate of only 95% — a number Judge Hanen casually minimized as coming from "other sources." *Texas 2015* at 109 n.101. The actual denial rate of 5%, in other words, was approximately 10 times the 0.5% denial rate that Mr. Palinkas had invented. See USCIS website, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf (through Sept. 30, 2014).[10]

[10] While some might assume at first blush that even 95% is a high approval rate, it is not high when one considers who actually files requests for DACA. An undocumented individual with some additional misconduct in his or her background is unlikely to proactively approach the government, reveal his or her name, address, undocumented status, and additional negative information, and provide fingerprints – nor is that person likely to send the government $465 – if he or she is unlikely to receive deferred action. For all these reasons, DACA requestors tend overwhelmingly to have strong cases. A denial rate of 5%, therefore, provides no reason to believe that DACA requests are being rubber-stamped; to the contrary, it shows that thousands of denials occur even among this highly self-selected group. To the contrary, the fact that hundreds of thousands of DACA-eligible individuals have not requested it suggests there are many who fear they would be denied, either for failure to meet the threshold criteria or in the exercise of discretion.

Further, at Judge Hanen's request, the government provided several examples of cases where USCIS had denied DACA on discretionary grounds even though the requestors had met the threshold criteria. See *Texas 2015*, Exh. 44, Declaration of (Associate Director for Service Operations) Donald W. Neufeld, at 510, para. 18 [hereinafter the Neufeld Declaration]. In his sworn declaration, Mr. Neufeld stated that "USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met." *Id.* He furnished specific examples. They included cases where a person had committed or had attempted to commit fraud in *prior* applications or petitions (not in connection with the DACA requests themselves), or where a person met all the threshold criteria but had previously made a false claim of U.S. citizenship and had had prior removals. *Id.* Despite this record evidence, Judge Hanan stated that "No DACA application that has met the criteria has been denied based on an exercise of individualized discretion." *Texas 2015* at 109 n.101. Elsewhere in the opinion, he similarly stated that "the Government could not produce evidence concerning applicants who met the program's criteria but were denied" and on that basis "this Court accepts the States' evidence as correct." *Id.* at 11 n.8. Apart from the fact that the government had produced precisely such evidence – and at the judge's request – the states in fact did not submit *any* "evidence" that there had been no discretionary denials. They merely asserted, without any factual support, that the applications were being "rubberstamped."

Moreover, officers must exercise a great deal of discretion just to apply some of the broadly-worded threshold criteria themselves. Whether someone endangers the public safety, for example, is more than simply a matter of finding facts. How probable the danger has to be and how severe the potential harm has to be before someone will be considered a threat to public safety are matters of opinion, not fact. The same is true when the question is whether the person is a threat to national security. 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. See, e.g., *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332-33 (11th Cir. 2003) (determinations of "exceptional and extremely unusual hardship," which is a statutory prerequisite for cancellation of removal, are discretionary and therefore unreviewable); *Romero-Torrez v. Ashcroft*, 327 F.3d 887, 889-92 (9th Cir. 2003) (same). Nor is there any apparent legal or policy reason to value either exercise of discretion more than the other. Either way, leadership is providing general guidance at the front end and officers, after considering the facts of the individual case, are exercising discretion at the back end.

As with most of its adjudications, USCIS officers use a standardized form when issuing denials. The DACA denial template has gone through several iterations. The earliest versions contained boxes that the adjudicator would check to indicate the reason for the denial. The listed reasons included the various threshold criteria for DACA and, as a ground for denial "*You do not warrant a favorable exercise of prosecutorial discretion because of other concerns*" [emphasis added]. See http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf, page 442.[11] During my tenure as Chief Counsel of USCIS from October 2011 to October 2013, I

[11] Professor Blackman reproduces one of the older (undated) versions. See Blackman II, at 29. One of the checkboxes on that version covered certain criminal convictions and then added "or you do not warrant a favorable

personally recall seeing the DACA denial template and noticing the explicit inclusion of an option for discretionary denials. I do not believe that all the subsequent versions of the check-box style template have been publicly released, but the only other versions that I have found similarly included this option. See http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf, App. F (showing versions issued on March 13, 2013; May 2, 2013; and one undated version). The inclusion of that option reminds the adjudicators of the Secretary's instruction that DACA requests may be denied in the exercise of discretion even when all the threshold criteria have been satisfied. At any rate, it appears that USCIS has now switched from a checkbox format to a narrative format, at least if the final denial templates use the same format as the Notices of Intent to Deny (NOIDs) that are reproduced in the Neufeld Declaration at 554-55.

Judge Hanen also commented that (conversely) "there is no option for granting DAPA to an individual who does not meet each criterion." *Texas 2015* at 109. That statement is literally true but highly misleading. With or without DACA and DAPA, anyone may request deferred action for any of the humanitarian or other reasons for which deferred action had traditionally been granted; the fact that the DACA and DAPA criteria do not apply is not disqualifying.

Finally, even if the record had demonstrated that USCIS officers have been systematically disobeying Secretary Napolitano's explicit 2012 instructions to exercise discretion when deciding DACA requests – and as the above discussion shows, it does not – there is no basis for enjoining the future operation of DAPA. To do so requires further speculation that, in the future, officers will systematically disobey the instructions that Secretary Johnson issued in his November 20, 2015 memoranda. Once DAPA becomes operational, if evidence were to emerge that no discretion is actually being exercised, then there might well be cause for complaint. But when the Secretary's memoranda expressly require individualized case-by-case discretion, shutting down an entire program before it starts, based solely on speculation that officers might fail to exercise the discretion they've been ordered to exercise, is not defensible.

At any rate, an earlier decision by the federal district court for the District of Columbia specifically rejected the claim that USCIS adjudicators were not actually evaluating the facts of each individual case. *Arpaio v. Obama*, Civ. Action No. 14-01966 (BHH) (Dec. 23, 2014), at 31-32.[12]

d. One last attack on the specific use of deferred action in DACA and DAPA is the claim that, if these policies are legal, then there are no limits to executive power. A future President, these critics say, could refuse to enforce the civil rights laws, or the labor laws, or the environmental laws, or the consumer safety laws.

But this line of argument is similarly misconceived, for there are several substantial, concrete,

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exercise of prosecutorial discretion because of national security or public safety concerns." That language clearly conveyed to the officers that they were to exercise discretion when making public safety and national security determinations, but admittedly it didn't confirm that discretionary denials could also be based on other grounds.

[12] The court also held the plaintiff lacked standing to bring the suit.

and realistic limits to executive discretion. I would suggest four:

First, every statutory structure is different. In each case, the initial question should be what the relevant statute says. In particular, how much discretion does it give the executive branch to formulate enforcement priorities?

In the present context, as noted earlier, Congress has given the Administration exceptionally wide discretion. 6 USC § 202(5) gives the Secretary of Homeland Security not only the power, but the "responsibility" for "establishing national immigration enforcement policies and priorities." Under 8 USC § 1103(a)(1), the Secretary is "charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens," except when those powers and duties are assigned to other specified executive officers. 8 USC § 1103(a)(3) requires the Secretary to, among other things, "issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act." Those general powers are subject to any specific constraints otherwise imposed, but as discussed earlier, the executive actions at issue here do not violate either specific provisions or the spirit of either the INA or any other statutes.

Second, resource constraints matter. If the executive were to refuse to substantially spend the resources Congress has appropriated for enforcement, then a serious legal issue would be presented, as President Nixon discovered. But DACA and DAPA do not even approach the sort of hypothetical non-enforcement policies that this argument conjures up. From its first days in office, the Administration has spent every penny Congress has appropriated for immigration enforcement. It has removed more than 2 million immigrants. More important still is this reality: Even after DACA and DAPA are fully operational, there will still remain in this country at least – and this is a conservative estimate – 6-7 million undocumented immigrants to whom these policies don't apply. And as noted earlier the President still will have only enough resources to go after fewer than 400,000 of them per year – i.e., less than 7% of even the non-DACA/DAPA population. Again, the resources are unlikely to permit even 400,000 removals of undocumented immigrants, because those same resources must also be used for border security and, further, because non-Mexican nationals comprise an increasingly large percentage of unauthorized entries and require significantly more resources per removal. Therefore, nothing in these new policies will prevent the President from continuing to enforce the immigration laws to the full extent that the resources Congress has given him will allow. As long as he does so, it is impossible to claim that his actions are tantamount to eliminating all limits.

Third, the particular priorities can't be arbitrary or capricious, see 5 USC § 706(2)(a), or otherwise violate equal protection or other individual constitutional rights. Both the Prosecutorial Discretion Memo and the DACA/DAPA Memo prioritize national security, public safety (through the removal of criminal offenders by severity of crime), and border security. But with a fixed pot of money, prioritizing some areas means de-prioritizing other areas. The President has de-prioritized breaking up families and upending the lives of those who have lived in the U.S. peacefully and productively for many years. Most Americans would likely agree those are sensible priorities. Few could deny they are rational.

Fourth, the particular priorities cannot conflict with any that the legislature has mandated. Here, Congress has specifically mandated that the Administration prioritize three things – national security, public safety (through the removal of criminal offenders by severity of crime), and border security. Again, those are exactly the 3 priorities that both the Prosecutorial Discretion Memo and the DACA/DAPA Memo expressly incorporate. The Administration's priorities not only don't conflict with those of Congress; they expressly accommodate them.

Despite claims to the contrary, therefore, serious tangible, practical limits do exist. As this discussion has shown, the recent executive actions fully respect all four of those limits.

3. Work Permits

In continuing to grant work permits to deferred action recipients who can demonstrate economic necessity, USCIS is exercising a discretionary power expressly granted by Congress, incorporated into the formal regulations, and in active use for more than three decades. Importantly, the recent executive actions do not change the agency's policies on work authorization in any way.

In 8 U.S.C. § 1103(a)(1), Congress charged the Secretary of Homeland Security with "the administration and enforcement" of all the immigration laws (except for any laws that Congress has assigned to other executive officers or departments). Section 1103(a)(3) then instructs the Secretary to "establish such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

From the earliest days of the Reagan Administration, the former INS (where the analogous immigration responsibilities then resided) understood this authority to include the power to decide which noncitizens should receive permission to work. See OLC Opinion, note 7 above, at 21 n.11. Exercising this power, the INS regulations specifically authorized work permits for recipients of deferred action. 8 C.F.R. § 109.1(b)(7) (1982).

When Congress later enacted the Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (Nov. 5, 1986) [IRCA], it did so against the backdrop of this existing regulation and made this authority explicit. In 8 U.S.C. § 1324A(h)(3), Congress defined the term "unauthorized alien" (meaning an alien who is not authorized to work) as excluding lawful permanent residents and aliens who are "authorized to be so employed by this Act *or by the Attorney General*" [now the Secretary of Homeland Security] [emphasis added]. Congress thus expressly authorized the Attorney General (now the Secretary of Homeland Security) to grant work permits, and specifically to people whom the statute itself does not already authorize to work. And at least since 1982, deferred action recipients have continued to be among the classes of aliens whom the immigration agency (now USCIS) specifically makes eligible for work permits, provided they demonstrate the economic necessity to work. The relevant provision currently appears in 8 C.F.R. § 274a.12(c)(14 (2014). See also *Perales v. Casillas*, 903 F.2d 1043, 1048-50 (5th Cir. 1990) (treating the executive power to decide which noncitizens may work as "unfettered" and

therefore not only discretionary, but so "committed to agency discretion by law" that it is not even subject to judicial review). Nor did Congress put any numerical limit on the number of work permits USCIS may issue – and Congress knows how to impose numerical caps when it wants to. See, e.g., 8 USC §§ 1151-1153 (immigrants), 1184(g) (temporary workers), 1184(o,p) (certain victims of human trafficking, domestic violence, and other crimes).

Despite this broad and long-accepted authority, some critics of DACA and DAPA have disputed this power. In effect, they argue that the statutory phrase "or by the Attorney General" should be interpreted to mean "or by the Attorney General in cases where this Act already authorizes employment." See, e.g., Jan Ting, *President Obama's "Deferred Action" Program for Illegal Aliens is Plainly Unconstitutional* (Dec. 2014), at 18-19, citing John C. Eastman, *President Obama's "Flexible" View of the Law: The DREAM Act as Case Study*, Roll Call (Aug. 28, 2014). They maintain that the only classes of noncitizens for whom Congress meant to allow the Attorney General to authorize employment were those whom Congress had already so authorized. That, of course, would render the phrase "or by the Attorney General" superfluous, since the individuals whom Professors Ting and Eastman concede this phrase covers would already be covered by the phrase "by this Act." It would also render superfluous all the statutory provisions that preclude work permits for specific classes of noncitizens. For example, Congress has prohibited the employment of business visitors, 8 USC § 1101(a)(15)(B); visitors for pleasure, *id*; asylum applicants for the first 180 days, 8 USC § 1158(d)(2); noncitizens in removal proceedings (unless already authorized to work), 8 USC 1226(a)(3); and (with exceptions) noncitizens who are awaiting execution of final removal orders, 8 USC § 1231(a)(7). All those provisions would be surplusage if, as the critics argue, the only people who could receive work permits were those already affirmatively so authorized by statute.

Professors Eastman and Ting attempt to support this interpretation nonetheless. They note that, before the 1986 enactment of IRCA, the Immigration and Nationality Act already (in Professor Ting's words) "separately authorizes or requires" the Attorney General to grant work permits. They argue that these latter provisions are the ones that would be superfluous if the Attorney General possessed the broader discretion to grant work permits to any class of aliens. But there are two flaws in this argument. First, the argument ignores the *Perales* decision cited above (finding no statutory limits to the work permit authority). Second, the specific provisions cited by Professor Ting are not, as he describes them, ones that "*authorize or* require" work permits [my emphasis]. The cited provisions are all mandatory.[13] Their superfluousness argument thus falls apart. Congress has *required* DHS to grant work permits to some, *forbidden* DHS to grant work permits to certain others, and *permitted* DHS to grant work permits to others in its discretion. There is nothing superfluous about that.

The only other argument Professor Ting offers on this score is that post-IRCA legislation added some new classes of noncitizens for whom issuance of work permits was indeed discretionary. Ting, above, at 26 n.80. But that is a thin reed on which to rely. All the cited post-IRCA provisions (relating to domestic violence victims and to nationals of Cuba, Haiti, and Nicaragua)

[13] They include 8 U.S.C. § 1101(i)(2) (requiring work permits for T-visa recipients) and refugees, asylees, and recipients of temporary protected status (all of whom similarly *must* be granted work permits).

singled out these particular groups for strong humanitarian reasons. The provisions authorizing the grant of work permits to those groups were obviously intended to be ameliorative. If Congress, through a simple charitable act of allowing work permits for those few groups, had thereby intended a change as momentous as the one Professors Ting and Eastman are hypothesizing – i.e. simultaneously prohibiting the grant of work permits to all those who had been eligible since the early 1980s unless specifically singled out elsewhere in the statute – the legislative history would surely have revealed at least a debate on the issue. They assign unrealistic weight to the fact that parts of a humanitarian provision contained language that was unnecessary because of an otherwise more general, unrelated provision of a long statute.

B. Nothing in the recent executive actions conflicts with either the letter or the spirit of the Immigration and Nationality Act or any other federal statute.

Critics of DACA and DAPA continually assert that the President's actions violate, or disregard, or suspend, or ignore the immigration laws. Rarely, however, do they ever attempt to identify any specific provisions of the law that they claim he has violated.

There is one exception. Critics will occasionally cite section 235 of the Immigration and Nationality Act, codified as 8 U.S.C. § 1225. Their argument is as follows: Section 1225(a)(1) defines an "applicant for admission" as "an alien present in the United States who has not been admitted or who arrives in the United States ..." In turn, section 1225(a)(3) says that "[a]ll aliens ... who are applicants for admission ... *shall* be inspected by immigration officers" [emphasis added]. Finally, section 1225(b)(2)(A) provides that "in the case of an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a [removal] proceeding" [emphasis added].

The argument rests on the use of the highlighted word "shall." The critics interpret this combination of provisions to mean that an immigration officer violates the law unless he or she detains, and initiates removal proceedings against, literally every noncitizen who is believed to be unlawfully present in the United States – regardless of the priorities set by Departmental leadership for deploying its limited enforcement resources.

Two federal judges in Texas have credited that argument. While holding that the court had no jurisdiction to consider an action brought by ICE agents challenging DACA, Judge O'Connor in *Crane v. Napolitano*, Civ. Action No. 3:12-cv-03247-O (N.D. Tex.) (Apr. 23, 2013 and July 31, 2013), suggested in dictum that section 1225 does indeed literally mandate removal proceedings against every noncitzen whom immigration officers believe is not "clearly and beyond a doubt entitled to be admitted." . Judge Hanen in *Texas 2015*, at 88-90, did the same. Under that interpretation, there is no room for any exercise of prosecutorial discretion.

That line of argument, however, has been thoroughly discredited. A superb law review article by Professor David Martin—former General Counsel of the INS and Principal Deputy General Counsel of DHS—identifies its many fatal flaws. David A. Martin, *A Defense of Immigration-*

Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade, 122 Yale L.J. Online 167 (2012), http://yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade. As Professor Martin points out, the argument first of all is immediately inapplicable to the approximately 40% of the undocumented population who were legally admitted on temporary visas but overstayed. Having already been admitted, they are not "applicants for admission" as expressly defined by section 1225(a)(1). Therefore they do not fall within even the literal language of subsections (a)(3) and (b)(2)(A) on which the critics' argument depends.

But even as to the remaining undocumented immigrants – i.e., those who entered without inspection and whom the statute does classify as applicants for admission – the argument collapses for several reasons. First, the word "shall" is routinely used in the law enforcement context. Interpreting the word "shall" in an analogous subsection of section 1225, the Board of Immigration Appeals explained in *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (BIA 2011), that "[i]t is common for the term 'shall' to mean 'may' when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring." *Id.* at 522, citing a long line of court cases that interpret "shall," in the enforcement context, as subject to prosecutorial discretion. See especially *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005) (declining to interpret "shall" literally in the law enforcement context). That result is a matter of common sense. If it were otherwise, then practically every law enforcement agency and every law enforcement officer in the country would be violating the law every day by failing to do the impossible, because almost no agency has the resources to arrest and prosecute every possible offender.

Moreover, that interpretation would be hard to square with the many statutory provisions that expressly authorize officers to use their discretion in deciding whom to refer for removal proceedings. These include not only the deferred action provisions discussed earlier, but also 8 U.S.C. §§ 1182(d)(5)(A) (parole), 1225(a)(4) (withdrawal of application for admission), and 1229c(a)(1) (voluntary departure "in lieu of" removal proceedings). Together, those provisions provide a statutory structure that is incompatible with the notion of mandatory removal proceedings for everyone suspected of being unlawfully present – even if, contrary to reality, there were enough resources to do so.

Finally, even the district court in *Crane* acknowledged that, although in its view the officer was required to issue the Notice to Appear, the officer could then unilaterally cancel the Notice to Appear before the immigration judge acquires jurisdiction, or DHS could move to dismiss the case thereafter. *Crane*, Apr. 23, 2013 Order, above, at 24, citing 8 CFR § 239.2(a,c). The court did not attempt to explain why Congress would require such a wasteful and irrational procedure –i.e., why it would require the immigration officer to detain the person, issue a Notice to Appear, and then cancel the Notice, rather than simply not file the charge in the first place.

Unable to convincingly identify any specific statutory provision with which DACA and DAPA conflict, the critics have often made vague suggestions that these policies violate the spirit, or the overall design, of the immigration laws. Again, given the long history of both prosecutorial

discretion generally and deferred action in particular, given the numerous applications of deferred action or similar large-scale relief policies announced by previous Administrations (discussed below), given that until now these types of actions have rarely been questioned, and given the fact that Congress has been well aware of the practice and has never legislated to prevent it, this argument is hard to understand.

Still, some have tried to support the "spirit" argument by citing some of the statutory provisions that allow the government, in its discretion, to grant *lawful permanent resident* status to people who meet certain specific conditions. Their argument is that this shows Congress intended not to allow benefits for those who don't meet those conditions. But that argument is a nonsequitur. The fact that Congress is willing to give lawful permanent residence – a green card – to only *some* people doesn't tell us anything about whether the Administration, in setting enforcement priorities, may grant *temporary* reprieves from removal, and *temporary* permission to work, to others. Deferred action, in fact, does not grant anyone an immigration status of any kind, let alone a permanent status; it is merely temporary relief from removal, revocable at any time for any reason. See, e.g., *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014) ("Like recipients of other forms of deferred action, DACA recipients enjoy no formal immigration status.") Judge Hanen's repeated objections to DACA and DAPA granting a "status" are, therefore, misplaced. See Kalhan, above, §§ I-IV (quoting and refuting Judge Hanen's strong reliance on the notion that DACA and DAPA confer an immigration "status").

Along similar lines, some critics have argued that DACA and DAPA are inconsistent with Congress's failure to pass the DREAM Act and its failure to enact comprehensive immigration reform. See, e.g., Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown L.J. Online (forthcoming 2015), at 19-21 [hereinafter Blackman I]. Congressional inaction is cast as an indication that Congress objects to broad relief for undocumented immigrants. First, congressional inaction tells us nothing about Congress's intentions. If it did, then the failed attempt of the 113th Congress to block DACA and DAPA would be at least as indicative of Congress's intentions as Congress's failure to enact the DREAM Act or comprehensive immigration reform. Second, again, a congressional decision not to provide a path to *lawful permanent residence* tells us even less about its views on temporary reprieves from removal and temporary permission to work.

Another form of "overall spirit" argument appears in Professor Ting's article, cited above. He maintains that the recent executive actions (unlike other exercises of prosecutorial discretion) do more than "refrain from detaining and expelling millions of illegal aliens." Ting, above, at 5. Quoting the OLC opinion, he says they "openly tolerate an undocumented alien's continued presence in the United States for a fixed period." *Id.* Professor Ting does not acknowledge how sweeping that argument would be if it led to the conclusion he wants to reach. By his reasoning, deferred action could *never* be permissible (unless, presumably, the person already has a valid immigration status and therefore doesn't need deferred action). *Any* time deferred action is granted to a person who is not already in lawful status, the person's continued presence is being "openly tolerated" for some period. That is the tradeoff that the policy benefits of deferred action present and that the long and previously unquestioned administrative practice of deferred

action has reflected. At any rate, Professor Ting's observation – while a relevant, albeit unconvincing policy consideration – does not raise any identifiable legal barriers.

Professor Blackman has argued that the OLC opinion went off course by arguing that DAPA furthers the generic congressional concern with family unity. Blackman I, § III. He argues – and to this extent, I agree – that Congress's desire to promote family unity was a qualified one. Balancing family unity against competing goals, Congress credited only certain family relationships. In particular, it was unwilling to grant lawful permanent resident status to the parents of under-age-21 U.S. citizen children. See 8 USC § 1151(b)(2)(A)(i).

But even if one attaches only small weight to OLC's argument that DAPA *affirmatively* furthers Congress' family unity objectives, deferred action is not *limited* to promoting family unity. Deferred action has been awarded for a wide range of humanitarian objectives, *including* family unity. The Immigration and Nationality Act itself contains a myriad of provisions that promote humanitarian concerns other than family unity. They provide relief based on long-term residence, e.g. 8 USC §§ 1182(h)(1)(A) (discretionary relief even for noncitizens who have committed crimes, if the crimes occurred more than 15 years earlier), 1259 (registry, for those who have lived here since 1972); those who fear persecution on specified grounds, 8 USC §§ 1157 (overseas refugees), 1158 (asylum); victims of human trafficking or other crimes, 8 USC § 1101(a)(T, U); and domestic violence victims (many provisions).

Professor Blackman further argues that previous "similar" grants of deferred action have all been instances in which the deferred action was "a temporary bridge to permanent residence or lawful presence." Blackman I, at 6. For many DAPA recipients, of course, the same will be true, depending on how they entered, the age of their sons or daughters, and other variables. Moreover, other executive programs that were the functional equivalents of deferred action – but with different labels, like "family fairness," "extended voluntary departure," or "deferred enforced departure" – had nothing to do with temporary bridges to lawful status. They were granted for a range of humanitarian reasons, including dangerous country conditions and the recent deaths of their spouses. See section I.C.2 below. Indeed, in many cases it was Congress that took action years after the grant of temporary protection to offer an opportunity for permanent legal status. Extended Voluntary Departure recipients from Poland, Afghanistan, Ethiopia, and Uganda were allowed to adjust their status to permanent residence through the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331, 1400-01 (1987). And after President George H.W. Bush issued an Executive Order deferring the deportation of Chinese nationals and granting them work authorization following the Tiananmen Square massacre, Congress enacted legislation to permit those people to adjust their status. Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 (1992). Finally, after President Bush granted Deferred Enforced Departure to 2,000 Persian Gulf evacuees of various nationalities who were airlifted from Kuwait during the Persian Gulf War, Congress enacted a private immigration law to permit those who had not already adjusted their status through some other means to adjust their status. Priv. L. No. 106-8, 114 Stat. 3099 (2000). In none of these cases was executive action provided as "a temporary bridge to permanent residence or lawful presence." Rather, what all these programs have had in common is that they

were non-statutory, purely executive actions granting temporary reprieves from removal and temporary work permits to large numbers of (in almost all cases undocumented) immigrants – just like DAPA.

Family unity and the imminence of some other lawful status are certainly legitimate *policy* reasons to grant deferred action or similar relief. But the reason executive discretion is necessary is that no humans – not members of Congress, not Presidents, not agency leaders – can anticipate every conceivable humanitarian need. The executive's discretion to base discretionary relief on new combinations of equities is essential; it cannot, and never has been, limited to any specific equities – either when exercised ad hoc or exercised for a large number of individuals.

Finally (on the subject of the overall structure of the immigration laws), there is indeed a recurring theme in Congress's various enactments. Far from supporting the critics of the President's recent executive actions, however, it affirmatively does the opposite. As noted earlier, both the Prosecutorial Discretion Memo and the DACA/DAPA Memo expressly reflect the Administration's prioritization of national security, public safety, and border security. These are precisely the priorities that Congress has directed the Administration to pursue. See, e.g., note 5 above (citing annual appropriations Acts prioritizing removal of criminal offenders); 8 U.S.C. §§ 1225(b)(1), 1225(c), 1226(c)(1)(D) (prioritizing national security and border security).

C. Other miscellaneous objections similarly fail.

1. Some of the critics' legal arguments have been directed at straw persons. Some, for example, have seized on the President's frequent statements that he acted because Congress had failed to act. They have argued that Presidential action doesn't become legal simply because Congress has not acted. Blackman II, at 43-45.

But no one claims otherwise. When the President explains that he is acting because Congress has not, he isn't asserting congressional inaction as his *legal* authority for acting. The legal authority comes from the multiple independent sources described in subsections I.A and I.B above. The President's references to congressional inaction are simply to make the point that he would have had no policy reason to exercise his legal authority in this way if Congress had fixed the problem legislatively as he has encouraged it to do.

2. Another argument has been that the President's actions do not become legal simply because previous Presidents have adopted similar policies. (The critics have sought to distinguish the programs of previous Presidents in any event, as discussed below.) While those previous Presidential actions lend *additional* credence to the President's legal authority, the legal authority, again, is independently provided by the many sources of law already described in sections I.A and I.B above. And apart from their supplementary legal value, the analogous actions of his predecessors negate the oft-repeated, but unsupported claim that his actions are so extreme as to be outside the range of acceptable political norms. Undoubtedly, the Administration has also been eager to contrast the congressional and public acceptance of his predecessors' actions with the hyperbolic reactions of many to DACA and DAPA. But the legal

authority, again, rests independently on the many sources already described.

Because the critics have also attempted to distinguish the actions of previous Presidents, a few observations about those comparisons might be helpful. In the past several decades, almost every President has used his executive powers to grant temporary reprieves from removal, and temporary permission to work, to large, definable classes of undocumented immigrants — for humanitarian, foreign policy, or other legitimate reasons. See, e.g., *Arpaio v. Obama*, above, at 6 (summarizing some of the recent Presidents' actions); Bridge Project, *Executive Actions Speak Louder than Words*, http://www.bridgeproject.com/wp/assets/Executive-Action-8.8.14.pdf; American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014), http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_5.pdf.

Despite the obvious parallels, critics of President Obama's recent executive actions have sought to distinguish his predecessors' programs. Professor Ting, for example, observes that Congress eventually passed legislation embracing, rejecting, or limiting some of those policies. Ting, above, at 9. That, of course, tells us nothing about either their legality or their compliance with political norms at the time the policies were adopted. Ting argues in the paragraph on pages 9-10 that those policies are further distinguishable because they were based on foreign affairs considerations, an area in which the President enjoys special powers. And indeed some of the prior Presidents' actions were based on foreign affairs. But not all were. The Reagan and Bush family fairness programs, which I turn to now, were not based on foreign affairs at all. They were based on family unification, just like DACA and DAPA.

Congress in 1986 had granted legalization to certain undocumented immigrants but not to their spouses and children. IRCA, above, title II. President Reagan immediately granted relief from deportation to the children (provided both parents or a single parent were legalization beneficiaries), and President Bush Senior later extended those benefits to the spouses and granted them work permits as well. These policies were called the "Family Fairness" program. The precise sequence of legislative, executive, and media developments is summarized in Immigration Policy Center, *Reagan-Bush Family Fairness: A Chronological History* (Dec. 9, 2014), http://www.immigrationpolicy.org/just-facts/reagan-bush-family-fairness-chronological-history [IPC Chronology].

Professor Ting argues these programs are meaningfully different from DACA and DAPA. He says that "Presidents Reagan and Bush regarded these individuals as victims of an oversight in the drafting of IRCA and worked with Congress to fix it." *Id.* at 10. Ting offers no support for that claim, and the record conclusively shows it to be false. Congress, in passing IRCA, made a conscious decision *not* to cover the family members of the legalization beneficiaries; Presidents Reagan and Bush provided executive relief nonetheless. Among the hard evidence is the Senate Judiciary Committee report on the bill that became IRCA. It specifically says: "It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning right by virtue of the legalization." Interpreter Releases (Oct. 26, 1987), at 1200, 1201, reproducing 1987

INS memo that cites S. Rep. No. 99-131 (99th Cong., 1st Sess. 343 (1985). See http://www.prwatch.org/files/ins_family_fairness_memo_oct_21_1987.pdf. A Chicago Tribune article adds: "The law said nothing about legalizing children or spouses who came after the start of 1982. *Although Congress considered including them, conservative groups who opposed letting more immigrants into the country derailed the idea.* Moreover, Congress mistakenly assumed that the legalized immigrants would patiently petition the government to let their relatives into the United States" [emphasis added]. Chicago Tribune (Aug. 24, 1990), http://articles.chicagotribune.com/1990-08-24/news/9003110433_1_illegal-immigrants-immigrant-families-deport. The fear was that including the family members could jeopardize passage in the House, where the vote was expected to be extremely close (and in fact was -- the legalization program ended up passing the House by only seven votes). IPC Chronology, above. And on October 7, 1987, the Senate defeated an amendment that would have put the spouses and children on a path to legalization. Two weeks later, the Reagan Administration announced its program for the spouses even as the INS was acknowledging the "clear" intent of Congress to exclude the family members from the IRCA legalization program. *Id.* Thus, even Professor Ting's representation that Presidents Reagan and Bush *thought* Congress's omission of the family members was an oversight in the drafting is not true.

Controversy has also emerged over the expected scale of the Bush Family Fairness program. The Bush program was announced on February 2, 1990. At the time, the predictions as to the number of eligible family members varied widely. In the previous year, the INS Statistical Yearbook said the agency had received 3.1 million applications for IRCA legalization and estimated that approximately 42% of those individuals (that would be about 1.3 million) were married. It reaffirmed that estimate one year later. (On the one hand, the Yearbook did not comment on how many of the spouses already qualified independently for IRCA; on the other hand, it did not have any estimates as to the number of children who would be eligible for Family Fairness.) Two newspapers quoted INS officials as estimating the number of beneficiaries at "more than 100,000 people," though that estimate appeared to be referring to the predicted number of applicants (expected to be much lower than the number of eligibles because many eligibles were expected not to apply). Another INS spokesperson said it "may run to a million." A few days later, an INS "Draft Processing Plan" estimated that "greater than one million" would apply. On the same day an INS internal Decision Memorandum to the Commissioner said the program "provides voluntary departure and employment authorization to potentially millions of individuals." About two weeks after that, INS Commissioner Gene McNary, testifying before the House Judiciary Committee, stated that Family Fairness would cover approximately 1.5 million already present in the United States and appeared to imply that yet another 1.5 million people outside the United States would also become eligible (though Mr. McNary, when contacted in late 2014, suggested he might have been misunderstood). As it turns out, far fewer than those numbers actually applied, largely because the Immigration Act of 1990 opened up alternative avenues for most of these individuals. See IPC Chronology.

Based on the congressional testimony of the then-INS Commissioner and the other data suggesting similar numbers of eligibles, the Obama Administration and numerous advocates have quoted the 1.5 million figure. They have pointed out that, like DACA and DAPA today, it

amounted to roughly 40% of the then-existing undocumented population. The critics (including a controversial "fact-check" by Washington Post blogger Glen Kessler, since corrected for serious errors at least twice) have seized on the fact that the actual number of Family Fairness applicants turned out to be much smaller than the Commissioner's predictions. But the critics (including the "fact-checker") miss the point, in several respects. First, the key point is not how many actually applied, or even how many were actually eligible (as to which the 1.5 million figure was probably reasonably accurate). Rather, the point was that at the time of President Bush's announcement his Administration was *predicting* (notwithstanding INS Commissioner McNary's protest, 24 years later, that he was misunderstood) that 1.5 million would be eligible and still saw no legal barrier to going forward. Nor was there an outcry from either Congress or the general public.

Perhaps most important of all, while the parallels to Family Fairness make that program a natural point of comparison, one must remember that, even if it were distinguishable, it is still just one of the many examples of executive actions granting temporary reprieves from removal, and temporary permission to work, to large categories of undocumented immigrants. In addition, even the totality of the examples is not being cited as the sole, or even primary, legal authority for DACA and DAPA. As noted earlier, they rest on multiple other sound legal grounds. The examples are offered mainly to show that DACA and DAPA have not exceeded acceptable political norms and to stress the need to judge President Obama's policies by the same standards that have been applied to previous Presidents.

3. Some critics have argued that DACA and DAPA, unlike mere decisions not to prosecute, cannot be justified on the basis of resource limits. They claim that these executive actions do not conserve resources, at least not for those individuals whom the agency has not yet encountered. To the contrary, they say, these policies drain the Department's law enforcement resources. As to the latter, they point to the money USCIS has had to spend to hire additional adjudicators and lease the necessary physical space. See, e.g., Blackman II, at 34-37. The plaintiffs in *Texas 2015* made a similar claim, *id.* at 16; to his credit, Judge Hanen acknowledged that this was not a matter for the court.

The argument founders for several reasons. First, contrary to the critics' assumptions, DACA and DAPA *do* help conserve enforcement resources. By identifying and investigating millions of undocumented immigrants, USCIS can sift out the low-priority candidates so that ICE and CBP can more efficiently direct their resources to the high-priority targets. In addition, the DACA/DAPA process enables USCIS to receive and compile massive amounts of data on millions of undocumented immigrants; these data will be invaluable to ICE and CBP in the event DACA/DAPA recipients later commit acts that make them high-priority removal targets.

The claim that these programs affirmatively drain enforcement resources fundamentally misconceives both the separate missions and the separate funding structures of the various DHS immigration agencies. For one thing, USCIS is an adjudications agency, not a law enforcement agency like ICE and CBP. Nothing it does reduces ICE's or CBP's enforcement resources. More important, the administrative costs entailed by DACA and DAPA are funded by the

requestors themselves, not by congressional appropriations. Neufeld Declaration, paras. 5, 26; see also 8 USC § 1356(m). It is true that the personnel and physical facilities have to be in place before the offsetting revenue from the DACA requests actually arrives. But that is merely a *cash flow* consideration, not a net expenditure.

Perhaps most important of all, while DACA and DAPA do indeed help to conserve scarce immigration enforcement resources, that is not the only objective they accomplish. The other policy benefits are discussed on page 29 below.

4. Finally, the President's opponents like to use the President's own words to try to show that the President himself believes he is acting illegally. They like to cite some spontaneous answers the President has given to questions from the public. The vast majority of the answers they cite are perfectly consistent with DACA and DAPA. Some advocates have asked the President to suspend all deportations, and the President has indeed said he cannot legally do that. He has also said he cannot rewrite the law and that in our constitutional democracy he must follow the law that Congress enacts. All those statements are true. DACA and DAPA don't violate any of those principles unless the President exceeds his legal authority. For all the reasons given, DACA and DAPA do not do so.

The critics are especially fond of quoting a verbal gaffe by the President in one public gathering shortly after the announcement of DAPA. In response to a heckler who wanted him to go further, an exasperated President Obama apparently said ("But what you're not paying attention to is the fact that I just took action to change the law ...." Press Release, *Remarks by the President on Immigration* - Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014). Of course, the President should not have used the word "law." A more accurate statement would have been that he had just changed the "policy." Judge Hanen saw great significance in that error. The judge read it as proof that the President had indeed changed the law and had done so consciously, despite having previously disavowed his power to do so. *Texas 2015*, at 107 and n.94. Other critics have similarly jumped on the President for casual spontaneous oral responses that the critics argue contradict his belief that DAPA is legal. See, e.g., Blackman II, at 45-54.

The case law of the 5th Circuit does not permit courts to attach legal consequences to such casual statements. In *Professionals and Patients for Customized Care*, 56 F.3d 592 (5th Cir. 1995), the court had to decide whether a policy of the Food and Drug Administration created binding norms that necessitated formal APA notice-and-comment rulemaking, or simply guidance as to the exercise of a discretionary power. The policy announcement explicitly required the exercise of discretion, but warning letters sent out by the FDA contained language that implied binding norms. The court refused to give significant weight to the letters. It explained: "Informal communications often exhibit a lack of 'precision of draftsmanship' and such internal inconsistencies are not unexpected, which is why such documents are generally entitled to limited weight." *Id.* at 599. If even written letters lack enough precision and formality to justify being treated as significant, common sense suggests that the President's spontaneous oral reaction to a heckler would command even less weight.

II
STANDING

In *Texas 2015* the plaintiff states offered multiple theories for establishing standing. Ultimately, Judge Hanen accepted two of them. Because the opposing briefs provide detailed analysis and argumentation on standing, I take this opportunity to highlight only a few key points.

Judge Hanen's principal basis for finding standing was that the federal government's grant of deferred action would make the recipients eligible for driver's licenses. In turn, at least one state (Texas) argued that the average cost of processing a driver's license exceeded the application fee. Increasing the number of eligible drivers, the state argued, would therefore have a net negative fiscal impact on the state.

But that theory is highly problematic. First, the state's estimated costs are based on statewide averages. Presumably those averages include the amortized share of the fixed costs – DMV facilities, equipment, administrative overhead, etc. Texas never alleged – much less offered evidence of – *any* marginal new cost attributable to the speculative number of deferred action recipients. The state failed to show, in other words, that it would have to hire any additional personnel, acquire any additional space, or obtain any additional equipment to handle the marginal increase in driver's license applications – much less that any marginal new costs would exceed the additional revenue.

Second, the state's calculations reflected only part of the fiscal equation. In estimating its "losses," the state rightly deducted the extra revenue from the application fees, but it never deducted any of the huge tax savings that studies have consistently shown DAPA will generate – even though, as the court acknowledged in a footnote, the amicus briefs had provided empirical evidence that DAPA would have a net *positive* fiscal impact. See *Texas 2015* at 51 n.38. See also the impressive study by the Center for American Progress, *Economic Benefits of Executive Action for Texas* (Feb. 19, 2015), http://www.scribd.com/doc/248188359/Economic-Benefits-of-Executive-Action-for-Texas. (finding that increased taxes from higher wages would increase Texas's tax revenues by $338 million over five years – about three times the amount of the costs Texas claims it will incur.)

The likely positive fiscal impact on the state impedes the very purpose of the standing requirement. As the Supreme Court has observed, the rationale for the standing requirement is to assure "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S 497, 517 (2007), quoting *Baker v. Carr*, 369 U.S. 186,204 (1962). When a state stands to gain from the very policy it is asking a court to invalidate, the incentive to litigate vigorously is to that extent diminished.

Third, even if there were some credible factual basis for Texas's claim that its additional costs will exceed its additional revenue gains, it takes little imagination to see where acceptance of its theory would lead. The court emphasizes that it is the fact of the injury, not its size, that matters

for purposes of standing. *Texas 2015* at 23 n.15. If that is so, and if the mere fact that favorable immigration decisions by the federal immigration agency could have a net negative fiscal impact for a particular state were enough to confer standing, then the state in which a given noncitizen lives would have standing to challenge every individual grant of deferred action that it considered erroneous. After all, that person would become eligible to apply for a driver's license. In fact the theory would not stop with deferred action. The court's logic would permit the state to challenge every grant of every immigration benefit that leads to eligibility for a driver's license or any other state benefit. A state by the same reasoning could challenge any grant of naturalization, since citizenship could make the person eligible for state welfare benefits. And apart from individual cases, a state could even more easily demonstrate standing to challenge any federal immigration agency interpretation of law or policy decision that is likely to lead to a greater number of individuals becoming eligible for driver's licenses or any other benefit.

Perhaps aware of those pitfalls, Judge Hanen invented a second, alternative theory – "abdication" standing. The theory – which the court acknowledged no court has ever adopted, see *Texas 2015* at 67 n.48 -- is that a state will have article III standing to sue if the federal government asserts the exclusive right to act but abdicates its statutory duty to do so. As applied here, Judge Hanen's argument was that DHS had refused to enforce the law against 40% of the undocumented population.

First, for all the reasons discussed on pages 5-6 above, even if there were a legal basis for this theory, there can be no serious claim that DHS has "abdicated" its statutory responsibilities. Second, if abdication could be demonstrated, and standing thereby established, simply by showing that an agency with the resources to pursue only 4% of the violators had decided to confine its focus to 60% of them, then practically every law enforcement agency in the country would be subject to daily lawsuits from states or individuals who objected to the agency's enforcement priorities.

III
THE ADMINISTRATIVE PROCEDURE ACT: NOTICE AND COMMENT RULEMAKING

In *Texas 2015*, Judge Hanen preliminarily enjoined DHS from implementing either DAPA or the expansion of DACA. It found that the plaintiff states were likely to prevail with their claim that these executive actions required notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 USC § 553.

The issue was whether the executive actions constituted "general statements of policy," which the APA specifically exempts from the notice-and-comment requirements. The Supreme Court has interpreted that term to include "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979). In *Texas 2015*, the outcome of that test ultimately depended on whether DHS was

truly exercising a "discretionary" power, rather than requiring officers to apply binding criteria. Since that is precisely the same issue presented by the states' constitutional and statutory claims discussed in section I.A.2.c, it is not necessary to repeat that analysis. As that previous discussion illustrated, the evidence in the record conclusively demonstrates the discretionary nature of both DACA and DAPA.

A Word on Policy

Although the main purpose of this testimony is to assure the Committee that the recent executive actions are on solid *legal* footing, I note briefly that these programs serve several common-sense *policy* goals as well. To summarize a few: Most will agree that, with finite resources, it is sensible to prioritize national security, public safety, and border security over separating families and destroying the long-term ties of those who have lived peacefully and productively in their communities for many years. Positive grants of deferred action draw the recipients out of the shadows and into the open. These individuals provide their names, addresses, and histories, and the government performs background checks to assure public safety. Surely this is healthier for everyone than maintaining a permanent underground culture. Police chiefs and other law enforcement professionals know that communities are also safer when undocumented immigrants who are either victims of crimes or witnesses to crimes feel secure enough to report the crimes to the police rather than avoid contact for fear of being deported.[14] Federal and state tax revenues from those who receive deferred action will increase.[15] Unscrupulous employers who currently know they can hire unauthorized workers at low wages will have less reason to hire them over U.S. workers and will no longer be able to drive down overall market wages or working conditions in the process.[16] And as many have shown, these executive actions can stimulate economic growth in additional ways.[17]

Conclusion

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[14] Charlie Beck, Chief of the Los Angeles Police Department, Statement to the U.S. Senate Committee on the Judiciary, *Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform* (December 10, 2014); Richard Biehl, Chief of the Dayton Police Department, et al., Letter to U.S Senate Committee on the Judiciary (December 9, 2014); James R. Hawkins, Chief of the Garden City Police Department, Statement to the U.S. Senate Committee on the Judiciary, *Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform* (December 10, 2014); National Task Force to End Sexual and Domestic Violence (NTF), Letter to U.S. Senate Committee on the Judiciary (December 9, 2014), http://4vawa.org/4vawa/2014/12/11/ntf-supports-president-obamas-deferred-action-for-parents-and-expansion-of-the-deferred-action-for-childhood-arrivals-program.

[15] White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration* (2014), http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf; Elizabeth H. Shuler, Secretary-Treasurer, AFL-CIO, Statement to the U.S. Senate Committee on the Judiciary, *Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform* (December 10, 2014), http://www.judiciary.senate.gov/imo/media/doc/12-10-14ShulerTestimony.pdf., at 2-3.

[16] *Id.*

[17] *Id.*

Reasonable people of good faith can certainly differ over the precise priorities the President should adopt when enforcing the nation's immigration laws with finite resources. Like the overwhelming majority of other immigration law professors and scholars, however, I believe that the *legal* authority for both the Prosecutorial Discretion Memo and the DACA/DAPA Memo is clear. There are Congress's express assignment of responsibility to the Secretary of Homeland Security for "establishing national immigration enforcement policies and priorities," in 6 U.S.C. § 202(5); the additional broad authority conferred by 8 U.S.C. § 1103(a); the long-settled recognition, by all three branches of our government, of broad prosecutorial discretion; the multiple provisions in which Congress has specifically recognized deferred action by name; the formal regulations that similarly recognize deferred action by name; the court decisions that do the same; the express grant by Congress of the power to decide who may be eligible for work permits; the formal regulations that have long made deferred action recipients specifically eligible for work permits; the absence of numerical limitations in any of these legal sources of authority; and the fact that the recent policy announcements will not prevent the President from continuing to spend all the immigration enforcement resources Congress gives him. All these sources lead to the same conclusion: The President's actions are well within his legal authority.

Thank you once again for the privilege of testifying before this Committee.

Mr. GOODLATTE. Thank you, Professor.

I will start the round of questioning, and I will recognize myself. I will start with a question for you, Professor Legomsky.

You state in your testimony that the "Administration's recent executive actions do not even approach an abdication of its statutory responsibilities."

What, in your view, would the Administration have to do to abdicate its statutory responsibilities? Would granting deferred action to all 11 million unlawful aliens be enough?

Mr. LEGOMSKY. My answer to that is yes, that would be enough.

Mr. GOODLATTE. So would, say, 9 million, would that exceed it?

Mr. LEGOMSKY. The answer to that would depend on an empirical question. The question is, would the President still be spending substantially the resources Congress has provided?

Mr. GOODLATTE. Let us remember the President, when you talk about deportations, the President counts people for deportation the previous Administrations did not count because they simply turned them back at the border rather than taking them through a process and deporting them. So about two-thirds of the people who are "deported" under the President's 2 million figure that you cited were not counted in previous Administrations, because they weren't put through that process.

But, be that as it may, you are saying that if the President blows through all the money in a way that uses it all up, whatever that number is, that is the number of people he can give not only deferred action to but also employment authorization and Social Security benefits and Earned Income Tax Credit and legal presence in the United States?

Mr. LEGOMSKY. Well, as I just said a moment ago, that is only one of what I see as four different limits. But the answer is yes. The President must spend the resources Congress has provided.

Mr. GOODLATTE. And as long as he does that, if that meets the number, if he spends it all on 100,000 people, which is the number of actual deportations that occurred last year, 102,000, then he can give deferred action to the other 10.9 million people who are unlawfully present in the United States. That is your answer?

Mr. LEGOMSKY. No, it is not, Mr. Goodlatte. For I think the third time, I think there are other limits as well, and they include not only spending the money but making sure it is within the terms of the statute, making sure the priorities are rational, making sure the priorities are compatible with those Congress has specifically mandated and so on. So it would depend on all of those things.

Mr. GOODLATTE. Well, let me just ask our other panelists, Attorney General Laxalt, would you like to respond to that assertion, that the President has this massive discretion?

Mr. LAXALT. You know, I think, zooming out, Congress has been debating this for many, many years. And in this particular case, this path was specifically not voted on by Congress. So by President Obama's own words many times over again before he did this, this is just not a power that our constitutional system contemplated him having.

If he does, as Mr. Chairman, I believe, was heading this direction, if 5 million is okay, then why isn't 6 million, and why isn't

7 million? And then, you know, if 2 years is okay, then why isn't 3?

So it seems pretty clear that, by his own words, he has stepped over. And once you add the benefits that are included, there is just no justification that this fits under prosecutorial discretion.

Mr. GOODLATTE. Let me follow up on that. You and 25 other States attorneys general, including some Governors, I think, in some States have brought an action in the District Court in Texas. Do you agree with what Judge Hanen said in his opinion in that case, that the Department of Homeland Security "cannot enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them. The DHS Secretary is not just rewriting the laws; he is creating them from scratch"

Mr. LAXALT. We believe, as the three claims that have been made, that the Constitution has been violated under the "take care" clause. The Administrative Procedures Act has been, as Judge Hanen, thwarted. He did not ultimately decide that for the sake of this preliminary injunction. He reserved that as well as the constitutional issues for the future. But the States, certainly, still believe that in all three cases the President has failed.

Mr. GOODLATTE. Let me afford that opportunity for Professor Blackman and Professor Foley to respond to that as well.

Mr. BLACKMAN. So I think that Professor Legomsky actually opined that DAPA didn't quite go far enough, and it is an important reason why. In a November 25 blog post on the Balkinzation blog, Professor Legomsky wrote that, "How come DAPA didn't apply to the parents of the DREAMers?" Right, the parents of the DACA beneficiaries?

I think this raises a very important point. Many of the professors who signed that letter think that the President didn't go quite far enough. So even the DOJ's perception was more narrow than that of the professoriate.

But I will stress for the moment that the reason why they didn't go far enough was because there has to be some sort of relationship to a parent, a group that Congress has preferred.

DACA was for people without any legal status. DAPA was for parents of U.S. citizens. One important point is parents of U.S. citizens need to wait 21 years before they can petition for a visa, followed by a 10-year bar. More importantly, parents of lawfully permanent residents can never get visas through their children. So this is a case where the policies are favoring people who have not been a class Congress has preferred.

Mr. GOODLATTE. Professor Foley?

Ms. FOLEY. Yes, I would just say it seems patent to me that both DACA and DAPA are categorical exemptions from law. And with respect to Professor Legomsky, who says that is not the case, just look to President Obama's own words when he announced DAPA publicly in November of 2014. He said in a televised speech before the Nation, "All I am saying is we are not going to deport you." I think that speaks volumes.

The other thing I would say with regard to DACA is just look at the numbers. We have 2 years of experience with DACA at this point, and the latest numbers as of the end of 2014 show that 97 percent of DACA applications have been approved by the Adminis-

tration. And in a letter from Director Leon Rodriguez to Senator Grassley not too long ago, he admitted that the reasons why the 3 percent had been rejected is because they are not filling out the paperwork properly or attaching the right check for the processing fee.

That, to me, sounds like, if you meet the criteria that has been unilaterally established by this President, you will get an exemption from deportation. And that is not what the INA declares.

Mr. GOODLATTE. Thank you.

The Chair now recognizes the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Professor Legomsky, could you respond to the question that has been posed by the Chairman?

Mr. LEGOMSKY. I will get it right this time.

First of all, the figure is 95 percent, not 97 percent. Professor Foley's numbers are quite old, and the current USCIS Web site has laid this out in detail for several months now. We can speak later, if you wish, about whether even 95 percent is too high, but it is actually 95 percent.

But second, I think, with respect, you have confused denials with rejections. When you were speaking about people losing because they hadn't signed a form or check or submitted the fee, those are the rejections. There are more than 40,000 of those. But in addition, there are more than 38,000 denials on the merits. I think it would come as quite a surprise to those folks to learn that decisions are being rubberstamped.

Mr. CONYERS. Thank you very much.

Let me ask you this. In your opinion, do the executive actions taken by the Administration, both DACA and DAPA, alleviate the need for Congress to pass broad immigration reform measures?

Mr. LEGOMSKY. Thank you, Congressman. I would say the answer is no.

As the President himself has made clear on many occasions, he can't do what Congress can do. Only Congress can create immigration status and a path to a green card and eventually citizenship. All he has done with deferred action is to say that we will give you a temporary reprieve from removal. We will make you eligible to apply for a work permit. If it is granted, then you can apply for a Social Security card.

But that does not approach a green card, which would give you the right to remain permanently, the right to eventually naturalize, and the right to bring in any of your family members and so on. Deferred action doesn't do any of those things.

Mr. CONYERS. Thank you. Let me ask you about the Texas litigation. Judge Hanen enjoined a deferred action program because he believed the applications were not being adjudicated on a case-by-case basis and concluded that this was not happening in the DACA context.

Do you think that that is a reasonable way to approach the decision in that case?

Mr. LEGOMSKY. Thank you. I am glad to have a chance to answer that question, because it really lies at the basis of the APA denial and even the constitutional claim.

Judge Hanen had no support in terms of evidence in the record that that was true. The starting point is the Secretary's memo. It explicitly says, repeatedly, you must engage in individualized, case-by-case determinations. It also specifically says that even if the threshold criteria are met, you still need to exercise discretion.

Furthermore, there is a lot of discretion being exercised just in determining whether the threshold criteria have been met. For example, to figure out whether somebody is a threat to public safety, it is not just a question of fact. It is also an opinion as to how much of a threat a person has to be before we will deny it, and so forth.

So what the critics are really reduced to having to argue, in effect, is that this USCIS workforce is somehow going to systematically disobey the Secretary's clear, explicit instructions to exercise discretion.

There is not one shred of evidence in the record to support such an accusation.

Mr. CONYERS. Now, are the President's critics correct when they argue that the President himself does not believe DACA and DAPA are legal? Has he contradicted himself somewhere along the line?

Mr. LEGOMSKY. I don't want my answer to sound disrespectful, but that has been one of the most irritating objections that I have been hearing along the way. I know that it makes for good political theater to keep saying the President has contradicted himself. But when you actually look at the statements the President has made, with just one exception, almost all of them have just been grand, general statements about how "I have to obey the law. I cannot suspend all deportations," which, of course, he has not done, and so forth.

He recognizes that there are limits to his discretion. And obviously, he believes that DACA and DAPA do not exceed those limits, as do the vast majority of experts in the field.

The one exception, I have to acknowledge, is the unfortunate statement made in a spontaneous reaction to a heckler at one gathering when he said, "I took an action to change the law." I am sure that if the President could go back and edit his comments, as so many of us would love to do when we speak orally, he would realize he should have said, "I took an action to change the policy," because that is a more accurate description of what he did.

But to read global, legal significance into that one offhand comment does seem to me highly misleading.

Mr. CONYERS. Thank you for the balance that you brought to this discussion.

I yield back my time.

Mr. GOWDY [presiding]. I thank the gentleman from Michigan.

The Chair will now recognize the gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Mr. Chairman, thank you.

Mr. Legomsky, let us go back to your political theater remark, because there have been two lines on that political theater that our friends on the other side of the aisle have played over and over again for audiences around the country.

One of them was kind of found in your testimony, your written testimony, that this Administration is okay because they have removed more immigrants, illegal immigrants, than any other Ad-

ministration. In fact, you state in here that they have removed, I think you said 2 million aliens.

But isn't it really a little deceptive, because aren't about half of those removals claimed by ICE? They actually originate because they are caught along the border. In fact, one of the articles pointed out said this: The statistics are deceptive because, Obama explained, enhanced border security has led to Border Patrol agents arresting more people as they cross into the country illegally. Those people are quickly sent back to their countries, but are counted as deported illegal immigrants.

Is that a fair statement?

Mr. LEGOMSKY. It is factually correct.

Mr. FORBES. Okay, then let me follow up, because I only have 5 minutes.

We had sitting right where you are sitting now the presidents of both the ICE agents and the border agents who testified unequivocally that they are the ones interviewing these people and that it is the President's policies that were causing more and more of these people coming across the border.

Isn't it really true, if you are talking about political theater, that that is, for the President to say he is sending more people back that he is stopping at the border, kind of like a fire chief justifying his right to commit arson because it helped him put out more fires. It just doesn't make sense to me.

And then when you look at the other line that they have been using on their political theater, it is this one: Well, somehow or another, if Congress doesn't act, and I determined as President of the United States that the law is broke and it just doesn't work, then all of a sudden it shifts the constitutional power over to me.

So Attorney General Laxalt, I would ask you, if you look, and you know, Congress, as I understand it, has the authority to establish a uniform rule of naturalization. Is there anything in the Constitution that says if the Congress doesn't want to act because they like where the policy is, or even because they can't act, that somehow that shifts the constitutional right over to the President, and that he can take any action that he otherwise couldn't have taken constitutionally?

Mr. LAXALT. Thank you, Mr. Congressman.

You know, this is the crux of the argument and of the lawsuit. It, certainly, is one of my biggest concerns. It has been so for many years, going back to probably when I was a law student at Georgetown.

Our Constitution is eroding, and the executive branch continues to take more and more power. I can't think of a more clear example of something that the Constitution clearly says the Congress is supposed to perform.

And as I said earlier, Congress has debated this. The President did not get the policy he wanted, and now he has decided to do it.

I would like to read a quote in answering to Professor Legomsky. I don't mean to gang up on you here, but as to your comment that the President, his multiple statements didn't exactly say he couldn't do this, a heckler told him that you have the power to stop deportations, and Obama replied, "Actually, I don't. And that is why we are here." "What you need to know, when I'm speaking as

President of the United States and I come to this community, is that if, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we are a Nation of laws. That is part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I am proposing is the harder path, which is to use our democratic processes to achieve the same goal that you want to achieve."

This President knows that he can't do this. He knows that our system did not allow him to take these extra steps. There is no question, as Judge Hanen said in his opinion, there is a wide berth for prosecutorial discretion. I don't think you are going to get a lot of argument about that.

But this goes so much further than any prosecutorial discretion that has ever been exerted. If this was allowed, then Congress' role in this entire field is abdicated. Why would Congress take year after year to debate these issues if a President is able to take a scope we have never seen before, and, in addition, add benefits on top of simply deciding to not deport?

Mr. FORBES. We saw that kind of syntax change when we heard you can keep your insurance policy, if you want to, as well. But it makes no sense that we have these arguments.

My time is out, Mr. Chairman. I yield back.

Mr. GOWDY. Thank the gentleman from Virginia.

The Chair will now recognize the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. I must begin by saying I am surprised to hear the attorney general of a great State confusing political statements with legal statements. All the quotes from the President are interesting in a political debate and a political discussion. They are not interesting in terms of what his powers actually are—his opinions, frankly, in a political context at all.

What is interesting, what is relevant, as the attorney general should know, as everyone here should know, are what the laws are, the precedents are, the court decisions are, not the President's or anybody else's political statement in any context.

Let me ask Professor Legomsky, we heard that the President's exercise of discretion, since it is categorical, is somehow different, and that he is establishing categories of people to whom he is giving rights that Congress hasn't chosen to give. Essentially, that is the gravamen of what we are being told, I think.

I think, rather, and please comment on this, that that is untrue. The President is exercising discretion in granting deferred action to certain people he can choose. The Supreme Court has said it. Congress has specifically said it. He can choose to do that by group, by category.

In fact, it would be difficult, I mean, if the President came out with a list and said the following 2 million people by name are granted deferred action, we would think that is sort of ridiculous, although I don't think anybody would question his authority to do that.

By doing it by category, I don't think he changes that. And please comment on the fact that he isn't invading Congress' prerogative because this deferred action can be revoked at any time, number one. It confers no permanent benefits. It has been stated re-

peatedly that these people get benefits. They may get a Social Security card, but my understanding is they don't get benefits.

Could you comment on those two points?

Mr. LEGOMSKY. Sure. I think everything you just said is absolutely correct.

Two things on the discretion issue. First of all, I do agree that there really is no law out there that says the President couldn't grant deferred action on the basis of a class-based discretionary judgment, if he wanted to do so. We don't have to reach that issue here, however, because the President didn't even do that. He did provide specifically, or the Secretary did, for individualized discretion.

I want to add that this is the way agencies normally behave, and it is a very sensible. You want the agency to provide some generalized guidance to its officers as to how they are to exercise discretionary power, first of all, because you want political accountability to rest with the leaders; secondly, because you want this information to be transparent, because it is important; and thirdly, the officers on the ground need to know what to do; and fourth, we want some reasonable degree of consistency. To the extent possible, you don't want relief to depend on which officer you happen to encounter or which prosecutor's desk your file happens to land on.

And in this particular case, the evidence in the record shows that, in fact, these case-by-case evaluations are being made.

Mr. NADLER. Thank you very much.

Before my next question, I would like to simply comment on some of what has been said in the dialogue with Mr. Forbes and some others.

The decision to formally remove border-crossers rather than to return them was a strategic choice first made by President Bush in order to disincentivize future illegal entries. A formal removal creates future bars to admission.

Would you comment on that?

Mr. LEGOMSKY. Sure. I think border apprehensions and priorities make sense both for the reason you just gave, Congressman, and for another very important, practical reason. It is just very smart strategy.

It is a lot smarter to stop a person at the border than it is to divert resources from the border, let people in, then try to chase them down years later.

Mr. NADLER. Thank you.

Many of the critics of the deferred action program complain that they go beyond nonenforcement of immigration laws and instead affirmatively provide a lawful status to people who were previously in unlawful status. Is that correct?

Mr. LEGOMSKY. No. Their status remains unlawful. They do have something called lawful presence, which has a very specific meaning in one particular provision. But their status definitely is still unlawful.

Mr. NADLER. Still unlawful. And finally, critics of the President's action suggest that they are unprecedented and act as though these issues are entirely novel to the Federal courts.

Hasn't the Supreme Court, in fact, spoken about the extent to which the Administration has authority to exercise prosecutorial

discretion in the immigration area specifically and whether granting deferred action is an appropriate form of that discretion?

Mr. LEGOMSKY. Yes, they have done that in a couple cases, as have many of the lower courts. One Supreme Court decision specifically recognized deferred action by name. The facts were different, but the takeaway was the same. The President has this power.

Mr. NADLER. So, finally, what about what the President has done, aside from the fact of his name, perhaps his party, and the politics of immigration, is different from what previous Presidents have done?

Mr. LEGOMSKY. I don't believe it is different. All fact situations are different in some sense, but they are not meaningfully different. A slightly different form was used than in previous cases, but the fraction of the undocumented population that the actions were predicted to effect is roughly the same. And in all other respects—the one common denominator is, in all of these cases, Presidents have used their powers to provide temporary reprieves from removal and temporary permission to work, both of them revocable, to large, specifically defined categories of undocumented immigrants. That is not unprecedented at all.

Mr. NADLER. Thank you very much.

My time has expired.

Mr. GOWDY. Thank the gentleman from New York.

The Chair would now recognize the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, it is often said that when human rights and human laws are in human hands that men lose their freedom.

Professor Foley, I sometimes am entertained by reading from the Federalist Papers to law professors like yourself. I am not an attorney, so it just gives me a little thrill, you understand?

But in Madison statements in Federalist No. 47, he stated that, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

The Framers of the Constitution understood that the accumulation of powers and tyranny were inseparable. They rejected giving the newly created Chief Executive the legal authority to suspend or dispense with the enforcement of the laws. That, of course, in their minds, was the province of Congress.

So my question to you is, do you believe that the President's recent actions comport with the Framers' conclusions? And is President Obama refusing to adhere to the "take care" clause in an attempt to evade the will of Congress? And was he acting constitutionally when he did that?

Ms. FOLEY. Congressman Franks, you ask a very salient question. Absolutely, the President here is violating the "take care" clause, because his duty under the Constitution, again, is to see to it that the laws are faithfully executed. So even if the laws are completely broken, and everybody on both sides of the aisle agree that the laws are broken, the President does not have the constitutional power to fix it. If it is going to be fixed, it has to be fixed by Congress and Congress alone.

I think the Framers would be rolling over in their graves if they knew what this President was doing.

And let me just address prosecutorial discretion for a moment, if I may. One of the hypotheticals that gets bandied about by those who support the President's action is to say, "Well, a sheriff, for example, can decide that he is only going to pull over speeders who go 5 mph or more over the speed limit and let everybody else go. That is what this President is doing. There is no difference."

There is a world of difference between those two things. What that President is doing in that hypothetical is classical prosecutorial discretion. But that is not what President Obama is doing by these actions.

To be analogous to what President Obama is doing here, that sheriff would have to, first of all, publicly pronounce to the world that he is not going to pull over the speeders despite the fact that the law says they are speeders. He would have to say, "And if I do pull anybody over, I am only going to give them a fine of a dollar, even though the statute says that it is $100 or more fine. And then maybe also when I decide I am going to pull them over, I am going to give them a gift card from Best Buy. I am going to confer benefits upon them."

That is what this President is doing, and that is clearly not prosecutorial discretion.

Mr. FRANKS. Well, I am not sure I should ask any more questions at that point.

But, Professor Blackman, do you agree with the comments, basically?

Mr. BLACKMAN. Oh, absolutely. As I noted in my opening remarks, in Federalist 51, Madison wrote, "Ambition must be made to counteract ambition." The President is ambitions; Congress is ambitious. The President wants something; Congress wants something.

The only way to prevent tyranny, to prevent tyranny from the fringe, is if both of them butt their heads. In many respects, the gridlock we have today is a symptom of that. All too often people say, oh, Washington is gridlocked. Well, people who voted for you sent you here with certain positions. And it is very much the case that today people have a very stark opinions on issues.

Now, while it is regrettable that this Congress hasn't seen to immigration reform, that is not a license to expand the President's power.

As Justice Scalia noted last year in the Noel Canning case, gridlock is a feature, not a bug, of our constitutional order. Similarly, Justice Breyer, when he looked at these issues, said that these are political problems, not constitutional problems.

So the point I would like to stress is the mere fact that Washington is gridlocked doesn't give the President additional power to transcend his constitutional authority.

Also, briefly, the Arizona case was mentioned a moment ago. It definitely said the President has powers over discretion. But in the very next paragraph, it says, but the case may turn "on the equities of an individual case." It says in the opinion, by Justice Kennedy, "the equities of an individual case."

So when you read *Arizona v. U.S.*, read both paragraphs, and this is won on a case-by-case basis. Thank you.

Mr. FRANKS. Professor Foley, let me just quickly expand on one other thing you mentioned. The Federal District Court in Texas made this distinction between the Federal Government simply not enforcing immigration laws on removal of an individual and taking the next step of actually providing lucrative benefits to unlawful aliens. That seems to be an incredibly stark precedent here. Could you expand on that a little bit?

Ms. FOLEY. Oh, absolutely. The conferral of benefits I think is the classic example of why you don't want to start going down the down this road constitutionally with the President, because think about what he is doing. He is, first of all, publicly announcing to everyone that even though the law says you shall be deportable, you are no longer deportable. And now I am going to give you this remedy called deferred action that Congress has blessed in certain other instances explicitly, but not blessed for this particular population.

And then once he makes those moves, then he confers all these benefits upon this population. I mean, that is classic bootstrapping. And if the President can make the first two moves, then why not just bootstrap and add the other move, which is the conferral of benefits.

That is what makes this so dangerous, because if Congress' core constitutional powers include anything, it is not just naturalization but it is the power of the purse. And these benefits have financial consequences, not only to the Federal Government, but, of course, to the States, which is why they have standing to sue him.

Mr. GOODLATTE [presiding]. The time of the gentleman has expired.

The Chair recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

Before asking any questions, I would ask unanimous consent to enter into the record five statements from the following organizations, explaining the legal authority for the President's actions, from the Constitutional Accountability Center, Asian Americans Advancing Justice, American Immigration Council,** National Council of La Raza, and the National Council of Asian Pacific Americans.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

****Note:** The submitted material from the American Immigration Council is not reprinted in this record but is on file with the Committee, and can also be accessed at: *http://docs.house.gov/meetings/JU/JU00/20150225/103010/HHRG-114-JU00-20150225-SD003.pdf.*

NEW REPUBLIC

President Obama's Unproductive Statements About His Productive Immigration Policy

His executive order wasn't an executive overreach

By Brianne Gorod, February 19, 2015

Earlier this week, a federal judge in Texas ordered a temporary halt to the implementation of President Obama's executive action that would defer the deportation of roughly 4.9 million immigrants. The rhetoric in his opinion echoed administration opponents who have criticized President Obama for executive overreach. The president's critics are clearly wrong when they claim he has exceeded his authority as chief executive. Ironically, though, much of the blame for their views may rest with one of the policy's biggest supporters: Obama himself.

As immigration rights advocates pushed the president to take executive action in his first term and early in his second, the president repeatedly resisted, claiming that he didn't have the authority to take the kind of action at issue in the Texas case. "I am president, I am not king. I can't do these things just by myself," he told Univision in 2010. In 2011, he discussed meeting with "immigration advocates ... [who] wish I could just bypass Congress and change the law myself." To these supporters, he responded "that's not how a democracy works." In 2013, he repeated the same message: "I'm the president of the United States. I'm not the emperor of the United States. My job is to execute laws that are passed, and Congress right now has not changed what I consider to be a broken immigration system."

The president's comments may have been motivated more by his sense of immigration politics than his views on immigration law—reports in 2014indicated that Obama was "dial[ing] down the partisan rhetoric on immigration ... [to] give House Republicans some breathing room to try to pass legislation"—but they nonetheless fueled detractors. Some on the right argued that the president didn't have the authority to take executive action on immigration; when Obama ultimately did take action, they maintained he was simply doing so in order to achieve unilaterally what he could not achieve by working with Congress. Indeed, in the decision out of Texas, the district judge wrote, "The Government must concede that there is no specific law or statute that authorizes [Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)]. In fact, the president announced that it was the failure of Congress to pass such a law that prompted him ... to 'change the law.'" (The judge formally based his decision to halt implementation not on the substance of the executive action, but on the government's failure to comply with certain procedural requirements he felt were warranted.)

But President Obama's opponents are as wrong now as he was then: He does have the authority to take executive action on immigration action, and that executive action isn't a response to congressional inaction at all. Rather, it's a response to congressional action—actions by past Congresses that have passed immigration laws that it is now the responsibility of the executive branch to enforce. There's nothing novel about this. Presidents are always asked to exercise discretion in determining how best to implement laws passed by Congress (a responsibility and power often referred to as "prosecutorial discretion"), and that's exactly what the Framers of our Constitution intended. When the Framers drafted the Constitution, their views on the presidency were shaped not only by their experiences under British rule, but also by their experiences under the Articles of Confederation, the precursor to the Constitution. The Articles lasted just eight years, and one of the central weaknesses that led to its failure was the absence of a strong executive branch capable of enforcing the nation's laws.

The Framers remedied this problem in the Constitution by creating a strong executive branch headed by a single president and vesting that president with the obligation to "take Care that the Laws be faithfully executed." Determining how best to enforce the law and what the laws mean are longstanding manifestations of that obligation. As then-Justice William Rehnquist wrote for the Supreme Court nearly thirty years ago in Heckler v. Chaney, an "agency's decision not to prosecute or enforce [a law] ... is a decision generally committed to an agency's absolute discretion." As he explained, the executive branch is in the best position to weigh competing priorities and to determine how best to enforce the law.

That's no less true in immigration than elsewhere. Indeed, the fact that "there is no specific law or statute that authorizes DAPA" is beside the point: there are lots of specific laws about immigration already on the books, and those laws necessarily require the president to make decisions about how best to use limited executive branch resources in implementing the law. After all, there are roughly 11.3 million undocumented immigrants in this country, and Congress has only provided funding to cover 400,000 removals per year. As the Supreme

Court recognized as recently as 2012 inArizona v. United States, a "principal feature of the removal system is the broad discretion exercised by immigration officials," and there are circumstances in which "federal officials ... must decide whether it makes sense to pursue removal at all."

The judge in Texas acknowledged this broad discretion, but repeatedly rejected the relevance of that principle in his opinion. Among other things, the judge described Obama's action as an "affirmative act" that went beyond simply exercising prosecutorial discretion, and he also accused the secretary of the Department of Homeland Security of "not just rewriting the laws," but "creating them from scratch." These critiques imply that the president's actions are particularly problematic because he has announced them as a formal and explicit policy, rather than deferring removals on a case-by-case basis. Put differently, the judge seems to be suggesting that this executive action is simply the president's attempt to make law where Congress failed to do so.

The president, however, was not attempting to make law without Congress. An executive action is not the same as a law passed by Congress; most significantly, it can be undone by a subsequent president in a way that a law passed by Congress could not be. And, of course, this executive action doesn't go nearly as far as what the president has repeatedly asked Congress to do.

Moreover, there is no reason to think the articulation of guidelines for the exercise of prosecutorial discretion is more problematic than the exercise of that discretion. As a group of law professors noted after President Obama announced this executive action, articulating these policies "secure[s] greater transparency by having enforcement policies articulated explicitly by high-level officials, including the President" and provides "[i]mmigration officials and officers in the field ... with clear guidance while also being allowed a degree of flexibility." Those benefits "promote[] the values underlying the rule of law," the law professors point out.

There are certainly limits to the president's power when it comes to determining how best to implement what's passed by Congress. But to figure out those limits one must look to the laws Congress has passed, not the ones that it didn't. President Obama's executive action in immigration is fully consistent with those laws; it's a shame he once said that he didn't have the authority to take executive action pursuant to the laws passed by previous Congresses.

At the end of the day, what matters is not what President Obama said about the legality of his action; what matters is what the laws and precedents say, and they make clear that his action was lawful. When the Fifth Circuit reviews this week's immigration decision on appeal, it should vindicate the views of the legal advisors who approved this action, and not the political advisors who presumably told him to say they wouldn't.

Written Statement of Mee Moua
President and Executive Director
Asian Americans Advancing Justice | AAJC

House Committee on the Judiciary

Hearing on: "The Unconstitutionality of Obama's Executive Actions on Immigration"

February 25, 2015

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national non-profit, non-partisan organization that works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Founded in 1991, Advancing Justice | AAJC is one of the nation's leading experts on civil rights issues of importance to the Asian American and Pacific Islander ("AAPI") community including: immigration and immigrants' rights, affirmative action, anti-Asian violence prevention/race relations, census, language access, television diversity and voting rights. We appreciate this opportunity to submit a statement concerning today's hearing on executive action on immigration.

Asian Americans are the fasting growing racial group in the U.S., currently making up about six percent of the U.S. population. Over sixty percent of Asian Americans are foreign born.[1] Our community members come to the U.S. in various ways – as students, family members, workers, or refugees and asylees. Dating back to exclusionary immigration laws of the late 1800s, the Asian American community has been and continues to be uniquely shaped by U.S. immigration laws. The Department of Homeland Security estimates that 1.3 million Asian Americans are undocumented. And nearly 1.8 million of the family members waiting in the backlog for family-based visas are in Asian countries.

The AAPI community stands to benefit significantly from President Obama's executive action on immigration and AAJC applauds his leadership to help immigrants and his family. Nearly 500,000 AAPIs will benefit from relief through Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parental Accountability. These discretionary programs will allow some immigrants to live without fear of deportation and separation from their loved ones. With work authorization, they will be able to more fully contribute and suffer less workplace abuse and exploitation. With an expanded DACA program, many more young immigrants will be able to continue their educations or enter the workforce.

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[1] Asian American Center for Advancing Justice, *A Community of Contrasts Asian Americans in the United States: 2011* (citing the 2007-2009 American Community Survey) at 17. *Available at:* http://www.advancingjustice.org/publication/community-contrasts-asian-americans-us-2011.

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Legal authority for the administration's actions is ample and it is grounded in the executive branch's power to enforce laws generally. Under the Immigration and Nationality Act, Section 103, 8 U.S.C. § 1103, Congress explicitly delegates authority to the Department of Homeland Security ("DHS") significant authority to determine how it will allocate enforcement resources and who it will prioritize for enforcement purposes. Since 1987, the DHS regulations have also recognized deferred action, describing it as "an act of administrative convenience to the government which gives some cases lower priority." 8 CFR § 274a.12(c)(14), added by 52 Fed. Reg. 16221 (May 1, 1987).

Moreover, courts have long expressly recognized the use of prosecutorial discretion or "non-priority status." See, e.g. *Reno v. American Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999*); Mada-Luna v Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987); *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976). This was reaffirmed most recently in *Arizona v. United States*, wherein the Supreme Court observed that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). In recent decades, both Republican and Democratic presidents have taken courageous actions to keep families together and to permit certain classes of immigrants to enter and/or remain in the United States. President Obama's recent actions simply follow earlier precedent.

Ultimately, though, the power to permanently improve and strengthen our entire immigration system rests with Congress. Executive action is necessarily limited in scope. Advancing Justice | AAJC strongly urges members of the House Committee on the Judiciary to focus their energy on passing fair and humane immigration legislation, rather than engaging in political theater. We need immigration legislation now that will allow undocumented immigrants to obtain citizenship, reunite families quickly, and protect the civil and human rights of all immigrants. We reject enforcement-focused policies that terrorize border communities, encourage profiling by state and local authorities, and incentivize detention and deportation without due process. Advancing Justice | AAJC pledges to work with all members of Congress who want to make positive changes to our immigration laws.

NCLR
NATIONAL COUNCIL OF LA RAZA

History Shows on Immigration:
First Executive Action, Then Legislation

By Charles Kamasaki [1]

In June 2013, the U.S. Senate passed bipartisan legislation to reform immigration laws. After first repeatedly indicating his intention to enact immigration reform in the House, in June 2014 Speaker John Boehner told President Obama that he would not schedule any votes on immigration in this session of Congress. The president promptly announced that while he preferred the comprehensive and permanent reforms that could be achieved only by legislation, he would soon take executive action to do what he could to fix the broken immigration system.

The president's announcement stimulated an outcry from critics who assert that such action would be unprecedented unless first authorized by Congress. In fact, the record demonstrates the exact opposite. When it comes to immigration policy, in the modern era it's almost routine for presidents to act first to permit the entry of people outside normal immigration channels and/or to protect large numbers of people from deportation, with legislation ratifying executive action coming later.

In the midst of World War II in July 1942, President Roosevelt's secretary of agriculture initiated negotiations with the Mexican government for a temporary worker agreement that eventually became known as the bracero program, an action Congress ratified a year later. When the authorization expired in 1947, the Truman administration continued to operate the program until it was reauthorized in 1951.[2] Before it ended in 1964, millions of workers had entered the U.S. under the auspices of the bracero program, hundreds of thousands under executive—not legislative—authority.

After the war ended in 1945, President Truman used his executive authority to permit 250,000 people from war-ravaged Europe to enter and/or stay in the U.S. outside normal immigration channels. It was only three years after this exercise of presidential discretion that in 1948 Congress passed the Displaced Persons Act, permitting some 400,000 additional entries.[3]

In April 1975, at the end of the Vietnam War, President Gerald Ford used his parole authority to authorize evacuation of up to 200,000 South Vietnamese to this country; it was not until a month later that Congress passed and the president signed the Indochina Migration and Refugee Act of 1975, which provided resettlement funding for some 130,000 of those parolees.[4] Full legislative authorization to protect and resettle those fleeing Vietnam, Laos, and Cambodia did not come until 1980, when Congress eventually passed the Refugee Act, overhauling the nation's refugee and asylum policy, which resulted in the eventual permanent resettlement of some 1.4 million Indochinese in the U.S. Although technically most entered as bona fide refugees, hundreds of thousands were paroled into the U.S., both prior to 1980 and afterward when statutorily authorized numbers proved inadequate.[5]

But these broad exercises of discretion were unusual situations, limited to refugees fleeing shooting wars a long time ago, and are not applicable to people already here, right? Wrong. Presidents have exercised their discretion more than 20 times since the mid-1970s to permit people already in the U.S. from being returned to their home countries. Some, such as Czechoslovakians, Hungarians, Romanians, and Poles, sought to avoid being returned to a Soviet Bloc country. Iranians in the 1980s would have been forced to live under the regime that had occupied the American embassy and held our people hostage. Afghans in the 1980s and 1990s were protected first from the Soviet puppet state and later from the Taliban. Others, from Rwanda, Ethiopia, Uganda, Lebanon, Kuwait, and Serbia, would have been returned to face civil strife or civil war. Still others, from Sierra Leone and Burundi and several Central American countries in the 1990s, sought refuge from natural disasters such as famine-induced drought or hurricanes abroad.[6] It was not until 2003, several decades after the practice of country-specific relief from deportation was first deployed, that Congress specifically authorized and codified the practice now known as "temporary protected status."[7]

Critics like to point out that most of these were temporary provisions for fairly small groups. However, the record shows that Congress made many executive orders of temporary relief permanent, often years after the fact. For example, just before and after Fidel Castro took power in Cuba in 1959, more than 900,000 Cubans fled to the U.S., the vast majority of whom were paroled into the country by Presidents Eisenhower, Kennedy, and Johnson. It was not until 1966, some seven years after the influx began, that the Cuban Adjustment Act was passed. The act theoretically only provides discretion to parole Cubans into the U.S. and eases access to lawful permanent resident status, although in practice few Cubans who reach U.S. soil are ever returned.[8]

Fourteen years later, in 1980, 130,000 Mariel Cubans and nearly 40,000 Haitians arrived in South Florida. Most, but not all, of the Cubans were paroled into the U.S. by President Carter. Haitians initially were protected from deportation only by successful litigation challenging the denials of their asylum claims; most of these Haitians, and some Cubans whose entry had been challenged, eventually received discretionary "Cuban-Haitian entrant status" in the Reagan administration. Six years later, the Immigration Reform and Control Act of 1986 (IRCA) created a process leading to lawful permanent resident status for Cuban-Haitian entrants.[9]

In 1987, President Reagan's attorney general, Edwin Meese, directed the Immigration and Naturalization Service (INS) to not deport any of the estimated 200,000 Nicaraguans in the U.S. without authorization, including those whose asylum claims had been denied. Subsequently, after Congress had in 1990 first authorized 18-month temporary protected status for Salvadorans fleeing their country's civil war, President George H.W. Bush instructed the attorney general to provide "deferred enforced departure status" to an estimated 190,000 Salvadorans. It was not until Congress passed the Nicaraguan and Central American Relief Act in 1997, more than a decade following Meese's initial exercise of discretion,that all members of these groups were permitted to adjust to lawful permanent resident status.[10]

In 1989, President George H.W. Bush's attorney general, Richard Thornburgh, instructed the INS to provide temporary deferred enforced departure status to some 80,000 Chinese students in the U.S. who feared returning to the civil strife that eventually led to the Tiananmen Square

massacre. Two years later, President Bush issued an executive order extending their deferred enforced departure status. Congress then passed the Chinese Student Protection Act in 1992, some three years following the attorney general's initial executive action, making the students eligible for lawful permanent resident status.[11]

Okay, so major exercises of prosecutorial discretion have benefitted those fleeing war, seeking to avoid returning to civil strife, or whose situations involved Cold War foreign policy considerations, but never for domestic policy reasons, right? Wrong again. Broad executive actions have been used by virtually every modern administration on more than a dozen occasions to further purely domestic policy and humanitarian objectives. For example, in the aftermath of various domestic emergencies—the San Francisco earthquake, the 9/11 attack, Hurricanes Katrina and Ike, and wildfires in California and elsewhere—immigration and disaster relief officials typically have relaxed enforcement efforts, in part to advance public health and safety goals.[12] Every recent administration in office during a decennial Census, beginning with President Carter in 1980 and continuing through President Bush in 1990, President Clinton in 2000 publicly instructed immigration officials to reduce enforcement efforts across the country during the Census. While under President George W. Bush "immigration enforcement officials did not conduct raids for several months before and after the 2000 Census," in 2010 under President Obama, the Department of Homeland Security issued far more circumscribed guidance instructing immigration officials not to interfere with the Census.[13]

Other exercises or discretion have gone well beyond specific emergencies or events like the Census. In 1977, President Carter's attorney general, Griffin Bell, temporary suspended the deportation of an estimated 250,000 people in the so-called "Silva class" who had successfully argued in federal court that they had unfairly been denied visas by a quirk in the allocation process. It was not until nearly a decade later, via IRCA in 1986, that all of these cases were resolved.[14]

In 1990, George H.W. Bush's INS commissioner, Gene McNary, issued a "Family Fairness" policy deferring the deportation of and granting work authorization to 1.5 million immediate family members of people who had qualified for legalization under IRCA, building on an earlier, more limited exercise of discretion in 1987 by Edwin Meese. It was not until late 1990, more than three years following Meese's original executive action, that Congress codified the practice in the Immigration Act of 1990, making all of those affected eligible for permanent residence.[15]

In 1997, President Clinton provided deferred enforced departure status to some 40,000 Haitians previously paroled into the U.S. who had applied for asylum before December 1, 1995. At the end of the 105th Congress a year later, legislation allowing these Haitians to adjust their status was enacted.[16]

The historical record is clear: presidents of both parties have used their discretionary powers on multiple occasions to protect various groups from deportation for an enormously wide variety of reasons. Moreover, in virtually every case, except those clearly linked to temporary conditions abroad, Congress has acted, albeit often years later, to ratify the president's original decision. And wisely so, because reflecting on this history makes another point clear: would we now, with the benefit of 20-20 hindsight, have reversed any of these major executive actions? Would we

Statement for the Hearing Record

Before the

House Judiciary Committee

"The Unconstitutionality of Obama's Executive Actions on Immigration"

February 25, 2015

Chairman Goodlatte, Ranking Member Conyers, members of the Committee, on behalf of the National Council of Asian Pacific Americans (NCAPA) and our thirty-four national Asian Pacific American organizations, we thank you for the opportunity to submit this statement for inclusion in the record for today's hearing.

We commend President Barack Obama on his leadership to provide nearly 5 million immigrants, including more than 400,000 Asian American Pacific Islanders (AAPIs), with temporary relief from deportation. The creation of the expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs, without question, falls squarely within the President's lawful executive authority.

The deferred action programs announced in November of 2014 are part of the Department of Homeland Security's plans to set and effectuate enforcement priorities. Setting and effectuating enforcement priorities fall within the appropriate exercise of prosecutorial discretion of the Secretary of Homeland Security. Indeed as a law enforcement agency with limited resources, the Secretary must make reasoned and thoughtful decisions on how to deploy enforcement resources most effectively. In fact, we believe the Department can and should go further in considering equities in decisions related to detention and removal to prioritize family reunification for all families and the needs of individuals who have come to the United States to escape war and economic turmoil.

As was most recently reiterated by the United States Supreme Court in *Arizona v. United States* immigration law is exclusively within federal control. Though the implementation of expanded DACA and DAPA are temporarily on hold due to a preliminary injunction granted by a federal district court judge earlier this month, the ruling was not based on any constitutional grounds. In

fact legal experts and scholars agree that President Obama's executive actions on immigration were well within his legal authority.

It is important to note that the President's executive actions came after months of Congressional inaction on legislative solutions. NCAPA will continue to press the Administration to further use its legal authority to grant relief from deportation to members of the undocumented community who do not have U.S. citizen or lawful permanent resident children as well as addressing families who face prolonged separation due to the visa backlogs in the family immigration system. NCAPA will also continue to push Congress, including members of this Committee, to seriously debate permanent legislative solutions to our broken immigration system and enact comprehensive, meaningful and humane reforms that benefit AAPI immigrants as well as our country as a whole.

Ms. LOFGREN. Thank you.

Professor Legomsky, I just want to say publicly that I have been in Congress for 20 years. I have read a lot of testimony in many hearings over the years. Your testimony is the singular best, most concise, logical testimony I have ever read in my 20 years in Congress, and I thank you very much for your service in that way.

I would like to ask you just a few questions. Professor Foley, in her testimony, indicates that the undocumented immigrants who are covered by DACA and DAPA are "no longer deportable," and that, according to the Office of Legal Counsel, "Illegal immigrants who fall outside these three priorities are not to be deported at all."

Do you agree with that? And if not, why not?

Mr. LEGOMSKY. No, that statement is not true, and I am not sure where Professor Foley gets the authority. None is cited.

They are, of course, still deportable. The Secretary has made clear that deferred action could be revoked at any time. There is nothing to prevent the Administration from initiating removal proceedings at any time. So I am not sure what the basis would be for that assumption.

Also, I was neglectful in saying thank you so much for those generous words, which are really too generous.

Ms. LOFGREN. In the Reno case, Justice Scalia had a key holding that Congress had made immune from judicial review any action or decision to "commence proceedings, adjudicate cases, or execute removal orders," and went on to say that, "[a]t each stage, 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 has become known as deferred action) of exercising that discretion for humanitarian reasons or simply for its own convenience."

Professor Foley, in her written testimony, I think tries to diminish the significance of that case, and to distinguish that, says that the court merely acknowledges that Congress did not want Federal courts to get tied up in adjudicating discrimination lawsuits.

Do you agree with that? And if not, why not?

Mr. LEGOMSKY. I think Professor Foley makes a fair point in noting that that case did involve a denial of relief rather than a grant of relief. But the broad takeaway from the case is evident from the court's language, where it went out of its way to say that this discretion extends to the decision whether to adjudicate cases, how to adjudicate cases, and also whether to execute removal orders.

So the facts might be slightly different, but I see no basis in the opinion for distinguishing it based solely on the facts.

Ms. LOFGREN. There has been a lot of discussion about how DAPA and DACA grant additional benefits, but it is my understanding that it simply defers action. And pursuant to Section 274A of the Immigration and Nationality Act, which provides that employment may be authorized either by the Act or by the Attorney General, and 8 CFR 274a.12 provides that an alien who has been granted deferred action, an Act of administrative convenience to the Government, may apply for authorization, if there is an economic necessity, which must be proven.

Is it your position that it is only the statutory basis that is being exercised following a grant of deferred action? Or does the executive action give some kind of benefit directly?

Mr. LEGOMSKY. Yes. I think it is a little bit of both. I would distinguish two kinds of so-called benefits.

First of all, there is benefit in simply receiving a piece of paper in which the Government tells you we are deferring action in your case. People can disagree on the policy of that. There are pros and cons of telling a person. But I have never seen anybody cite a law that says it is illegal to tell a person we are not going to proceed against you.

The other benefits, the ones you have been describing just now, are, as you point out, specifically authorized by statute and even more specifically authorized by the regulations. They have been enforced since the early 1980's. Again, they do have the force of law. And they specifically say that if you received deferred action, you are eligible to apply for a work permit.

Ms. LOFGREN. Now, we appropriate money every year that allows for the removal of roughly 7 percent of those who are in the country in an undocumented status. I mean, the affidavits submitted to the judge in Texas by the head of ICE and the head of the Border Patrol indicate that having a piece of paper to note the priority would be helpful to them, because the cost for removal is not at the stop. It is the detention, the court processes. There are a lot of costs that go into that. And knowing that this person was not the priority at the beginning would be helpful to the agency before costs are incurred.

Do you think that without having these priorities, we are going to end up having to say that the nanny who is caught on the street is as high of a priority as a drug dealer or gang member?

Mr. LEGOMSKY. I think that would be the logical result. It would be up to each individual police officer to decide, "What do I think my agency's priorities ought to be?"

I would add that in addition to the benefit you just described, mainly helping ICE sift out the low priorities so that they can focus on the high priorities, in addition, USCIS is collecting a lot of very useful law enforcement data that can be shared with these other enforcement agencies. Of course, all that is being paid for by the requesters themselves, not by the taxpayers.

Ms. LOFGREN. My time is expired, Mr. Chairman. I yield back.

Mr. GOWDY [presiding]. Thank the gentlelady from California.

The Chair would now recognize the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. Thank you to the witnesses who are here today.

I want to direct the first question to our two law professors. Did both of you read the 123-page opinion by Judge Hanen?

Ms. FOLEY. Yes.

Mr. BLACKMAN. Yes.

Mr. GOHMERT. Okay. I have it here myself.

For full disclosure, Andy Hanen was a classmate in law school. He was one of the best and brightest. That is why he went with one of the best firms in the country in Houston, and why President Bush nominated him. He is a brilliant guy.

Have you also read the response that has been filed by DOJ, both of you?

Mr. BLACKMAN. Yes.

Ms. FOLEY. Yes.

Mr. GOHMERT. Well, I was noticing at page 10 of the response, where they are saying the Government would suffer irreparable harm absent a stay. And in the very next sentence, they say that the injunction Judge Hanen granted blocks DHS from exercising its authority conferred by Congress. And it is Congress that is trying to stop them from exercising the authority, not by a written Executive order, as Judge Hanen makes clear, but, as a good monarch would do, the President spoke law into existence, and then the Secretary of Homeland Security ran and put it into a memo.

And so I am wondering if a law student, in response as a question, given a question, "Here is your exam. Respond to the 123-page opinion of Judge Hanen," and they came back and said irreparable harm because the injunction will prevent us from doing the job that Congress conferred on us, what would be your response as law professors to that answer?

Ms. FOLEY. I guess my first response would be, again, bootstrapping argument, F, right? Because what is happening here is that they are saying they are going to suffer irreparable harm because they are prevented from doing what they think they have the authority to do. But, of course, the $6 million question is, do they have the authority to do what they are trying to do?

It has to be no. The answer has to be no, because despite Professor Legomsky's attempt to identify four criteria that he thinks provide a meaningful limiting principle, with respect, they don't provide a meaningful limiting principle. If this President can do this, future Presidents can unilaterally suspend, for entire categories of people whom they prefer for some political reason, operation of various laws, environmental laws, labor laws, tax laws, and on and on and on. And that clearly upsets the constitutional balance. That is not faithful execution of the law.

Mr. BLACKMAN. And if I may add, the Ranking Member is correct. This was not a constitutional decision. The decision was on the Administrative Procedures Act.

But I think Judge Hanen showed his hand a bit, maybe a Texas bluff, if I may use the example. And he suggested very clearly that there would be an abdication.

The Constitution says the President "shall take Care the Laws be faithfully executed." This tracks very closely with the standard in *Heckler v. Chaney*, which speaks of a complete abdication of the laws against an entire class of people.

Judge Hanen's opinion explains very clearly why this is the case.

Now, one aspect of Judge Hanen's opinion which hasn't been appreciated is that we need notice and comment, right? We need rulemaking. We need to see how this program is working. I think this hearing justifies why. We don't exactly know how this policy works.

In my research, I found a checklist used by DHS which has no "other" box. It is the only way to deny DAPA, by checking the box. Professor Legomsky found some narrative form, which is slightly different. He actually admitted in his testimony there are different

types of forms being used. Do we know which one is being used? No, we don't.

This would be a perfect opportunity to take the time to show the American people how this is working. Show us what is happening, and then we can go to court.

So I think if there is one salutary aspect of Judge Hanen's opinion, it is we can learn what this is doing. We are learning this now, after the memo has been released. Had Texas not filed the lawsuit when it did, this policy would be in effect, and there would be no opportunity to challenge it.

Mr. GOHMERT. My time is about to expire, but this is an incredible response in how poorly done it is, in my mind.

The bottom of page 10, it says, "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. As such, the preliminary injunction necessarily causes an irreparable harm."

They cite that this belongs to Congress and then come back and say, so if you leave it to Congress, it causes the executive branch irreparable harm.

For heaven's sake, our Justice Department needs better attorneys and especially when you look at page 15, saying that you have to throw out the injunction because it undermines the department's efforts to encourage illegal aliens.

Again, Professor, it bootstraps. They were not given that responsibility. That is not their job.

I see my time has expired.

Mr. GOWDY. Thank the gentleman from Texas.

The Chair would now recognize the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank you very much, Mr. Chair. I think it is appropriate to acknowledge we have Members here and witnesses here, how much we appreciate you coming and offering your testimony.

I also think it is important to acknowledge that there are many issues that this Judiciary Committee, my friends on the other side of the aisle, Republicans and Democrats work together and collaborate on. I think that should be a message preceding the very vigorous disagreement and unfortunate interpretation that is now given at this hearing.

Let me associate myself with the words of my Chairman. I would like to think that this is a hearing regarding President Barack Obama's executive actions, and I would prefer him not to be called "Obama" and to honor the office which he holds.

I also want to acknowledge the Constitution. We went through this argument, to the various professors, with respect to the powers of this President. And we all can interpret the final words of Section 2, that deals with "shall take Care that the Laws be faithfully executed." And, therefore, we make the argument that the executive actions are in actuality a reflection of those laws being faithfully executed.

So I don't really want you all to suggest that I am trying to show my smiling face, but immediately when the order came out from Texas, Texans and families that would have been severely im-

pacted came together and said they stand with the President for the humanitarian, the relief, the authorized relief, the discretionary relief, that allows him not to convey status, but, through his Attorney General, to be able to have prosecutorial discretion and to be able to discern the prioritization, Professor, of crooks and criminals, felons versus the families.

These are family members. This is an example of a parent who would be, if you will, separated from their child.

And I think I want to make sure and that I have Professor, is it Legomsky? I am so sorry.

Mr. LEGOMSKY. Pretty close. Thank you.

Ms. JACKSON LEE. Pardon me?

Mr. LEGOMSKY. Yes, Legomsky. Yes.

Ms. JACKSON LEE. Legomsky. I want to make sure that I pose questions to you in my short period of time, because I think you elevated us to a level of understanding worthy of commentary.

This is a hearing that contributes to political security and not national security. In this hearing, the backdrop, we are not funding DHS. That is a horrific tragedy in the midst of the crisis of ISIL, and we are doing it on untoward and misdirected arguments that really are not accurate. And I think that is important.

I would say to my good friend from Nevada that we have documentation that Nevada would be severely hampered by the presence of your lawsuit, but more particularly not funding DHS. I may have the opportunity to present that into evidence. I am sort of looking through my documents right now.

But there is documentation that grants that you would want and need would not be generated. And I ask you to review the impact of not funding DHS. And you would ask me, well, I am not at a DHS hearing. I just came from one. That is why I stepped away. But you are engaging in a discussion that tracks why DHS is not being funded, allegedly because these executive actions are unauthorized. And it is absolutely incorrect.

Let me also show you, if I might, for the people who believe that this is a frivolous exercise, Professor Legomsky, these are the procedures that the discretionary efforts have asked these individuals to go through. And I think I count up to 15. I would really like to know how many of us go through 15 eligibility requirements to do anything.

Quickly, my question to you is, to go back to this constitutional question of the executive action, and you premised it on the fact that the President, the discretionary authority, but in actuality that the arguments made by my good friends, and I call them that, are incorrect, that his authority that he is now exercising is limited. It is not a broad parameter. It is not offering citizenship. It is not offering the Affordable Care Act.

Could you just tell us how we are in the context of not having a runaway executive, laying the precedent for a runaway executive in the future?

Mr. LEGOMSKY. Yes, thank you.

Mr. GOWDY. Professor, the gentlelady is out of time, but you may answer the question.

Ms. JACKSON LEE. I thank the Chairman for his indulgence.

Mr. LEGOMSKY. Thank you. Let me say first that, as outlined earlier, I think there are several tangible limits. I know Professor Foley has just said I don't think any of those four limits really work, but I am not sure why they don't work. There are real limits on what a future President can do.

May I just say, also, that I very much appreciate your having brought to life what these issues are about. This is not an academic game. We are talking about the lives and the hopes of millions of people, and I am thankful to you for bringing that out.

Mr. GOWDY. The Chair thanks the gentlelady from Texas and will now recognize the gentleman from Pennsylvania, the former United States Attorney, Mr. Marino.

Mr. MARINO. I have a request that, since I am running among three hearings today, would the Chairman skip me for a moment?

Mr. GOWDY. I would be thrilled to go to the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. I thank the Chairman.

Professor Foley, a number of my colleagues on the other side of the aisle have said Republicans are holding the DHS funding bill hostage. Now, Professor, we passed legislation last month that funds the Department of Homeland Security at the levels they agreed to, levels they wanted.

So in your opinion as a legal scholar, do you think we have held anything hostage, or have we done just what, constitutionally, we are supposed to do?

Ms. FOLEY. Congressman Jordan, I think you are doing exactly what the Constitution contemplates that you should do, what the Framers anticipated you would do. They anticipated that you would vigorously defend your constitutional prerogatives.

Mr. JORDAN. Right. But we passed the bill at the levels they want. We did include language in the legislation that said we think that what the President did last November was unconstitutional. We took an oath last month when we were sworn into this Congress to uphold the Constitution. So we put language in there that said we don't think you can use taxpayer money you shouldn't use. We are not going to allow you to use American taxpayer dollars to carry out an action we think is unconstitutional.

Now, do you think believe the President's actions last November were unconstitutional, Professor Foley?

Ms. FOLEY. I absolutely do. And let me just say that it is one thing to hold an appropriations measure hostage. It is another thing to hold the Constitution hostage, which is what I think the President has done.

Mr. JORDAN. Yes. So you think it is unconstitutional. I think it is unconstitutional. The two gentlemen to your right think it is unconstitutional. And a whole bunch of other folks on the right and the left of the political spectrum think what the President did was unconstitutional, right?

Ms. FOLEY. That is correct.

Mr. JORDAN. And last week, we had a Federal judge say what the President did was unlawful, correct?

Ms. FOLEY. Correct.

Mr. JORDAN. So the fundamental question, the fundamental question here is, how can Democrats insist on making sure that

they can hold the DHS bill hostage to maintain the ability to fund something so many people think is unconstitutional and a Federal judge has said is unlawful?

Don't you think, Professor Foley, that is the central question? How can Democrats insist we want a bill that allows us to fund something everybody—not everybody, but a lot of people—think is unconstitutional and a Federal judge has said is unlawful? How can they insist on that?

Ms. FOLEY. I don't know. You may want to ask your colleagues on the other side of the aisle that question. But I would just say, again, in my opinion, it seems like it is, in fact, the other side of the political aisle that is holding the Constitution hostage.

Mr. JORDAN. But it is even worse than that, Professor Foley. They not only want to insist that they be able to fund something that is unconstitutional and a Federal judge has said is unlawful, they are not even willing to debate the issue on the floor of the United States Senate. I mean, it is one thing to make this, "well, we think." Just bring it up for debate. Let us have the full debate like we are supposed to.

The Committee next-door, we invited Secretary Johnson to come in and testify at an oversight hearing just next-door, and he refused to come testify. He can go on every TV show over the weekend and talk about this, but he can't come testify and answer these fundamental questions?

So if anyone is holding it hostage, it seems to me it is the Democrats of the United States Senate. We have a bill over there funding the Department of Homeland Security at the levels the Democrats agreed to, but has language which says you can't do something that is unconstitutional and a Federal judge says is unlawful, and they refuse to even debate it.

Ms. FOLEY. Well, that is a shame. That is not the way a constitutional republic is supposed to work. It is the process of debate and deliberation that gives you your value to the American people.

And this is a controversial issue, and it ought to be discussed and debated. I mean, I am glad we are having the hearing today, but they shouldn't play politics with the Constitution.

Mr. JORDAN. Yes, and the final thing I would say, Mr. Chairman, and it has been said many times, but 22 times the President had said that he couldn't do what he did. Legal scholars on the left and right have said it is unconstitutional. A Federal judge has ruled it is unlawful. We have a bill that funds DHS at the levels the Democrats agreed to and puts language in there that is consistent with the President's statements 22 times, consistent with what legal scholars across the political spectrum say, and consistent with what the Federal judge just ruled on last Tuesday. It is unbelievable to me that we cannot just pass that legislation and do what the American people want us to do.

With that, Mr. Chairman, I yield back.

Mr. GOWDY. I thank the gentleman from Ohio. The Chair will now recognize——

Ms. JACKSON LEE. Mr. Chairman, could I ask unanimous consent for introducing two items into the record, please?

Mr. GOWDY. Okay.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

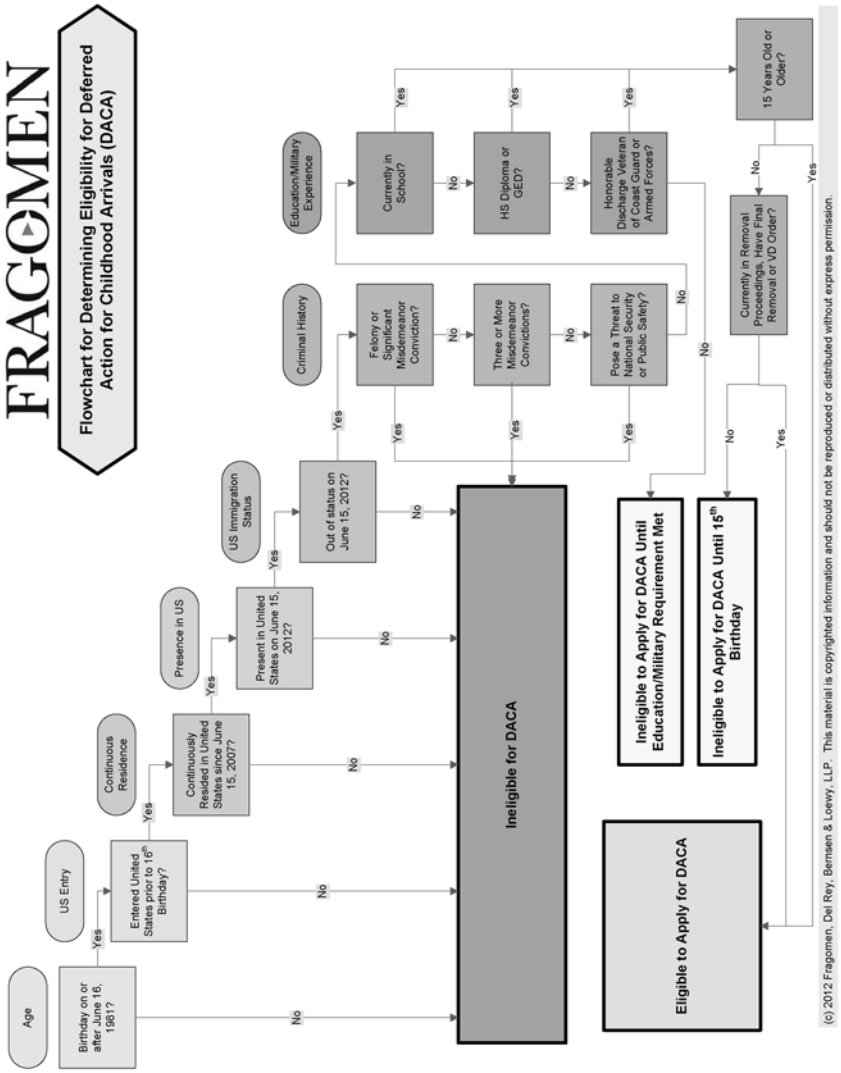
I offered an eligibility chart. I would like unanimous consent to place that into the record.

Mr. GOWDY. Without objection.

Ms. JACKSON LEE. A chart dealing with the State of Nevada Homeland Security profile summary of FEMA, I ask unanimous consent to place that into the record. I yield back.

Mr. GOWDY. Without objection.

[The information referred to follows:]


FRAGOMEN
Flowchart for Determining Eligibility for Deferred Action for Childhood Arrivals (DACA)
Age
Birthday on or after June 16, 1981?
US Entry
Entered United States prior to 16th Birthday?
Continuous Residence
Continuously Resided in United States since June 15, 2007?
Presence in US
Present in United States on June 15, 2012?
US Immigration Status
Out of status on June 15, 2012?
Criminal History
Felony or Significant Misdemeanor Conviction?
Three or More Misdemeanor Convictions?
Pose a Threat to National Security or Public Safety?
Education/Military Experience
Currently in School?
HS Diploma or GED?
Honorable Discharge Veteran of Coast Guard or Armed Forces?
15 Years Old or Older?
Currently in Removal Proceedings, Have Final Removal or VD Order?
Yes
No
Ineligible for DACA
Ineligible to Apply for DACA Until Education/Military Requirement Met
Ineligible to Apply for DACA Until 15th Birthday
Eligible to Apply for DACA
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State of Nevada

Homeland Security Profile Summary

Grant Programs Directorate (GPD)

FEMA

Homeland Security Advisor (HSA)
Chris Smith, Chief

State Administrative Agency (SAA)
Nevada Department of Public Safety, Division of Emergency Management, Jim Wright, Director

State Emergency Management Agency Director
Chis Smith, Chief

FEMA Regional Administrator (Acting):
Karen Armes, Region IX

GPD Program Analyst:
Dale Finney

Overview

The steering and implementation of Nevada's homeland security programs is performed by two entities: The Homeland Security Advisor to the Governor and the Governor's Homeland Security Commission. These entities set the strategic direction for all of the State's homeland security efforts. The program implementation is performed by the Division of Emergency Management (DEM). As a division of the Nevada Department of Public Safety, DEM supports the Homeland Security Commission and administers all of the State's homeland security grant programs. These groups are collectively responsible for implementation of the State Homeland Security Strategy.

Within the State of Nevada, there has been one urban area identified to participate in the Urban Area Security Initiative. This area is comprised of Clark County and the city of Las Vegas, as well as all other unincorporated areas and incorporated cities of Clark County. This Urban Area is also a participant in the Metropolitan Medical Response System Program.

Impact of GPD Homeland Security Funding and Programs to Date

Principal Homeland Security Accomplishments

- The State of Nevada has successfully coordinated with local jurisdictions, state agencies and some tribal Nations the completion of their THIRA, SPR, and NIMSCAST evaluation processes which measure foundational components of the state Emergency Management Program. The State continues to assist local jurisdictions with NIMS required operational planning and statewide cyber-related planning efforts.
- Nevada has created a self-sufficient emergency management program for the hospitals by providing education and training opportunities on preparedness requirements and expectations of the health care community, to include the completed Statewide Medical Surge Plan. The State has identified, prioritized and developed the plan to address the community and facility level gaps identified in the EOP gap analysis, and the State continues to facilitate follow up meetings in order to provide the hospitals with the tools they need to continue to maintain the plans that have been developed.
- The established IP based backbone of the Nevada Core System was recently expanded to include existing legacy LMR (land/mobile radio) systems. The completion of the system allows first responders to connect to the legacy backbone and interface with any other dispatch center or end user via interoperable gateways. This allows a jurisdiction's dispatch center to take over for any other centers that may be experiencing system problems.

Principal Homeland Security Initiatives in Progress

- Nevada is undertaking significant efforts to secure the State's information technology networks through an extensive cyber security investment. Efforts include investments in cyber forensics, cyber intrusion prevention, configuration management of cyber protection devices, and capabilities to interrupt and prevent malicious events in near real time.
- Nevada is working on a new Mass Causality Incident plan that includes fire/EMS support in response to active shooter incidents. Ballistic personal protection equipment (body armor) is

currently being issued to fire/EMS personnel who will assist law enforcement responders in an active shooter incident. These non-traditional law enforcement personnel will be able to support rapid triage, treatment and extrication of people from the "warm zone" of such events.

- Nevada has established a task force charged with rewriting the statewide Emergency Alert System (EAS) and the Integrated Public Alert and Warning System (IPAWS) plans. Nevada Department of Public Safety, Division of Emergency Management will review and update each plan, facilitate regional collaboration on the plan, and enhance public education and awareness efforts regarding EAS and IPAWS.

Recent Changes

- None

State of Nevada
GPD Homeland Security Funding Summary and Scope of Support
FEMA Preparedness Grant Program

Grant Program	FY 2002 - 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	Program Total
State Homeland Security Grant Program [1,4]	$ 92,621,916	$ 6,639,387	$ 5,137,205	$ 2,801,316	$ 3,459,364	$ 3,733,000	$ 114,392,188
Urban Areas Security Initiative Grant Program [5]	$ 53,157,662	$ 8,150,150	$ 5,705,105	$ 1,826,923		$ 1,000,000	$ 69,839,840
Tribal Homeland Security Grant Program			$ 418,329			$ 348,366	$ 766,695
Law Enforcement Terrorism Prevention Program	$ 18,780,472						$ 18,780,472
Metropolitan Medical Response System Program [3]	$ 1,760,509	$ 317,419	$ 281,693				$ 2,359,621
Citizen Corps	$ 1,699,888	$ 156,729	$ 125,598				$ 1,982,215
Non-Profit Security Grant Program	$ 296,837	$ 75,000	$ 141,000	$ 75,000		$ 75,000	$ 662,837
Emergency Management Performance Grants Program [2]	$ 19,397,729	$ 4,140,910	$ 4,141,368	$ 4,302,537	$ 4,223,420	$ 4,455,369	$ 40,661,333
Emergency Management Performance Grants Program Supplemental	$ 596,532						$ 596,532
Transit Security Grant Program	$ 975,260						$ 975,260
Transit Security Grant Program Supplemental	$ 475,129						$ 475,129
Drivers License Security Grant Program [6]	$ 3,144,803	$ 795,833	$ 829,474				$ 4,770,110
Buffer Zone Protection Program	$ 3,278,188	$ 2,053,897					$ 5,332,085
Emergency Operations Center	$ 4,870,018	$ 594,591					$ 5,464,609
Interoperable Emergency Communications Grant Program	$ 795,312	$ 468,500					$ 1,263,812
Public Safety Interoperable Communications Grant Program	$ 11,932,471						$ 11,932,471
Emergency Operations Planning	$ 713,161						$ 713,161
Fire Grants	$ 11,439,507	$ 1,437,153	$ 564,637	$ 459,788	$ 923,962		$ 14,825,047
Fire Prevention & Safety	$ 855,483	$ 119,573	$ 452,435	$ 114,693			$ 1,542,184
Staffing for Adequate Fire and Emergency Response Grants	$ 3,777,990	$ 2,459,678	$ 14,724,708	$ 2,815,772	$ 6,564,964		$ 30,343,112
American Recovery and Reinvestment Act Station Construction Grants	$ 4,180,654						$ 4,180,654
Fiscal Year Total	**$ 234,749,521**	**$ 27,408,820**	**$ 32,521,552**	**$ 12,396,029**	**$ 15,171,710**	**$ 9,611,735**	**$ 331,859,367**

1. 2002 State Homeland Security Grant Program includes State Domestic Preparedness Grant Program
2. 2003 State Homeland Security Grant Program includes State Homeland Security Grant Program II.
3. 2003 Urban Areas Security Initiative (UASI) includes UASI II, UASI Discretionary Grant Program (PPP), UASI Radiological Dispersal Device Protective Measures Program, UASI Port Security Grant Program, and UASI Transit Security Grant Program
4. 2002 Emergency Management Performance Grant Program includes EMPG – Terrorism
5. Due to the non-state specific nature of Intercity Bus Security Grant Program, Intercity Passenger Rail Security Grant Program, Trucking Security Grant Program, and Freight Rail Security Grant Program, these programs are not accounted for in state breakdowns
6. 2008 Driver's License Security Grant Program was referred to as a Real ID.
7. 2003 Metropolitan Medical Response System (MMRS) was transferred to FEMA from the Department of Health and Human Services. As such, state-by-state breakdowns are not available.

Mr. GOWDY. The Chair would now recognize the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

Professor Legomsky, you said how many different professors or attorneys specializing in immigration law felt that this was appropriate and constitutional?

Mr. LEGOMSKY. One hundred thirty-five immigration scholars and professors, not even counting practitioners, signed on to that letter.

Mr. COHEN. Do you know how many people in that similar class, although the class is hard to define, said it wasn't constitutional?

Mr. LEGOMSKY. I am aware of two and a third person whose views are somewhat ambiguous on it. There are very, very few in number.

Mr. COHEN. So 135-to-3. That is even better than Kentucky usually gets in basketball against bad opponents.

Mr. LEGOMSKY. Yes. I don't want to represent that every immigration professor has opined on the issue. But of those who have, those would be, roughly, the numbers.

Mr. COHEN. And you are a professor of immigration law, is that correct, for 30 years?

Mr. LEGOMSKY. Yes, sir.

Mr. COHEN. And you have written a textbook that is in, what, 183 law schools? Is that correct?

Mr. LEGOMSKY. It has been. I am very fortunate. Thanks.

Mr. COHEN. You are, indeed, the most expert person we have. These other folks are fine people, and they have done a lot of good work trying to say that Obamacare is unconstitutional, and a lot of work on health care law, and some work saying that Colorado shouldn't be able to legalize, even though Justice Brandeis talked about the laboratories of democracy, they shouldn't be able to do that.

But you are the expert, and none of these other folks have written textbooks on immigration law, lectured on immigration law. In fact, their main work has been on property law, constitutional law, and health law.

You believe this is 100 percent constitutional, do you not?

Mr. LEGOMSKY. I do, and can I just say I have a great deal of respect for both of my colleagues here. They both have done some wonderful scholarship, and they are both top people in their fields.

Mr. COHEN. Right.

Mr. LEGOMSKY. But, ultimately, whether the "take care" clause has been violated depends on immigration law. If you are going to say the President hasn't taken care to faithfully execute the laws, you have to specify what laws you think the President has violated.

And one of the things that struck me about this discussion is that there has been almost no reference to any specific provisions of the law that they actually say have been violated.

Mr. COHEN. You are familiar with 6 USC 202? There is a clause there that says the Secretary shall, acting through the Undersecretary for Border and Transportation Security, shall be responsible for the following, and it gives eight items. Number five is establishing national immigration enforcement policies and priorities.

Does that not clearly give the Administration the authority to do what they did?

Mr. LEGOMSKY. I think it does with one qualification.

I agree with Professor Foley that that it's not limitless. The Secretary must exercise that power consistently with any specific statutory constraints. But again, no such constraints have been credibly identified.

Mr. COHEN. And you were an attorney, also, I think for Immigration? Do you have any ballpark figure on how many dollars it would cost the taxpayers to hire enough attorneys and go through the proceedings to try to send those people out of the country?

Mr. LEGOMSKY. I am sorry, sir. I don't have a number on that. There have been studies, though. There is no doubt that the number was cost-prohibitive. It would be impossible to do.

Mr. COHEN. Millions of dollars.

Mr. LEGOMSKY. Yes, many, many billions.

Mr. COHEN. Could it——

Mr. LEGOMSKY. I am sorry, I want to take that back. I shouldn't say many billions, because I really don't know the number. But it is astronomical.

Mr. COHEN. Astronomical is close to many millions. They are in the same ballpark.

Presidents Reagan and Bush the first did much similar to what President Obama has done, and you commented that, other than I think it was maybe Ms. Lee and it might have been Representative Nadler, other than the difference in parties, et cetera, how would you distinguish the reprisals that this President has gotten that those didn't? Why is this President different from all other Presidents?

Mr. LEGOMSKY. Well, I think, first of all, they are very similar in that, in each case, the President was acting in an area in which Congress specifically decided not to act.

One of the differences that Professor Foley mentioned, and I have to say this is a fair argument, though I disagree with it, the argument was, well, President Bush was exercising a specific statutory power because there was something in the law that authorized voluntary departure. I don't know that Congress intended for voluntary departure to be exercised on a class-wide basis, but there is that.

The only point I would make is that, first, deferred action itself is recognized in many places in the statute. It has been recognized by many courts. And secondly, the most explicit legal authority, which does have the force of law, is the regulation that has been in force for more than 30 years.

Mr. COHEN. Thank you, sir.

I just want to make clear that, Professor Foley, I wasn't meaning anything about the U.T.-Kentucky game. They played a great first half. I was pulling for U.T. also, but Kentucky is just too much.

I yield back the balance of my time.

Mr. GOWDY. I thank the gentleman from Tennessee.

The Chair would now recognize the gentleman from Texas, Judge Poe.

Mr. POE. I am over here on the far right. Let me ask you some questions. Thank you all for being here.

Professor Blackman, thank you also for being here. South Texas, I couldn't get into South Texas, but I am glad you are here.

Mr. BLACKMAN. You can visit my classroom anytime, sir.

Mr. POE. Tell Professor Treece hello. He and I are contemporaries. It is quite a tribute to him or credit to him the school has him.

Let us assume these hypotheticals. Being from law schools, law professors love hypotheticals, so let us talk hypotheticals.

The next President, whoever it is, decides, "I am going to postpone the individual mandate in Obamacare indefinitely." So be it. Issue a memo out to the fruited plain.

The next President decides, "I am going to postpone the implementation of EPA regulations indefinitely throughout fruited plain." Sends out a memo.

"I have decided that in all fairness, some people just should not have to pay income tax. So I am going to tell the IRS not to enforce the IRS Code to a certain, specific group of people that I think just shouldn't have to pay income tax." Memo out to the fruited plain.

And we could go on indefinitely, indefinitely.

If everything stands like it is with the courts, the President, executive issues, orders, is this a possibility that these types of executive memos from future executives may just happen?

Mr. BLACKMAN. With respect, we are living in that era. President Obama has delayed the individual mandate once for an entire class of people based on a hardship. What was the hardship? Obamacare. It was too expensive.

President Obama has delayed the employer mandate twice, until 2016. What was the hardship? Obamacare. It was too difficult.

So, with respect, we are living in that era. And I think it is a very, very scary time. And take your example, and imagine future Presidents doing that as well. "You know what? We don't have enough agents to enforce the Internal Revenue Code and the capital gains tax, so we are not going to enforce it. If you paid to us, we will refund it. And we will prospectively tell people. We can tell people the corporate income tax is way too high, so for any corporation who has at least so many employees, we are not going to enforce it. It is just too much work."

I think this sets a very dangerous precedent. Now one point I will add is faithfulness. The Constitution says you shall faithfully execute the law. I am okay with the President making a good-faith belief that his action is consistent with the statute. It is his discretion. I am okay with that.

But I think what the facts demonstrate here is one of bad faith. The reason why the President's statement about lacking power is relevant is not for political theater. It is to say, he said this. He was asked, can you defer the deportation of the mother of a U.S. citizen? He said no. The Justice Department said no, this can't happen.

Then suddenly, you lose in Congress. They find this authority. I think it is a prima facia case for bad faith.

Now, we are in uncharted waters. If you open a constitutional casebook, where I do perhaps have some expertise, you will find that there is not much written on the "take care" cause. And that is why constitutional lawyers are actually relevant to the discus-

sion why the separation of powers trumps immigration law when it goes too far.

It was mentioned 6 USC 202 and 8 USC 1103, these provisions no doubt grant discretion. But they do not grant the amount of discretion that the Justice Department claims now. It is unconstitutional, under the nondelegation doctrine.

And I should add that the OLC memo does not put that much weight on the supervision, but DOJ did. After they basically lost in oral arguments, they shifted their position to these two provisions and put a lot more weight on it.

So I will stress that there is discretion, but it is within what happens in the "take care" clause, which, unfortunately, now we have to litigate. And it will be at the Fifth Circuit any minute and invariably at the Supreme Court.

Mr. POE. I want to reclaim my time, Professor. I only asked you the time. I didn't ask you to tell me how to make a watch. I mean that kindly, only because we have so little time, understand.

My question was, those hypotheticals that I gave you, are those real possibilities, if everything stands the way it is, that the next future executive, in good faith, faithfully executing the law, the IRS Code, says it is just not fair that everybody has to pay this income tax of 39 percent or whatever it is? It is waived for those people.

Or the EPA, it is too big of a burden out there on Americans to have to comply with the EPA regs. We will give them a pass. It is just not fair.

That was my question, and the answer is, it is a possibility.

Mr. BLACKMAN. Yes. No, the answer is yes. If this precedent stands, that Presidents can make these good-faith arguments, then the game is over. Then you as a body of Congress have no power, and all you have left is your power of the purse.

Mr. POE. One more question. One more question, if that is permitted by the Chair.

What if the same scenario exists, and you have a State Governor who decides that, as the executive of the State, that the Constitution empowers him or her to waive Federal law or Federal regulations, that it is his discretion or her discretion of the Governor, executive order, send out a memo to the State of whatever. I didn't say Texas, but it could be. Just ignore this Federal rule by a regulatory agency under the idea that the executive, whoever it is in the State, has the same authority.

Mr. BLACKMAN. Well, that would violate the supremacy clause in both cases. The Constitution is the supreme law of the land. The President is bound by it, and the States are bound by it, and neither can ignore it.

Mr. POE. All right. Thank you, Mr. Chairman.

Ms. LOFGREN. Will the gentleman yield?

Mr. POE. I am out of time. I yield back to the Chair.

Mr. GOWDY. Thank you. Thank you, Judge Poe.

The Chair would now recognize the gentlelady from California, Ms. Chu.

Ms. CHU. Mr. Chair, I would like to enter into the record, the Center for American Progress report that says it would cost $50 billion to deport the estimated 5 million people who would benefit under DACA and DAPA.

Mr. GOWDY. Without objection.
[The information referred to follows:]

What Would It Cost to Deport All 5 Million Beneficiaries of Executive Action on Immigration?

SOURCE: AP/Lynne Sladky

Isabella Roseta sits with her daughter Vanessa during a Florida Immigrant Coalition meeting about President Obama's executive order on immigration.

By Philip E. Wolgin | Monday, February 23, 2015

This charticle contains a correction.

One month ago, the House of Representatives passed a funding bill for the U.S. Department of Homeland Security, or DHS, that if enacted, would end the immigration directives announced by President Barack Obama on November 20, 2014. Ending executive action would place 5 million people—the majority of whom are young DREAMers or parents of citizens or permanent residents—back in the crosshairs for deportation.

Putting aside the strong support among American voters for providing a pathway to legal status for these groups, most people do not believe that the United States would have the will or the resources to deport all 5 million potential beneficiaries.

But what would it actually take to achieve the end result of the action that the House of Representatives is pushing—for the nation to deport these 5 million people? In 2010, the Center for American Progress published a report estimating the cost of deporting the entire undocumented population. Updated calculations from that report appear below, taking into account the subset of the undocumented population that is now eligible for executive action.

The cost of deporting the beneficiaries of the recent DHS immigration directives would likely be greater than the average cost of deportations. Given that beneficiaries of the programs must have been in the country for at least five years, deportation would require costly interior removals rather than the less resource-intense removals that occur as people attempt to cross the border.

Put simply, it would cost more than $50.3 billion dollars to deport this entire population—an average cost of $10,070 per person. The figures below break down the factors that contribute to deportation costs.

FIGURE 1

The cost of deporting 5 million executive action beneficiaries

Source: Author's analysis, see Figures 2–5 for details.

Why is this estimate higher than those of DHS or *Politico* and lower than CAP's previous estimate?

DHS

DHS says it costs $8,661 to deport a single immigrant. But in any given year, roughly two-thirds of all deportations are of people attempting to cross the U.S.-Mexico border, whereas only one-third are of people actually living in the interior of the United States. It takes more time, effort, and resources to apprehend someone who has been living in the country for years under the radar—and the contemporary unauthorized immigrant population has been living in the country for an average of 12.7 years. The long-settled nature of this population, the fact that to qualify for the Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, program individuals must have children, and the fact that in order to be eligible for any of the programs, applicants must not have committed serious offenses mean that members of this population are deeply rooted in their communities.*

CAP's new estimate for deporting the immigrants eligible to be shielded by the DHS directives, $10,070 per person, takes these higher enforcement costs and long average length of residence into account in order to produce the most conservative estimate possible.

Politico

Politico estimated that it would cost between $20 billion and $25 billion to deport those eligible for executive action. Because it only believes that 3 million of the 5 million who are eligible would come forward, however, its full deportation costs are based on a smaller population. Since the CAP analysis—and ostensibly *Politico*'s as well—considers the deportation of the entire executive-action-eligible population, there is no reason to assume that only 3 million out of 5 million people would be deported if the executive actions were overridden. The CAP calculation takes into account the entire eligible population, resulting in a total cost of $50.3 billion.

CAP's 2010 estimates

In 2010, CAP estimated that it would cost $23,482 to deport a single person. In 2011, however, DHS changed how it reported apprehensions, adding in people caught by the Secure Communities program.This change ultimately led to far more apprehensions being reported as part of ICE Enforcement and Removal Operations. Apprehensions in FY 2010, for example, jumped from 35,774 people prior to the inclusion of those caught through the Secure Communities program to 270,635 people following this change. The increased number of apprehensions meant that the overall ICE budget was divided among a larger number of people, leading to a lower per-person deportation cost and a corresponding shift in the cost estimates.

Because the Secure Communities program has led to a significant portion of total apprehensions over the past few years, using these updated figures provides a more accurate—but still very conservative—estimate of per-person deportation cost. This updated analysis also does not include costs for the Office of Domestic Investigations, or ODI, a part of Immigration and Customs Enforcement that deals with serious offenses such as human smuggling, gang activity, and immigration fraud. Given that individuals must not have committed a serious offense in order to qualify for executive action, ODI would likely be only tangentially involved in apprehending this population.

The deportation process consists of four administrative functions: apprehension, detention, legal processing through immigration courts, and transportation.

FIGURE 2

Apprehension: Immigration and Customs Enforcement

Calculating the cost of apprehending unauthorized immigrants in the interior of the country

Legal Proceedings	Fugitive Operations	Criminal Alien Program	Comprehensive Identification and Removal of Criminal Aliens
$66.5 million	**$41.7 million**	**$95.3 million**	**$8.2 million**

Total FY 2014 interior removals cost: **$211.7 million**

FY 2014 interior removals cost per person: **$2,071**

Apprehension cost for 5 million people: $10.4 billion

Note: 102,224, or 32.4 percent, of the deportations carried out by Immigration and Customs Enforcement, or ICE, in FY 2014 were deportations of people apprehended in the interior of the country. The total FY 2014 interior removals cost is the sum of 32.4 percent of the revised enacted FY 2014 Immigration and Customs Enforcement budgets for the four principal immigration enforcement divisions of ICE—Legal Proceedings, Detention and Removal Operations – Fugitive Operations, Detention and Removal Operations – Criminal Alien Program, and Comprehensive Identification and Removal of Criminal Aliens. This total FY 2014 interior removals cost was divided by the 102,224 interior removals to determine the interior removals cost per person for FY 2014. The apprehension cost for 5 million people is the FY 2014 interior removals cost per person multiplied by 5 million.

Source: U.S. Department of Homeland Security, *Congressional Budget Justification: FY 2016* (2015), p. 5, available at http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

FIGURE 3

Detention: Immigration and Customs Enforcement

Calculating the cost of detaining unauthorized immigrants

FY 2014 custody budget	Immigrants detained daily	Cost to detain an immigrant each day	Average days spent in detention
$2.25 billion	**34,000**	**$181.70**	**31**

Average cost to detain an immigrant: **$5,633**

Cost to detain 5 million people: $28.1 billion

Note: Congress has mandated a 34,000 person-per-day detention bed quota. As a result, roughly 34,000 people are detained on any given day. Dividing the Immigration and Customs Enforcement, or ICE, Custody Budget for FY 2014 by 365 days of the year and then again by the 34,000 immigrants held in detention each day equals the cost to detain an immigrant each day. Since the average daily stay in immigrant detention is 31 days, it costs more than $5,600 to detain each individual immigrant. Multiplying that by the 5 million people eligible for executive action equals the cost to detain 5 million people.

Source: U.S. Department of Homeland Security, *Congressional Budget Justification: FY 2016* (2015), p. 5, available at http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf; Sharita Gruberg, "Infographic: Congress' Immigrant Bed Quota" (Washington: Center for American Progress, 2014), available at https://www.americanprogress.org/issues/immigration/news/2014/05/09/89381/infographic-congress-immigrant-bed-quota/; Transactional Records Access Clearinghouse, "Legal Noncitizens Receive Longest ICE Detention," June 3, 2013, available at http://trac.syr.edu/immigration/reports/321/.

FIGURE 4

Legal processing: Executive Office for Immigration Review

Calculating the cost of immigration court proceedings for unauthorized immigrants

FY 2014 EOIR appropriations	Number of EOIR matters completed, FY 2014	FY 2014 EOIR cost per person
$312.2 million	**248,078**	**$1,258**

Cost of immigrant court proceedings for 5 million people: $6.3 billion

Note: Dividing the FY 2014 Executive Office for Immigration Review, or EOIR, appropriations by the number of EOIR matters completed produces the FY 2014 EOIR cost per person. While "matters completed" includes some proceedings such as bond hearings that do not directly relate to case completions for deportation, using the entire number of matters completed provides a conservative estimate of the overall cost per proceeding. That figure was multiplied by the 5 million people eligible for executive action to produce the total cost of immigrant court proceedings for 5 million people.

Source: U.S. Department of Justice, *FY 2016 Congressional Budget Submission* (2015), p. 22, available at http://www.justice.gov/sites/default/files/-jmd/pages/attachments/2015/02/01/3._administrative_review_and_appeals_ara.pdf.

FIGURE 5

Transportation: Immigration and Customs Enforcement

Calculating the cost of transporting and removing unauthorized immigrants

Transportation and Removal Program	Cost per deportation
$113.3 million	**$1,108**

Cost of transporting 5 million people: $5.5 billion

Note: FY 2014 transportation costs were calculated based on the percentage of interior removals (32.4 percent). 32.4 percent of the budget for Immigration and Customs Enforcement, or ICE, Detention and Removal Operations – Transportation and Removal Program was then divided by the 102,224 interior deportations carried out in 2014 to produce the FY 2014 transportation costs per person. This figure was multiplied by the 5 million people eligible for executive action to produce the cost of transporting 5 million people.

Source: U.S. Department of Homeland Security, *Congressional Budget Justification: FY 2016* (2015), p. 5, available at http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

Even disregarding the immense harm to individuals, families, and communities that would result from deporting 5 million DREAMers and their parents, $50.3 billion dollars is a significant expenditure—more than the annual budget of more than half of the cabinet-level government agencies and larger than the gross domestic product, or GDP, of more than 100 countries. And this high cost would come on top of losing the significant future economic gains created by the president's executive action if the beneficiaries are deported: $22.6 billion in payroll taxes over five years, $41 billion added to the Social Security system over one decade, and $210 billion **in additional GDP over one decade.**

Instead of pretending that the United States will deport all 5 million individuals shielded by the president's executive action, Congress should come together and pass an immigration reform bill that puts them on a path to legal status, toward becoming

full and equal members of society.

Philip E. Wolgin is Associate Director for Immigration at the Center for American Progress. He would like to thank Marshall Fitz, Patrick Oakford, and Silva Mathema for their help in conducting this analysis.

**** Correction, February 23, 2015:*** *This charticle has been updated to reflect the correct full name of the DAPA program, which the Department of Homeland Security has updated. The correct name is Deferred Action for Parents of Americans and Lawful Permanent Residents.*

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Ms. CHU. Professor Legomsky, critics argue that even though DAPA and DACA have individualized criteria that officers have to use on a case-by-case basis, that the high rate of approval for these programs shows that there is some sort of blanket approval of these cases.

Professor, you served as chief counsel of the USCIS in the Department of Homeland Security for several years, including during the time when DACA started, so I am curious to hear what you learned about the adjudication process of these cases. I understand that USCIS reports a 95 percent approval for DACA applications. Can you explain why this there is this high approval rate, and whether it is appropriate or not appropriate to conclude that officers are not making individualized assessments?

Mr. LEGOMSKY. Thank you. At first blush, I agree that 95 percent sounds high, but it is not when you think about who is actually applying for DACA and DAPA.

If you are an undocumented immigrant, and if in addition you have some other negative conduct in your background, there are at least two things you are very unlikely to do. First of all, you are not going to initiate contact with the Government and say, "This is my name. This is where I live. I am undocumented, and I also have this other negative thing in my background. And here are my fingerprints, so that the FBI can do a background check on me." You are not likely to do that.

Second, unless you are independently wealthy, and not many of these folks are, you are not going to send the Government a check for $465 for something you are very unlikely to receive.

So for both reasons, this tends to be a very self-selecting population, overwhelmingly people with rock solid cases. And therefore, the high approval rate in no way is evidence that these decisions are being rubberstamped.

And may I just add quickly also that the notion that they are being rubberstamped would come as quite a surprise to the 38,000 people who have received denial notices.

Ms. CHU. Thank you for that. Professor, Congress mandates through the Secretary of Homeland Security the national immigration enforcement policies and priorities. Thus, in doing so, the Secretary has directed the agency to prioritize certain categories of people over other categories.

In the Texas case, Judge Hanen seems to accept that prosecutorial discretion is appropriate in this context. However, he seems to oppose the idea of granting deferred action and notifying the individuals that they are not an enforcement priority.

Isn't deferred action in and of itself a form of exercising prosecutorial discretion? How would you counter Judge Hanen's reasoning?

Mr. LEGOMSKY. Well, I agree with you. I think you are absolutely right. Deferred action is simply an exercise of prosecutorial discretion. The only thing that distinguishes it from some exercises is that the Government is giving the person a piece of paper saying this is what we have decided to do.

I think, with respect, that Judge Hanen has confused the question of whether deferred action is legal with the question of whether these other benefits are legal once deferred action has been granted. If he objects to those other benefits, for example, the ones

that are codified in the statute or that are in the regulations, then properly what he should be doing is advocating for a change in those laws. But the President did not touch any of those. It is just deferred action.

Ms. CHU. Professor, in Judge Hanen's opinion, he argued that DHS acted unlawfully because he did not allow the public to comment about the new DAPA program in accordance with the Administrative Procedures Act. Can you walk us through whether DHS was required to follow the Administrative Procedures Act before implementing the DAPA program?

Mr. LEGOMSKY. Yes, thank you. The APA notice and comment requirements, by statute, do not apply to general agency statements of policy, which the Supreme Court has expressly interpreted to include any guidance that the agency wants to give about how it plans to exercise one of its discretionary powers, which it has done here.

So what this really turned on in this case was whether you believe DHS when they say they are exercising real discretion. Judge Hanen concludes that they were not. But the only evidence he cited was an unsupported statement by one USCIS agent, Kenneth Palinkas, whose support was simply, they are being decided by service centers, which by the way, is where the vast majority of USCIS adjudications are being decided. And he said, therefore, they must be getting rubberstamped. That simply doesn't follow.

Adjudicators at the service centers, and I know this from personal experience, take great care to go over the documentation very carefully. There are also FBI background checks and so on. And if there is any case in which they think there would be some use in conducting a personal interview, then they can and will refer the person to an interview at a field office.

So those are very careful adjudications. I don't know where he gets the idea that they are being rubberstamped.

Ms. CHU. Thank you.

I yield back.

Mr. GOWDY. Thank the gentlelady from California.

The Chair will now recognize the gentleman from Pennsylvania, the former U.S. Attorney, Mr. Marino.

Mr. MARINO. Thank you, Mr. Chairman.

Good afternoon, panel. I am sorry that I wasn't here a great deal. But as I said, I have several hearings going on at the same time.

Professor Legomsky, am I pronouncing your name correctly?

Mr. LEGOMSKY. Yes.

Mr. MARINO. As a prosecutor, I had the authority at the State and Federal level to use prosecutorial discretion, but only on a case-by-case basis, on an individual basis, not for a class. I couldn't simply say, if I wanted to, that those individuals driving under the influence, even though they are above the .08, those that are below .1, I am not going to prosecute. Would you agree with that?

Mr. LEGOMSKY. Yes.

Mr. MARINO. Okay. The President's deferred action, as far as I see it from a legal perspective, is simply saying that I am not going to prosecute now, but I may down the road and I may not. So wouldn't you agree with me that those who are here that the President wants to defer deportation are violating the law?

Mr. LEGOMSKY. Congressman, I think now I answered your first question too quickly. I should have said, "Yes, but." As long as discretion is left to the individual officer to decide whether to initiate prosecution in the case that you described, then it does seem to be perfectly legal. I was understanding your hypothetical to mean there was no discretion. But in this case, there is. The Secretary has repeatedly and explicitly told the officers that even if the threshold criteria are met, they are still to exercise discretion. And in fact, at the court's request——

Mr. MARINO. Sir, with all due respect, I am not hearing that from the officers. When I am hearing from the officers is a direct order: Do not detain these individuals. Let them go.

And again, I am going to go back to the issue. On an individual basis, I say yes, there is discretion. But the people that are here are here illegally or else the President would not have to issue an order saying we are going to defer this. So that is a class of people, that is millions of people. You are an expert in these areas. From a prosecutor's point of view, and even from some defense attorneys' point of view that I have spoken with, it goes beyond what was intended concerning prosecutorial discretion.

Another issue that I want to bring up with you concerning the way that we operate here. Now I am sure that you know, but the media has not been pursuing it, that the House of Representatives has passed a Homeland Security bill giving the President $1.6 billion more than he asked for, $400 million more this year than last year.

So the only issue I hear from the Administration is that we want to shut down Homeland Security. I would beg to differ with you, and I think common sense dictates that if you are giving more money than the President asked for that would fund Homeland Security, it isn't the fact of shutting the Government down. It is the fact that the President has made it clear that he wants the deferred action and Congress has said no, we are not allowing you funds to do that. What say you?

Mr. LEGOMSKY. Well, on the first point, let me just observe that USCIS has many thousands and thousands of adjudicators, and if one of them told you that we are not allowed to use any judgment in deciding whom to prosecute, that person is directly violating the Secretary——

Mr. MARINO. I can clear that up. It hasn't been one of them. It has been many. And it has been multistate. And I have a little concern about the information I am getting from the Administration concerning what I am getting from the frontline people.

Attorney General, do you want to weigh in on this prosecutorial discretion?

Mr. LAXALT. Thank you, Congressman. You know, I think it is great to go back directly to this point, because OLA has spoken about this. They know that you need a case-by-case basis. And they are basically making a mockery of all this by using these magic words.

I don't mean to attack the professor here, since he was formerly in this job. But they are stating that they are doing this, but there is just no way with this kind of volume they are, with the percentages that have been approved.

While the professor discusses self-selection, as it said in Judge Hanen's opinion, of the 5 percent who are not making it through, they are not making it through because of procedural errors. There are still not individual case-by-case bases. You guys have all the authority in the world. That would be the next question, is to pull up a bunch of line agents and find out whether or not it is true that individual discretion is happening. I find it just impossible to believe, but just guessing.

Mr. MARINO. I see that my time has expired. I yield back. Thank you, Chairman, for fitting me in here.

Mr. GOWDY. Thank the gentleman from Pennsylvania. The Chair will now recognize the gentleman from Florida, Mr. Deutch.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Chairman, in less than 3 days, the Department of Homeland Security is going to run out of funding. At that time, critical security operations are going to be scaled back and others will be shut down. Cyberattacks in North Korea won't shut down. The recruitment of more terrorists by ISIS won't shut down. And gang violence below our southern border won't shut down.

This Congress is on the verge of forcing over 100,000 DHS employees to work without pay and put another 30,000 employees on furlough. They are TSA agents and port inspectors, disaster relief staff and intelligence experts, Coast Guard members and Border Patrol officers.

My question is, is this how the new Republican Congress treats people who report to work every day to protect our country? These Americans have mortgages to pay. They have children to support. They have homes to keep warm, car tanks to fill up, and local businesses to support.

Homeland Security funding has nearly dried up for one simple reason. Some Members of the majority are more concerned with pleasing the anti-immigrant fringe than paying the men and women who go to work every day protecting the security of our Nation.

They are holding DHS funds hostage. Their demand? That we mandate the deportation of thousands of students and young people who arrived here illegally as small children. That we deport immigrants who have small children who never chose to break the law from the only home that they have ever known.

Now, with little time left until our Homeland Security funding expires, this Committee is using precious time on a hearing on whether the President's immigration Executive orders are constitutional. Since the founding of our Nation, questions involving the constitutionality of executive actions have been heard and resolved by the judicial branch. And questions of whether the President's Executive orders on immigration are constitutional are being heard in courts as we speak.

I happen to believe that the President's Executive orders on immigration are constitutional, but I also understand that some of my colleagues disagree. I respect that.

Still, the fact remains that defunding DHS will not advance my Republican colleagues' stated goal of nullifying these Executive orders. Defunding DHS will not ramp up deportation. On the contrary, forcing border agents and immigration court officials to work

without pay or to go on furlough most likely will slow down deportation.

Now my Republican colleagues want a border security enforcement-only approach to immigration policy. Well, guess what? That is the policy that has been in place for years, and it is not working, even with the record-breaking deportation numbers of this Administration.

It is logistically and financially impossible to locate, prosecute, and deport 11 million undocumented immigrants in the United States.

Like other law enforcement agencies, Immigration and Customs Enforcement must work with the budget that it is handed. That means exercising discretion, choosing which deportation should proceed and which should be put on hold, or, as the President calls it, deferred.

Do we deport a member of a gang or a college student who arrived here illegally when she was 3? Do we deport the mother of an American child or do we try to keep families together? These are the questions that Republicans in Congress have refused to answer year after year after year with a comprehensive immigration reform bill. These are the questions that my Republican colleagues left President Obama to answer with his November 20 Executive orders on immigration.

The President's Executive orders don't change the law. They are temporary. They simply ensure undocumented immigrants living, working, and raising families in our communities that they will not be deported before someone with a felony or a serious misdemeanor.

We should be working day and night to keep the Department of Homeland Security funded and fully operational instead of holding hearings on questions that the courts are in the process of answering. The safety of the public and the well-being of our communities must be the priority of immigration enforcement officials, and I humbly suggest that it should also be the priority of this Congress.

Thank you, Mr. Chairman. I yield back.

Mr. GOWDY. Thank the gentleman from Florida.

The Chair will now recognize himself.

General Laxalt, I want to make one observation before Professor Legomsky and I have a conversation about prosecutorial discretion. My colleague from New York, Mr. Nadler, suggested that you were naive for thinking that the 22 separate times the President said he lacked the power to do what he did, you and I should have realized that that was a political comment and not a legal comment. So what I would ask you to please consider is requiring a disclaimer to go beneath every comment made by an elected official, so we can know going forward whether he or she really means it or whether it is just for political expediency, because I mistakenly thought the chief law enforcement officer for the entire country would mean what he said when he was making a legal observation. And it was just news to me from Mr. Nadler that all of that was just political grandstanding.

So if you can work around the First Amendment limitations and require disclaimers, so we really know whether a candidate or an officer-holder means what he or she is saying, it would be helpful

to me. And I would not feel as naive and perhaps you wouldn't either for relying on what the President said.

Now, Professor, what are the limits of the doctrine of prosecutorial discretion?

Mr. LEGOMSKY. Well, the main limits are the ones that I laid out in more detail in the written statement, but to summarize them briefly, one, the President cannot refuse to substantially spend the resources Congress has provided, because——

Mr. GOWDY. So if we fully funded everything he wanted with respect to DHS, he could not suspend any deportations?

Mr. LEGOMSKY. I think that is an unanswered question.

Mr. GOWDY. Well, that is what you just said.

Mr. LEGOMSKY. No, I said that was one limit.

Mr. GOWDY. But I just removed that limit. So if we were to fully fund that, he would lack the discretion to not enforce that law, correct?

Mr. LEGOMSKY. Well, I suppose that is theoretically possible. It just has never been decided by a court, because it would be rare to find a law enforcement agency——

Mr. GOWDY. Well, what I am trying to get at, Professor, is, if your district attorney decided that he or she was not going to enforce or prosecute any heroin cases because he or she just thought the war on drugs was a lost cause, other than elections, what remedy would the legislative branch have if they disagreed strenuously with that executive branch employee's wholesale refusal to enforce the law? What remedy exists for us?

Mr. LEGOMSKY. The legislature could very specifically supersede the decision. There is nothing in the statute that specifically supersedes the President's priorities, but the legislature could——

Mr. GOWDY. So you mean the legislative branch could put in that statute, the word "shall." You shall prosecute.

Mr. LEGOMSKY. That would not nearly be enough. We all know that in the——

Mr. GOWDY. Well, what should we put in our DHS funding to let the President know? Help us write that bill, Professor.

Mr. LEGOMSKY. I don't know that I could draft it off the top of my head.

Mr. GOWDY. Well, take a crack at it.

Mr. LEGOMSKY. Okay, well, Congress could do something similar to what it did when it mandated very specific priorities. There is language that specifically mandates a priority on national security. There is language that——

Mr. GOWDY. But why does the legislative branch have to pick priorities? Why can't we just say we want the law enforced?

Mr. LEGOMSKY. I was offering one option as to how a statute could be drafted.

Mr. GOWDY. Well, you would agree with me that the ultimate remedy is the ballot box, right? If the D.A. is not enforcing the law, his or her voters can vote them out, right?

Mr. LEGOMSKY. Well, yes and no. There are certain instances in which plaintiffs have been found to have standing to challenge prosecutorial discretion. But I don't see this as being one of them.

Mr. GOWDY. Do you think the consequences of elections might have been why the President waited until after the midterms to issue his Executive order as opposed to before?

Mr. LEGOMSKY. Yes and no. I am not sure if it was the outcome of the election so much as the desire to avoid the kind of political confusion that would result.

Mr. GOWDY. Well, it is not political confusion, Professor, with all due respect. This is legal confusion, because I am trying to understand what the limits of prosecutorial discretion are.

There are at least three different categories of law. There are certain laws that say you can't do something, like possess child pornography. There are certain laws that require you to do something, like register for selective service. And then there are laws that Congress passes, which require the executive branch to do things, for instance, turn in a budget by certain date.

Is your testimony that the executive has the power to use prosecutorial discretion in all three categories of law?

Mr. LEGOMSKY. It would depend on the facts, and it would depend on the specifics that——

Mr. GOWDY. Well, give me a fact pattern where a President can refuse to do something that Congress tells him or her to do by a certain date? That is not prosecutorial discretion, with all due respect, Professor. That is anarchy.

Mr. LEGOMSKY. I agree with you, Congressman, that Congress, if specific enough, could foreclose a particular type of exercise of prosecutorial discretion. My only point is that they have not done so in this——

Mr. GOWDY. Well, let me ask you this, because I am out of time. Can the President suspend all deportations? And if not, why not?

Mr. LEGOMSKY. I believe not, because that would contravene both the Congress and passing the Immigration and Nationality Act generally, but——

Mr. GOWDY. Well, how far can he go? Out of the 11 million, if 4 million is okay, can he go up to 8 million?

Mr. LEGOMSKY. My answer to that question is the same as the one I give a little bit earlier. It is impossible to answer without the empirical knowledge of whether that would still leave him with the ability to substantially spend the resources Congress has provided.

Mr. GOWDY. What I would love, if you can, and again, I am out of time, I want you, and maybe it is a suggestion for your next law review article, I want to know if Congress fully funds—DHS, does the President then lack the discretion citing the apportionment of resources to exercise discretion.

Mr. LEGOMSKY. The question has simply never been answered.

Mr. GOWDY. Well, I would love for you to take a crack at it. In your next law review article, I would love for you to take a crack at it, if you would be willing to do so.

The Chair would now recognize his friend from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair. Let me also thank the Ranking Member of the full Committee for his presence here.

I want to start with the Attorney General and perhaps further explore this question of prosecutorial discretion in the context of the President's Executive order. So there are approximately, I be-

lieve, 11 million undocumented immigrants in this country, correct?

Mr. LAXALT. Correct.

Mr. JEFFRIES. And presumably one of the options that some in this Congress would like to see, who disagree with the President's Executive order, is the deportation of all 11 million undocumented immigrants, correct? That is amongst the range of ideas within this Congress, this Committee. There are some presumably who would like to deport all 11 million. Is that fair to say?

Mr. LAXALT. I am not here to represent any of the Members' views on this issue, Mr. Congressman.

Mr. JEFFRIES. Okay. Do you think that is a reasonable solution?

Mr. LAXALT. You know, we have entered this lawsuit as 26 attorneys general because we believe there are serious pressing constitutional issues at stake. And as I have stated in as many ways as I can, for us, this is not about politics and it is not the job of the attorney general to wade into this political realm, and it is not something I plan on doing.

Mr. JEFFRIES. Thanks a lot.

Now, Congress has never allocated the resources necessary to deport all 11 million undocumented immigrants. That is an accepted fact. Nobody from the far left to the far right argues otherwise. So if the President and the Department of Homeland Security lack the ability, because we, Congress, have not given him the resources to deport all 11 million undocumented immigrants, doesn't the Department of Homeland Security have the discretion to prioritize the deportation of some undocumented immigrants over the deportation of others?

Mr. LAXALT. Mr. Congressman, the 26 States that have joined this case, along with, at least preliminarily, the Federal district judge in Texas, believe that there are limits in this area, and we have kind of gone over them ad nauseam, but that the President has overstepped his constitutional authority to take care and execute, and, as we just discussed, failed to do case-by-case in almost any way you analyze—in case-by-case analysis.

Mr. JEFFRIES. No, I appreciate that. I want to move on, but let me just make the point that I think should be self-evident. If Congress has not given the President the resources to deport all 11 million undocumented immigrants, then it seems that the Department of Homeland Security should have the ability to prioritize the deportation of felons over the deportation of families. That is a reasonable approach, since Congress has not seen fit to give the Department of Homeland Security the ability to simply deport everybody who is in this country on an undocumented basis.

Now in Nevada, the Office of Attorney General is not self-funded, correct?

Mr. LAXALT. I don't understand the question.

Mr. JEFFRIES. Your funding is provided by the State Legislature, true?

Mr. LAXALT. Yes, the general fund, yes.

Mr. JEFFRIES. So you joined this lawsuit and you made the decision to join this lawsuit, I believe on January 26. And you announced that decision consistent with your views as it relates to

the Nevada Constitution. You didn't consult with the Governor when you made that decision, correct?

Mr. LAXALT. Mr. Congressman, I am an independently elected attorney general, and it is my job to——

Mr. JEFFRIES. I am not arguing that you should have. I just want to establish the fact that you didn't. Correct?

Mr. LAXALT. You know, I——

Mr. JEFFRIES. It is a matter of public record. I just want to make sure that I am clear and you are clear and the Committee is clear. You didn't consult with the Governor.

Mr. LAXALT. Well, as is in the record, our offices certainly communicated about this issue.

Mr. JEFFRIES. I appreciate that. If I could enter into the record a Wall Street Journal opinion piece, "Nevada's right choice on immigration," in support of your position and ask unanimous consent to do so. It is a February 2 article.

Mr. GOWDY. Without objection.

[The information referred to follows:]

http://www.wsj.com/article_email/david-rivkin-and-lee-casey-nevadas-right-choice-on-immigration-1422924012-lMyQjAxMTE1OTIxNTkyOTU3Wj

Nevada's Right Choice on Immigration
Obama's disregard for federal law makes it imperative that states join the suit against him.
By DAVID B. RIVKIN JR. And LEE A. CASEY Feb. 2, 2015 7:40 p.m. ET

A very public dispute broke out last week when Nevada Attorney General Adam Laxalt went against Gov. Brian Sandoval's wishes and joined a lawsuit filed by 25 other states challenging President Obama's imposition of his immigration reform policies by executive action.

Messrs. Sandoval and Laxalt are both Republicans who agree that the current immigration system is broken and that comprehensive reform is necessary. But Mr. Sandoval opposes litigation and has suggested that new immigration reform legislation is the best way to proceed.

Yet on Jan. 26 Mr. Laxalt announced that Nevada had joined the plaintiff states in Texas v. United States of America. "As Nevada's chief legal officer," he explained, "I am directed by Nevada's Constitution and laws to take legal action whenever necessary 'to protect and secure the interest of the state.' "

Mr. Laxalt was right to join the suit. Mr. Sandoval's legislative path will neither solve America's vexing immigration problems nor rein in a president who has ignored the Constitution's limits on executive power.

Texas v. United States of America challenges the president's use of an executive order to suspend federal immigration laws that require, among other things, deportation of undocumented immigrants and strict limits on who may lawfully work in the U.S. The Constitution requires that the president "Take care that the laws be faithfully executed," and provides no exemption for laws with which the president disagrees.

As the Supreme Court stated in Youngstown Sheet & Tube Co. v. Sawyer (1952), ruling against President Harry Truman's seizure of the nation's steel industry during the Korean War, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

The president is, in other words, stuck with laws passed by Congress and signed into law by previous presidents. The reason for this is at the heart of America's constitutional separation of powers—the power to make laws and to execute them are divided between separate branches of government, Congress and the president respectively.

The third branch—the judiciary—has the power to say what the law is, including when the president and or Congress have crossed the constitutional lines. It is only litigation before the courts that can now vindicate the most basic tenets of our constitutional system.

However desirable immigration reform might be, congressional action won't prevent this president from ignoring provisions in a new law that he dislikes or opposes. Only a determination by the courts that he has overstepped his constitutional authority can do that. Unless the president's ability to play lawmaker is decisively defeated in litigation, congressional legislation on any contentious public-policy issue would be inherently futile.

Nor is Mr. Laxalt obliged to follow Gov. Sandoval's preference. Nevada law permits the governor to direct the attorney general to bring or defend an action in the courts. But as Mr. Laxalt explained, it also imposes an entirely independent obligation on the attorney general to take such action if he believes it necessary to secure the state's interests.

All American states, including Nevada, have critical interests at stake here, both because of the burdens President Obama's suspension of federal immigration law imposes on their state budgets and governments, but also because of their basic character as coequal sovereigns. The Constitution is a "grand bargain" among the states and the American people. That bargain includes a powerful federal government, but one that has limited powers that may be exercised only in accordance with the institutional arrangements the Constitution creates.

The separation of legislative and executive authority is among the most important limitations on federal power. It is now up to the federal courts to restore the Constitution's balance between the president and Congress and between the federal government and the states. Mr. Laxalt made the right choice. Those state attorneys general that have yet to join Texas v. United States of America should follow his lead.

Messrs. Rivkin and Casey practice law in Washington, D.C., and served in the White House and Justice Department during the Ronald Reagan and George H.W. Bush administrations.

Mr. JEFFRIES. It says a very public dispute broke out last week when Nevada Attorney General Adam Laxalt went against Governor Brian Sandoval's wishes and joined a lawsuit filed by 25 other States. The two of you are both Republicans who agree that the current immigration system is broken and that comprehensive reform is necessary, but Mr. Sandoval opposes litigation and has suggested that new immigration reform legislation is the best way to proceed.

That is his perspective. I would assume that even though the two of you disagree, even though this Republican Governor believed that you took unilateral action, would it be reasonable based on his disagreement with your actions to defund the Office of the Nevada Attorney General?

Mr. LAXALT. Mr. Congressman, there is no way something like that would happen. Obviously, the Attorney General Office is the top law enforcement for the entire State. We have many, many statutory duties to protect our citizens from law enforcement, to consumer fraud. And a lot of this is much ado about nothing. The Governor and I work together on many, many issues every day. And I am the legal adviser to all of our agencies as well as all of our boards and commissions. So, you know, this was an unfortunate one issue, but as I said, there is no issue with the Governor and me.

Mr. JEFFRIES. Thank you. My time has expired, but I hope you would also agree, based on that same logic, that even though there is a disagreement between the President, Democrats in Congress, and congressional Republicans, it would be unreasonable, to use your phrase, to defund such an important agency, the Department of Homeland Security, simply because of a political dispute.

I yield back.

Mr. GOWDY. I thank my friend from New York.

Before I go to the gentleman from Idaho, Mr. Laxalt, I would say, I think have any independent attorney general is a great idea, something we ought to try on the national level at some point.

With that, Mr. Labrador?

Mr. LABRADOR. Thank you, Mr. Chairman. I would like to point out that my good friend Mr. Jeffries is comparing apples and oranges. There is nobody in Congress who is trying to defund Homeland Security except for the Democrats. We actually funded fully the Department of Homeland Security, except for the President's illegal and unconstitutional actions. It seems like my friends on the other side are willing to put 5 million illegals ahead of the safety and security of the United States.

I just want to make that clear, because we passed a bill that fully funds—in fact, as was previously stated, not only fully funds but funds above the levels that the President asked for. We completely funded the Department of Homeland Security. The only people that are stopping this funding are Democrats in the Senate that are not even willing to listen to an argument why we should have this bill passed through Congress.

So there is nobody here on my side who is trying to defund this.

Mr. Legomsky, I listened to your testimony. I have been sitting here the whole time. I understand you are a professor of law, and you also were the chief counsel for USCIS. Is that correct?

Mr. LEGOMSKY. Yes.

Mr. LABRADOR. Did you ever practice immigration law? Did you ever do private practice?

Mr. LEGOMSKY. No, I did not.

Mr. LABRADOR. Okay, I did 14 years of private practice in immigration law, and I defended and represented a lot of people who were in legal jeopardy in the immigration system.

What do you think one of the attorneys working for ICE or one of the attorneys working at the time for INS would have said if I would have gone up to them and said, Mr. Attorney or Mrs. Attorney, could you please give me prosecutorial discretion because you guys don't have enough funds to enforce the law in the United States? What do you think the answer would have been to my little office in Idaho?

Mr. LEGOMSKY. If the only reason were that they don't have enough funds, the answer probably would have been no. But, of course, the real question is, we don't have enough funds and here is why I think my client should be a low priority. In that case, I hope a reasonable ICE agent would take that——

Mr. LABRADOR. I asked that many times, and you know what the answer was every single time? No. Because they never did that, because you are confusing what is really happening here. And I have been listening to you very clearly.

You said, your own words were that the there is direct criteria, so there is a threshold of criteria. Can you name one case that has been put in deportation or removal proceedings, just one case that has been put in deportation or removal proceedings, that has met the threshold of criteria?

Mr. LEGOMSKY. I have to answer in two parts, I am afraid.

Mr. LABRADOR. Just one case.

Mr. LEGOMSKY. I understand. But I have to explain.

Judge Hanen in his order specifically ordered the Government to give some examples of cases in which people were found to have met the threshold criteria but nonetheless were denied——

Mr. LABRADOR. Have they provided that information?

Mr. LEGOMSKY. Yes. That is what I was leading up to.

Not only did they provide the information but Mr. Neufeld in his sworn affidavit offered several specific examples of such cases. Nonetheless, Judge Hanen inexplicably said the Government has not provided information that the cases——

Mr. LABRADOR. Professor Blackman, could you address that question?

Mr. BLACKMAN. So in paragraph 24 of the Neufeld declaration, the only examples cited were gang membership, gang affiliation, or fraud. The only examples the Department of Justice could put forth in defending this policy was gang membership or fraud. Those are criteria in zone one. Gang membership would make you a high priority for national security risk because of your gang membership. And fraud, I don't think there is much discretion saying someone committed fraud or was dishonest with the tribunal.

The only example——

Mr. LABRADOR. So are you saying fraud in the application or previous fraud?

Mr. BLACKMAN. Previous fraud for lying on the application, lying on a previous application, right? These are the only examples the Neufeld declaration brought forth. If these were the best examples they have, then there isn't much discretion.

Mr. LABRADOR. And those are criteria, especially the fraud criteria, that would make you ineligible for any form of relief under immigration law.

Mr. BLACKMAN. Yes. And that has been the Secretary's policy. That has nothing to do with case-by-case discretion. So if that is the best they can gin up, there is not much there. And that was actually in paragraph 24 of the Neufeld declaration.

Mr. LABRADOR. Okay, let us talk now, you say it is not illegal to tell a person we are not going to proceed against you, right? That isn't putting you in differed action. And I think you have been misleading us a little bit. I don't think you are doing it on purpose, because I have really enjoyed your testimony. But there is a difference between not deporting somebody, not putting somebody in removal proceedings, and putting them in deferred action, is there not?

Mr. LEGOMSKY. Yes, but the difference is that in the latter case, you are affirmatively telling them that.

Mr. LABRADOR. No, but the reason you are doing it is because you want to grant them benefits. That is the main difference.

I had cases where they were put into deferred adjudication, and it is because there was some criteria that they met. They were either helping the prosecutor, they were helping the local police. There was some criteria that they needed to stay in the United States so they could be granted affirmative benefits. That is why we have deferred adjudication.

Sometimes immigration chooses not to deport somebody, but the reason you put somebody in differed action is to grant them a specific benefit.

That is what this Administration is doing. This Administration is deciding not just that we are not going to deport people. They are saying we want to put them in a criteria that, under the law, they are going to receive specific benefits, and they are doing that.

So could this President say tomorrow that I want every person who is here in the United States illegally from Mexico, I want to put them in deferred action? Could he say that?

Mr. LEGOMSKY. My gut instinct is to say that that would be very difficult because it would turn on the empirical question of whether, after doing so, you are still able to substantially spend the resources Congress intended.

Mr. LABRADOR. You know, you keep saying that. They can always suspend the money. That is the most ridiculous statement I have heard. They will always spend the money. The question is, does he have the discretion to just pick one category of people and say that I am not going to deport you. That has never been done in immigration. It was always done on a case-by-case basis. And at this point, this President has decided not to do it on a case-by-case basis but to categorize groups of people and put them into a category that grants them benefits. And that is illegal.

Mr. GOWDY. The gentleman is out of time. The professor may answer, if he would like to.

Mr. LEGOMSKY. Sure. Well, as you know, Congressman, especially from representing people in the past, there are lots of reasons people have been granted deferred action, including a range of humanitarian reasons.

But as to your last example, where he granted only to nationals of Mexico, I would just mention that there are lots and lots of cases in which Presidents have granted functionally equivalent discretionary relief to people based solely on their country of origin. So that would present a close question.

Mr. LABRADOR. Based on TPS, and something that the law already granted the President the authority to do, so let us not make that——

Mr. LEGOMSKY. It could be defund enforced departure or some other remedy.

Mr. GOWDY. The gentleman is out of time. I thank the gentleman from Idaho.

The Chair will now recognize the gentleman from Illinois, and apologize for overlooking him last time. It was inadvertent.

Mr. GUTIERREZ. I know that, Mr. Chairman. It is good to be with you all this afternoon.

Mr. Chairman, could I have my staff assistant hand out a memorandum that was November 4 to all of our witnesses, so they have a copy?

Mr. GOWDY. Yes, sir.

Mr. GUTIERREZ. Thanks.

Ms. LOFGREN. While that is being done, can I ask unanimous consent to put in the record the declarations of Donald Neufeld; the ICE Director, Sarah Saldana; and the CBP Commissioner, Mr. Kerlikowske?***

Mr. GOWDY. Without objection.

Mr. GUTIERREZ. Thank you, Mr. Chairman.

First of all, I think we should use this document because it is a letter written in 1999 signed by Henry Hyde and Lamar Smith and Bill McCollum and a series of other outstanding Republican Chairmen of this Committee, in which they write to Janet Reno, saying you guys have to promulgate some discretion here. You haven't done it enough. And you have the ability and the right in law to do exactly that, and you haven't done it.

So I just want to state for the record that not our party, but the majority party, has stated and stipulated through this memorandum that they believe in discretion, and that the Administration should use discretion. And in the memorandum, just for the public, it says, "We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion."

Mr. COLLINS. Will the gentleman yield?

Mr. GUTIERREZ. I can't.

Mr. COLLINS. You can't, or not possible, or don't want to?

Mr. GUTIERREZ. Not right now. I am in the middle of reading——

***Note:** These submissions are available in the Appendix.

Mr. COLLINS. Well, you are reading a letter——

Mr. GOWDY. The gentleman from Illinois controls the time.

Mr. COLLINS. Will he yield?

Mr. GUTIERREZ. I can't. If I could have that time back, because I was trying to have a conversation——

Mr. COLLINS. Well, I will be happy to give your time back, if you put it in proper context. The letter, which——

Mr. GOWDY. The gentleman from Illinois controls the time.

Mr. GUTIERREZ. Why are you so upset? You have three witnesses to one already.

Mr. COLLINS. Well, because when you left the room the other day I talked about——

Mr. GOWDY. The gentleman from Illinois controls the time.

Mr. GUTIERREZ. Even the Attorney General has to laugh at that. I mean, it is 3-to-1. It is stacked.

Mr. COLLINS. Well, 3-to-2 right now.

Mr. GUTIERREZ. Oh, 3-to-2, okay.

Mr. GOWDY. Just so the gentleman knows, we stopped the clock. The gentleman from Illinois.

Mr. GUTIERREZ. Thank you so much. I came here to try to have a conversation, but you see how it gets in here, just reading a memorandum signed. It is here. I have entered this into the record a dozen times, so everybody should have a copy of it by now, and everybody should know I am bringing it up each and every time anybody talks about discretion, because it is established.

I mean, Henry Hyde, Illinois, Chairman of the Committee, signed this. Lamar Smith, no pushover when it comes to those illegal immigrants and how the American Government should treat them.

So it says, "Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings. See attached memorandum. Furthermore, a number of press reports indicate that the INS has already employed this discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines."

So let us make it clear, it is well-established in the law, unlike other parts of the Federal Government, that there is discretion when it comes to the application of the law in immigration law.

And the attorney general, I have a definition here of politician. Are you a politician? I have Webster's. Are you a politician?

Mr. LAXALT. I am an elected representative, yes.

Mr. GUTIERREZ. You are a politician, right? I will find it, it will say elected representative. I just want to get that in there. You run for public office. So I can find you other definitions of politicians.

So just that we are clear, you are in the politics business, right? And that is what you do and that is how you earn a living.

So I just came here to say, look, the Supreme Court is going to answer this for us all. That is why we are a Nation of laws, right? And we all know where this is going. I am not a lawyer, but I happen to know this is going to go to the Fifth Circuit.

They picked the most conservative judge they could possibly find to hear this case. They didn't come to Illinois with this case, right? They didn't go to New York. They didn't even go to Nevada to pick the case. No, they went and they found the judge who had already—not him but in his district. So they went to Southern Texas.

So, look, this is going to be decided. But I just wanted to make it clear, because there seems to be some confusion, Mr. Chairman. People keep saying that what the President did was unconstitutional. And the former attorney general and now Governor, another politician in Texas, who was the attorney general, tweeted it is unconstitutional. Any of you read the decision, anybody read the decision and he said it was unconstitutional? Nope. Yet you have the Governor of the State of Texas, a former attorney general, saying it is unconstitutional.

You see the parameters were dealing in. We are dealing in political parameters on what should be an issue about how it is we deal with an immigration system.

I just want to go back to my colleagues who spoke earlier. The fact is, 4 percent, many of my colleagues like to argue the following, "Well, why don't you just round up all the criminals and deport them?" Because we only provide sufficient money for 4 percent. Let me repeat that: We only provide—and no one has ever come here to suggest that we should provide any more money. So it is always about the criminals and always in this context.

And even my friend, I am sorry he went, he said, oh, Mexico. Why are we always talking about Mexico? Why did that Federal judge only describe the border? What happened to the border at LAX? What happened to the one at O'Hare? What about the one in New York City, Kennedy? All of those are points of entries in which millions and millions of undocumented immigrants have come into this country, documented and have overstayed, and are part of the 11 million, and, therefore, can be provided relief under the President's order.

So my only point to you is, you are not going to deport 11 million people. This is a political case. It will be judged on its merits in the Supreme Court.

And I will just and with this, because the Chairman—Mr. Chairman, I want to find a solution to the problem, not keeping having hearings here where the four distinguished jurists who all know a lot about the law are not going to decide the case. So why don't we find a solution to the problem of our broken immigration system, so that we can provide solutions to people, because I am sure most of us would agree we should go after gangbangers, we should go after drug dealers, rapists, and murderers, and not people trying to raise their families in the United States that are caught up in a broken immigration system.

And lastly, this is a very perilous place for my friends in the majority, because you have 5 million American citizen children who are never going to forget for generations how it was you treated their mom and their dad, how it was you treated their mom and their dad, and if you treated them in a cruel manner.

That is the community. We are not a community in which the undocumented and the documented live in a caste society. No, you know what? Fourth of July, we are having hotdogs and ham-

burgers, and on Thanksgiving, we are having turkey all together, with our papers and without.

Mr. GOWDY. I am trying to treat my friend from Illinois in a good way.

Mr. GUTIERREZ. You have been so generous, and I apologize.

Mr. GOWDY. No, you do not need to apologize. I thank the gentleman from Illinois.

The Chair would now recognize the gentleman from Texas, the former U.S. Attorney, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman. I would like to yield my time to the gentleman from South Carolina, Mr. Collins.

Mr. GOWDY. I think he is from Georgia.

Mr. RATCLIFFE. Is there a difference?

Mr. GOWDY. We kicked him out of South Carolina several years ago. He has warrants outstanding. He is from Georgia now.

Mr. COLLINS. I just wanted to clarify again, and we did this last time. It is Groundhog Day. Here we go again.

The letter spoken of, which I went through this about a month or so ago, was dealing with legal permanent residents. It was not dealing in this discretion of illegal or crossing—it was not dealing in this issue. So basically to take a letter at the time when things were taken out of a 1996 legislative reform in dealing with this, let us at least be fair with the letter. And to come up here and to use a letter, and take people who are no longer in this body, who no longer can defend themselves, and even some who happen to be here and just not on this Committee, to say that is just wrong.

I believe the gentleman from Illinois has a good heart. I just believe he is dead wrong on many things dealing with this. This is one though, let us at least have an honest discussion about this. Let us not at least throw in names so you can make yourself basically appear an argument that is not there. This is what is wrong right now with this. This is what is wrong with this argument. This is what is wrong the American people to get.

And I appreciate the gentleman yielding. And with that, I yield.

Mr. RATCLIFFE. I thank the gentleman. I am not sure if my faux pas offended South Carolinians or Georgians, but my apologies to both.

Mr. COLLINS. Probably equally.

Mr. RATCLIFFE. I thank all the witnesses for being here today. I enjoyed reading your testimony and hearing some of it.

Professor Legomsky, it is very clear to me that you obviously think the President's November 20 Executive order was constitutional. But it also appears to me that while you think the President's action was lawful, from reading the tone and tenor of your testimony and your articles, it also seems to me that you want him to be right.

Mr. LEGOMSKY. I do. I believe in what he is doing and think he is taking sensible actions. So yes, I confess to that.

Mr. RATCLIFFE. So do you consider yourself an advocate for the rights of people who are in this country illegally?

Mr. LEGOMSKY. I consider myself an advocate for the legal rights of all people, whether they are here illegally or not. Everyone has certain rights.

Mr. RATCLIFFE. Okay, so people who come across our borders without permission, are they here illegally?

Mr. LEGOMSKY. Yes.

Mr. RATCLIFFE. Okay. Is there reason that you never refer to them as illegal aliens or folks who are here illegally?

Mr. LEGOMSKY. Yes. I have referred, on occasion, to people who are here illegally, but I don't like the phrase "illegal alien" because I don't like the idea that the word "illegal" would be used to describe a person. They have acted illegally. They have entered illegally. I have no objection to that. But the phrase "illegal alien" offends many people because you are defining an entire person by one act.

Mr. RATCLIFFE. So to the Chairman's prior question, as I heard your testimony, is the issue here really a constitutional one or is it a budgetary issue? In other words, if we remove the limited resources question and issue, does this all go away, in your opinion?

Mr. LEGOMSKY. I think that is a very thoughtful question, and it does tie in with a thoughtful question that Mr. Gowdy had asked earlier. I don't think you can separate the two.

Whether this is constitutional depends on whether the President has a justification for choosing the priorities that he has. And one of the factors that has informed those priorities is the reality of limited funds.

Mr. RATCLIFFE. Professor, I think I know your thoughts on Judge Hanen's issuing the injunction. I think it is very clear. But I missed some your testimony. Have you opined on whether or not you think the Administration has violated the APA?

Mr. LEGOMSKY. I have. I do not believe they have violated the APA, and my basic reason, which I can state succinctly, is that the only argument made for why the APA notice and comment procedures might be thought to apply would be that they didn't really involve the exercise of discretion. And for all the reasons given in my written testimony, I think there is simply no factual support in the record for that conclusion.

Mr. RATCLIFFE. Okay, what your written testimony that was provided doesn't address is the Government's response in seeking a stay to the injunction. Do you agree that the Government is on solid legal footing there?

Mr. LEGOMSKY. I am sorry, do you mean in requesting a stay?

Mr. RATCLIFFE. Yes.

Mr. LEGOMSKY. I do. A stay is a discretionary judgment, but certain factors inform it, one of which is how likely you are to succeed on the merits, how much damage would there be to either side if the stay is not granted, and so on.

I think reasonable minds can disagree about the stay. My own view is that it would make sense to grant it.

Mr. RATCLIFFE. Well, can you explain to me, Professor, from your perspective, how our Federal Government is irreparably harmed by not conferring benefits on what they refer to as third parties, what I would refer to as folks who are in this country illegally? Can you explain to me how the Government would be irreparably harmed?

Mr. LEGOMSKY. In the stay motion, the Government asserted two different harms. One harm is simply to the Government's authority granted by Congress to establish national immigration enforcement

policies and priorities. The other harm, which is much more tangible, though, is that at this point the Government has already invested resources in hiring adjudicators, leasing physical space, and so on, that will be eventually recouped by the revenue that comes in from the request. But if that were to be shut down, then this money would be wasted. And in the meantime, the Government does have to continue its preparations, if it is to resume this on schedule.

Mr. RATCLIFFE. Well, so the Government asserts, to your point, "When these harms are weighed against the financial injuries claimed by the plaintiffs, the balance of hardships tips decidedly in favor of the stay." I hear you saying that you agree with the Government's assertion, in that respect.

Mr. GOWDY. The gentleman from Texas is out of time, but you can answer the question as succinctly as you can, Professor.

Mr. LEGOMSKY. Sure. I strongly disagree with the idea that Texas is going to lose even one penny because of this for several reasons.

First of all, they never allege that they are going to have to hire a single additional person to process these driver's licenses. It is the marginal additional costs, not the average amortized cost that should count.

Secondly, they don't——

Mr. RATCLIFFE. Wait a minute. In fairness, Professor, all of these folks, if they were allowed to stay under the President's Executive order, they could apply for Texas driver's licenses.

Mr. LEGOMSKY. Yes.

Mr. RATCLIFFE. And each of those would come at a cost to the State of Texas of $130 per license times hundreds of thousands of folks in the State illegally.

Mr. LEGOMSKY. Well, two things. The first point——

Mr. GOWDY. Say them as quickly as you can. I am already 2 minutes over, okay?

Mr. LEGOMSKY. Okay, sorry. I will go to the second point. The second point is that while Texas, to its credit, offsets that cost by the revenues it would receive from the applications, it still comes out to a negative, if that is all you take into account. What they don't take into account is what so many empirical studies have now demonstrated, which is that their tax revenues will increase dramatically as a result of DAPA and DACA. There has even been a study that specifically finds the same thing to be true for the State of Texas. So they will gain financially quite a bit from this.

The third thing is that if you adopted this theory of standing, just think for a moment of what it would lead to. If the mere fact that, when a Federal benefit is granted, someone could then apply for a State benefit were enough to confer standing, then every time USCIS grants anything to anyone, the State of which that person is a resident could then come in and say we have standing to challenge that. Surely, that is not what the standing doctrine was designed to accomplish.

Mr. GOWDY. Thank the gentleman from Texas.

The Chair will now recognize the gentleman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chair.

First of all, I want to thank all of the witnesses. It has been a very enlightening hearing. So thank you all for being here today.

We have had several exchanges from Members regarding this idea of prosecutorial discretion. As a former prosecutor myself, I understand and appreciate the need for prosecutorial discretion when it comes to ensuring justice. That is the role of the prosecutor.

However, what I do not understand, in this context, is how this remedy that has been created, deferred action, exceeds what we now know as prosecutorial discretion. And in fact, Professor Foley, you indicated that the President's immigration order is unconstitutional for three reasons, and this was the second reason, and that was the creation of the remedy deferred action. Can you expound on that and tell me how it is different from ordinary prosecutorial discretion?

Ms. FOLEY. Yes. It is a really great question because deferred action is something that Congress has authorized in specific statutes for specific populations in the past. So there are some statutes out there that say X, Y, or Z is entitled to deferred action. Now normally when something like that happens, if a court looks at the grant of deferred action in another area, let us say A, B, or C, the court would say, well, the fact that Congress clearly knows that deferred action exists and has granted it for X, Y, and Z necessarily implies that they don't intend to grant it for A, B, and C. So that is point one.

The other thing is that deferred action has been granted administratively, not by Congress in statute, but by the executive branch on several occasions in the past. My written statement elaborates on four instances that the OLC relied upon in blessing the constitutionality of the President's action.

For every single one of those, except for the widower or widow one that President Obama took in 2009, all three of them involved a situation where Congress had already passed a statute that gave this group legal status. And deferred action was given administratively as a bridge until they could achieve the processing of that status.

So in those situations, you can see that granting administrative deferred action is perfectly consonant with congressional will.

Now the widow or widower one I don't think was legal, frankly, because that was granted at a time when the applicable statute did not grant that kind of deferred action to widows or widowers. In fact, several months later, after that administrative deferred action was granted, then Congress amended its statute. But at the time the grant of deferred action was taken, that statute did not exist. And, therefore, I don't think you can say it was consonant with congressional will.

Now once Congress passed that statute, then it is game over. And in fact, at that point, the Administration receded from its administrative grant of deferred action and just said it is none of our business anymore. Congress has legislated it.

And that is all working correctly, right? So we will never know whether that was legal or not, because it got mooted out by subsequent statute.

Mr. BISHOP. Thank you very much.

Professor Blackman, is this something that you can comment on as well?

Mr. BLACKMAN. Yes, absolutely. So the Office of Legal Counsel memorandum posed the key question: Is the President acting consonant with congressional policy? And the key aspect of consonance the President has to look at whether Congress has acquiesced to it. As Professor Foley noted, there are several instances in the past where Congress has acquiesced to this.

But in each case for those deferred actions, it serves as a temporary bridge where there was some lawful status, something happened, and then something else happened, right? So to give you a good example, in 2005 when Hurricane Katrina hit the Gulf, you had a lot of students who were studying at universities. Their schools were shut down. They lost their status. They were foreigners.

So the President said I will give you 4 months to enroll at another university. If you take that time to enroll at another university, you will not be deported in that time.

In my mind, that is a good example of deferred action. Someone had some status. Something bad happened, like Hurricane Katrina. And then they lost it, and then you give it back to them later. What is happening here is that there is no prospect of success.

So DAPA beneficiaries will not get anything after a 3-year period is up. Nothing. The only way that they can get a visa if perhaps their child turns 21 in the interim and perhaps they have a 10-year bar on return to the country and that is waived. There is no opportunity for the DAPA beneficiaries to get any relief.

This is not really a tunnel. It is more of a bridge to go through the law. I think that makes it inconsistent with the congressional policy and, therefore, a violation of the "take care" clause of the Constitution.

Mr. BISHOP. Thank you very much.

Mr. GOWDY. Thank the gentleman from Michigan.

The Chair would now recognize the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. I thank all the witnesses for your perseverance here today, too. This is a relatively long hearing for us, and I picked up a lot sitting here listening.

I wanted to make a point here, and then move on to a broader one, and that is this. Some years ago, I went through an exercise of what Congress is obligated to do under Article III. This has to go back to about 1802, when there were a couple Federal districts that were abolished by Congress, court districts. I read through all of that debate, and so I began to ask this question. What we are obligated to do under Article III is produce a Supreme Court of the United States. And we could conceivably abolish all of the Federal districts and the only thing left would be the Supreme Court. And the only obligation we have there, since it calls for a Chief Justice, is to have a Chief Justice. But we don't have to fund the building or his staff. He could be at his own card table with his own candle. That is what Congress is obligated to do.

So I would suggest that Article III is pretty limited, if Congress decides to assert its power and authority over it. If nothing else, the workload would stack up on Chief Justice Roberts. So that was

just an exercise in constitutional discussion, more or less kind of metaphysics.

So I just went down through Article II. Since the President is usurping Article I authority, what does the President of the United States have under Article II? I went through a number of these things here.

He is the Commander in Chief of the Armed Forces. Congress forms the Armed Forces. They may not exist, at least theoretically.

He may require an opinion of the principal officers of each executive department. He may, but there may not be departments for him to require an opinion of.

Then he shall have power to grant pardons and reprieves, and he has, with the advice and consent of the Senate, treaties and appointments, but then he is subject to the authority of the United States Congress.

So in the end, the question comes down to, what enumerated powers does the President have independent of congressional approval? That turns out to be six.

He may pardon.

He shall deliver the state of the union. If it is not an address, it might be in a letter, as it was under the early Presidents. So he could send a letter to Congress and meet that requirement.

He shall recommend legislation. Well, he does that without having to be prompted very much.

He may convene Congress. He may adjourn, but so may Congress adjourn, so that is really not a power that is effective.

He shall receive ambassadors and ministers. That means that the President then shall be the head of state and conduct the functions of a head of state, at least diplomatically.

And the last one is this wonderful one, "He shall take Care that the Laws be faithfully executed."

So when you look through that, the only two that have any power really at all is the power to pardon, which could be significant under certain circumstances, but the power and the obligation "to take Care that the Laws be faithfully executed."

And I don't know that I have heard an argument as to how the President might be doing that under the circumstances we are discussing here today. Not only that, not only is he violating his own oath of office, it is very, very clear that he has said, "I am not going to enforce the laws that I don't want to enforce. And by the way, Congress, I am going to recommend legislation to you, and if you don't pass that legislation, then I am going to implement it by my executive edict," not always Executive order, executive edict. "And I am going to take care that the laws that I don't want to be executed are not, including the section that requires that those who were interdicted by law enforcement and immigration be placed into removal proceedings," shall be placed into removal proceedings. And we have a President who says they shall not. And he has ordered his executive branch to violate laws.

And by the way, some of this is not in litigation in the court case we are talking about over the November 20 edicts, but it is under litigation in the *Crane v. Johnson* case that was filed a couple years ago, *Crane v. Napolitano*.

So I would just ask this question, and that is, what if Congress decided to usurp Presidential authority? What if President decided, "The President is not doing his job. He is not keeping his oath. Why don't we form a justice department and fund a justice department and direct and order a justice department?"

I would ask first the question of Professor Foley. If Congress decided to do that, we could enforce these laws. What would be the consequence of such a thing?

Ms. FOLEY. It is a great question. I posed this before, the last time I testified before the Committee on the President's action with regard to Obamacare and delaying the employer mandate. The hypothetical I posed was what if the Speaker of the House decided he wanted to appoint himself Commander in Chief? But it is the same idea, right?

Article II can supposedly usurp Article I, but Article I can't usurp Article II? It doesn't work either way. I mean, neither one is constitutional.

The point about this being prosecutorial discretion, just ask yourself, everybody I think on this panel agrees that the $6 million legal question on prosecutorial discretion is, is what the President doing consonant with congressional will, because you get to control your statutes and he has to faithfully execute them under the Constitution? So is what he is doing consonant with what you want and what you have directed, pursuant to the INA? I think the answer is patently that it is not consonant with congressional will.

And just as a thought experiment, again, ask yourself this: Why didn't previous Presidents think they had the authority to do this? If this was so politically palatable for such a long period of time, the last 30 or 40 years, why didn't President Clinton do it? Why didn't President Carter do it? The reason they didn't do it is because no President thought they had the authority to do this because they didn't think Congress had authorized it under the INA, which explains why the President went around 20-plus times and said he didn't have the legal authority to do this.

By the way, the Supreme Court has said as much. There is a case called *Utility Air Regulatory Group v. EPA*, involving EPA's carbon tailoring rule that was decided last summer. In that case, the Supreme Court basically said, look, one of the reasons why the carbon tailoring rule violates separation of powers, and it did violate separation of powers, is because the EPA is promulgating a regulation that flies in the face of years of understanding of what the Clean Air Act was thought to give the authority to the EPA to do as a regulatory matter.

It is the same thing here, the same form of construction of Congress' will should take place in this case.

Mr. KING. In the end, and in conclusion, Mr. Chairman, it is the people who decide the division between the three branches of government. And I think they need to declare war on the enemies of the Constitution.

Mr. GOWDY. The gentleman from Ohio yields back his time.

The gentleman from Florida, Mr. DeSantis, is recognized.

Mr. DESANTIS. Thank you, Mr. Chairman.

Professor Legomsky, I just want to make sure I have it right. Obama's statements 22 times that he said he didn't have the au-

thority, you are saying that he just meant that he didn't have the authority to suspend all deportations. Is that accurate?

Mr. LEGOMSKY. I think he went further than that. He said his authority is limited. He didn't have the authority to suspend all deportations.

Mr. DESANTIS. Right, but you deny that he has disclaimed the authority to do what he did in November, correct?

Mr. LEGOMSKY. Right.

Mr. DESANTIS. I think that that is at variance with the facts.

February 14, 2013, the President of the United States, "I am not the emperor of the United States. My job is to execute the laws that are passed. Congress right now has not changed what I consider to be broken immigration system. What that means is that we have certain obligations to enforce the laws that are in place, even if we think that, in many cases, the results may be tragic here. We have kind of stretched our administrative flexibility as much as we can."

September 17, 2013, he said, "What we can do is then carve out the DREAM folks saying young people who have basically grown up here as Americans that we should welcome. But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally, so that is not an option. What I have said is that there is a path to get there, and that is through Congress."

So those are instances not where he is saying he can't suspend everything. He is specifically saying he has reached his administrative limit, that he has reached the limit of what he can do. And these are in response to questions that specifically wanted to address some of the classes of people that he has now addressed with this latest executive action.

So to say, as you characterize it, is completely at variance with the facts. And I think it really undermines your credibility.

Let me talk about the political statements versus legal statements.

Professor Blackman, I think you correctly point out in your testimony that this is not just all about the courts. Congress has a role there. The powers we have are political powers and political checks. So when the President is out saying these things, the idea that he is making political statements that don't matter—when he vetoed the Keystone pipeline, he didn't go to court to do that. He took a political action based on the power he had an Article II of the Constitution. And you cited James Madison in Federalist 51. Madison, is this not correct, in a later Federalist Paper said the power of the purse is Congress' most powerful check, correct?

Mr. BLACKMAN. Yes, that is right.

Mr. DESANTIS. So Madison envisioned, if an executive branch is acting a certain way, Congress could always simply remove the funds so that the executive could not continue with the actions, right?

Mr. BLACKMAN. That is right.

Mr. DESANTIS. So that is perfectly legitimate that Congress would restrict funding, if they believe their powers have been infringed upon.

Mr. BLACKMAN. Yes.

Mr. DESANTIS. Do you also think that the advise and consent power that the Senate has is a legitimate check on Presidential overreach? In other words, if the President is putting someone in a position who has pledged to continue conduct that we think infringes on our authority, the Senators could use that as a legitimate reason to deny someone appointment?

Mr. BLACKMAN. It is, and just 6 months ago, the Supreme Court rebuked the Administration for making illegal recess appointments in the Noel Canning decision. So this is a part of a very long trend of when the Congress is gridlocked and they will not get along, the President finds ways of bypassing it.

Mr. DESANTIS. And the courts do have a role, but it is a limited role to cases and controversies. And isn't it the case that there are going to be disputes between executive and legislative branches that may not give rise to a case of controversy, and thus not be ripe for adjudication in the courts?

Mr. BLACKMAN. That is right.

Mr. DESANTIS. So if you expect the courts to do everything, well, then we are leaving a lot of authority out there that will essentially be uncontested if Congress isn't willing to act.

Professor Foley, you mentioned that the key issue is if the executive actions are consonant with the underlying law. Isn't it the case that the underlying law prohibits people who are here illegally from having unlawful employment in the country?

Ms. FOLEY. Yes. In fact, the only way that this group, the DACA/DAPA recipients are granted work authorization, is because the Obama administration has decided to unilaterally grant them deferred action, which, again, that remedy, deferred action, is a remedy that Congress hasn't statutorily specified for this population.

Mr. DESANTIS. And the statute trumps administrative action or executive memos or anything like that. So you have Congress that said very clearly prohibition on employment. Now the President is issuing 5 million work permits. So to me, that is absolutely in conflict with what Congress has said.

Let me ask you this, in terms of somebody who could be harmed by this, if the President issues these work permits and the background is that people who are here illegally are actually exempt from Obamacare's employer mandate, meaning if I am an American citizen applying for a job, somebody here has one of these work permits, they go and we have the same skills, we qualify for the same wage, the person who is here illegally, actually, will be cheaper for the business to hire, because they don't have to provide Obamacare. They would have to provide it for a U.S. citizen.

So in that instance, would a U.S. citizen potentially have an ability to bring a lawsuit challenging that?

Ms. FOLEY. I think it is possible, although I have to confess, in terms of standing, what the affected U.S. citizen would have to establish is but for the ACA nongrant of eligibility.

Mr. DESANTIS. Let us assume the employer just said, "Yes, look, I would have hired you, but I am saving $3,000 here. I mean, I have to do that."

Ms. FOLEY. Yes. I think it is possible. I think if you have the right facts and circumstances with an affidavit filed by the em-

ployer that but for he would have hired the U.S. citizen, I think you could establish standing.

Mr. DESANTIS. My time is up. I yield back.

Mr. GOWDY. I thank the gentleman from Florida, on behalf of all of us.

This concludes today's hearing. We want to thank our four panelists for your collegiality with the Members of the Committee and your collegiality with one another. It has been very educational. I felt like we were back in law school, so most of us will be waiting on our C- grades later on this afternoon. Maybe not DeSantis or Zoe, but the rest of us will be.

So, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, our thanks again to each of you. And we are adjourned.

[Whereupon, at 1:32 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*	)	
Plaintiffs,	)	
	)	No. 1:14-CV-254
v.	)	
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF DONALD W. NEUFELD

I, Donald W. Neufeld, hereby make the following declaration with respect to the above captioned matter.

1. I am the Associate Director for Service Center Operations (SCOPS) for U.S. Citizenship and Immigration Services (USCIS), a component within the U.S. Department of Homeland Security (DHS or Department). I have held this position since January 2010. In this position, I oversee all policy, planning, management and execution functions of SCOPS. My current job duties include overseeing a workforce of more than 3,000 government employees and 1,500 contract employees at the four USCIS Service Centers located in California, Nebraska, Texas and Vermont. These four centers adjudicate about four million immigration-related applications and requests annually, including all requests for deferred action under the Deferred Action for Childhood Arrivals (DACA) process.

2. I was previously the Deputy/Acting Associate Director for USCIS Domestic Operations from June 2007 to January 2010 where I oversaw all immigration adjudication activities at USCIS's four Service Centers and 87 field offices throughout the United States, as well as 130

Application Support Centers, four Regional Offices, two Call Centers, the Card Production Facility and the National Benefits Center. From January 2006 to June 2007, I was Chief of USCIS Field Operations managing and overseeing the 87 field offices delivering immigration benefit services directly to applicants and petitioners in communities across the United States and the National Benefits Center (NBC) which performs centralized front-end processing of certain applications and petitions. My career with USCIS and the legacy Immigration and Naturalization Service spans more than 30 years, where I have held several leadership positions including Deputy Assistant District Director for the Los Angeles District, Assistant District Director and later District Director of the Miami District, and Service Center Director for the California and Nebraska Service Centers. I began my career in 1983, initially hired as a clerk in the Los Angeles District, then serving as an Information Officer, then an Immigration Examiner, conducting interviews and adjudicating applications for immigration benefits. I also performed inspections of arriving passengers at Los Angeles International Airport.

3. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

USCIS's Role in Immigration Enforcement

4. DHS has three components with responsibilities over the enforcement of the nation's immigration laws: (1) Immigration and Customs Enforcement (ICE); (2) Customs and Border Protection (CBP); and (3) USCIS. USCIS is the DHS component that administers a variety of immigration-related programs. Currently, USCIS adjudicates approximately seven million applications, petitions and requests per year, including applications for naturalization by lawful permanent residents (LPRs), immigrant visa petitions (including employment-based visa petitions filed by U.S. employers and family-based visa petitions filed by U.S. citizens and

LPRs), a variety of non-immigrant petitions (including temporary worker categories such as the H-1B), asylum and refugee status, other humanitarian protections under the Violence Against Women Act (VAWA) and for victims of trafficking and crimes, humanitarian parole, and deferred action, among others.

5. USCIS's current budget is approximately $3.2 billion. This budget is funded overwhelmingly by user fees paid by individuals who file applications. Only approximately 5% of our budget is from Congressionally-appropriated taxpayer funds, and those appropriations are specifically designated for operation and maintenance of the employment verification system, known as E-Verify, and for limited citizenship-related services (none of which are related to requests for deferred action).

6. USCIS employs approximately 13,000 federal employees and an additional 5,000 contract employees housed in a range of facilities throughout the United States and overseas. USCIS maintains 87 Field Offices under its Field Operations Directorate (FOD) and four major Service Centers under SCOPS. These Service Centers are located in Dallas, Texas; Laguna Niguel, California; Lincoln, Nebraska; and St. Albans, Vermont. Altogether, the Service Centers employ approximately 3,000 federal workers. USCIS also operates the NBC, which is similar in size to a Service Center. The NBC performs some limited adjudications, although it was originally established to prepare cases for adjudication in other offices by conducting pre-interview case review.

7. The Field Offices and Service Centers adjudicate a wide range of immigration-related applications and requests. USCIS distributes the responsibility for processing and adjudicating various categories of applications and requests among the Field Offices and Service Centers

based on multiple considerations in order to achieve maximum efficiency, reliability, consistency, and accuracy.

8. The Service Centers are designed to adjudicate applications, petitions and requests of programs that have higher-volume caseloads, including non-immigrant visa petitions (such as H-1Bs), I-130 petitions establishing relationships between a U.S. citizen or LPR and a foreign national relative, employment-based applications for adjustment of status to lawful permanent residence, multiple forms of humanitarian protection (including temporary protected status, protection under the VAWA, non-immigrant status for victims of crimes and trafficking), and requests for deferred action under the DACA process.[1]

9. In addition to the Field Offices and Service Centers, USCIS also uses three centralized "lockboxes" for the initial receipt and processing of most applications, requests, and fee payments received by the agency each year. At the lockbox, every application and request is opened, reviewed for basic filing requirements, then fees are collected, and data is captured. In order to ensure reliability and proper processing, each application and request must be logged into one of the USCIS computer systems, the paper applications and requests must be scanned, the payment must be processed, a receipt must be issued, and the hardcopy applications and requests must be distributed to the appropriate Field Office, Service Center, or the NBC for further processing.

[1] DACA is not the only deferred action program handled by USCIS Service Centers. For example, the Vermont Service Center (VSC) currently administers two programs through which individuals may be placed in deferred action, one related to relief under VAWA and one related to U nonimmigrant status. VAWA allows certain spouses, children, and parents to self-petition for family-based immigration benefits if they have been battered or subjected to extreme cruelty by the U.S citizen or LPR spouse or parent, or U.S. citizen son or daughter. If the VAWA self-petition is approved by VSC, the self-petitioner can file an application for adjustment of status that is adjudicated by the appropriate field office. In addition, based on the approved self-petition, the self-petitioner is eligible for consideration for deferred action and for an employment authorization document. VSC adjudicates all VAWA self-petitions and also administers the deferred action and EAD component of the VAWA program.

The DACA Process

10. In 2012, then-Secretary of Homeland Security Napolitano "set[] forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws." In doing so, USCIS was tasked with implementing the DACA process and adjudicating these requests for deferred action. As explained by then-Secretary Napolitano, the DACA process supports DHS-wide efforts to efficiently prioritize overall enforcement resources through the removal of criminals, recent border crossers, and aliens who pose a threat to national security and public safety, while recognizing humanitarian principles embedded within our immigration laws. The individuals who could be considered for DACA "lacked the intent to violate the law" because they were "young people brought to this country as children[.]" She further explained such children and young adults could be considered, on a case-by-case basis, for deferred action if they met the guidelines, passed a criminal background check, and lived in the U.S. continuously for five years. Secretary Napolitano explained that DACA was part of "additional measures to ensure that [DHS's] enforcement resources [were] not expended on these low priority cases but [were] instead appropriately focused on people who meet [DHS's] enforcement priorities." *See* Exhibit A (June 15, 2012 Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," (hereinafter "the Napolitano Memo")).

11. Under DACA, aliens brought to the United States as children before the age of 16 and who are determined to meet other certain guidelines, including continuous residence in the United States since June 15, 2007, can be considered for deferred action on a case-by-case basis.[2]

[2] The guidelines for DACA under the Napolitano Memo include: 1) being under the age of 31 as of June 15, 2012; 2) entering the U.S. before reaching the age of 16; 3) continuously residing in the U.S. since June 15, 2007 to the present time; 4) being physically present in the U.S. on June 15, 2012 and at the time of making the request for

Requestors who meet the guidelines are not automatically granted deferred action under DACA. Rather, each initial DACA request is individually considered, wherein an adjudicator must determine whether a requestor meets the guidelines and whether there are other factors that might adversely impact the favorable exercise of discretion.

12. In addition to satisfying the DACA guidelines, requestors must submit to, and pay for, a background check. Information discovered in the background check process is also considered in the overall discretionary analysis. If granted, the period of deferred action under the existing DACA program is—depending on the date of the grant—two or three years.[3] Requestors simultaneously apply for employment authorization, although the application for employment authorization is not adjudicated until a decision is made on the underlying DACA request.

13. Procedurally, the review and adjudication of an initial request for deferred action under DACA is a multi-step, case-specific process described in greater detail below. The process begins with the request being mailed to a USCIS lockbox, which then reviews requests for completeness. Following review at the lock-box stage, those requests that are not rejected (as briefly described below) are sent to one of the four USCIS Service Centers for further substantive processing. Once a case arrives at a Service Center, a specially trained USCIS adjudicator is assigned to determine whether the requestor satisfies the DACA guidelines and ultimately determine whether a request should be approved or denied.

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consideration for DACA; 5) having no lawful status on June 15, 2012; 6) being currently in school, having graduated or obtained a certificate of completion from high school, having obtained a General Educational Development (GED) certificate, or being an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and, 7) having not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and not otherwise posing a threat to national security or public safety.

[3] The 2012 Napolitano Memo directed USCIS to issue two-year periods of deferred action under DACA. Pursuant to the November, 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewals now receive a three-year period of deferred action.

14. Unlike a "denial," a DACA request is "rejected" when the lockbox determines upon intake that the request has a fatal flaw, such as failure to submit the required fee,[4] failure to sign the request, illegible or missing required fields on the form, or it is clear that the requestor does not satisfy the age guidelines.

15. A DACA request is "denied" when a USCIS adjudicator, on a case-by-case basis, determines that the requestor has not demonstrated that they satisfy the guidelines for DACA or when an adjudicator determines that deferred action should be denied even though the threshold guidelines are met. Both scenarios necessarily involve the consideration of and exercise of USCIS's discretion.

16. Adjudicators evaluate the evidence each requestor submits in conjunction with the relevant DACA guidelines, assess the appropriate weight to accord such evidence, and ultimately determine whether the evidence is sufficient to satisfy the guidelines. Adjudicators must utilize judgment in determining weight accorded to the submitted evidence.

17. Where a guideline is not prescriptive, USCIS must also exercise significant discretion in determining whether that guideline, and the requestor's case in relation to that guideline, counsels for or against a grant of deferred action. For example, one of the DACA guidelines is that the requestor "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." *See* Exhibit A, at 1. While determining whether a requestor has been convicted of a felony is straightforward, determining whether a requestor "poses a threat to national security or public safety" necessarily involves the exercise of the agency's discretion.

[4] Very limited fee exemptions are considered. *See* Exhibit B (FAQ 8).

18. Even if it is determined that a requestor has satisfied the threshold DACA guidelines, USCIS may exercise discretion to deny a request where other factors make the grant of deferred action inappropriate. For example, if the DACA requestor is believed to have submitted false statements or attempted to commit fraud in a prior application or petition, USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met. As another example, when USCIS learned that a DACA requestor falsely claimed to be a U.S. citizen and had prior removals, as an exercise of discretion, USCIS denied the request even though those issues are not specifically part of the DACA guidelines.

19. Under current DACA procedures, denials issued solely on discretionary grounds, including for national security and public safety reasons, are generally required to undergo review by USCIS headquarters. There is an exception to that requirement for cases involving gang affiliation—where such affiliation is confirmed by interview—and those cases may be denied without further guidance from USCIS headquarters. After an adjudicator in a USCIS Service Center determines that, in his or her discretion, a request should be denied for purely discretionary reasons, the adjudicator may send to USCIS headquarters a "Request for Adjudicative Guidance," which summarizes the case, usually recommends a denial for discretionary reasons, and seeks concurrence or guidance before rendering a final decision. This process has been established to allow USCIS to ensure consistency and avoid arbitrary decisions regarding discretionary denials.

20. Adjudicators have the authority to verify documents, facts, and statements provided by the requestor by contacting educational institutions, other government agencies, employers, or other entities. *See* Exhibit B (USCIS Frequently Asked Questions for DACA Requestors (hereinafter DACA FAQs)), FAQ 21. In addition, adjudicators at the Service Centers may refer

a case for interview at a Field Office. *See* Exhibit C (redacted DACA interview notices). Typically, an interview would be requested when the adjudicator determines, after careful review of the request and supporting documents, that a request is deniable, but potentially curable, with information that can best be received through an interview instead of requesting additional supporting documents. For example, where an adjudicator suspected a requestor was associated with a gang, an interview was conducted to question the requestor regarding this association.

21. An adjudicator may also issue a "Request for Evidence" (RFE) or a Notice of Intent to Deny (NOID) to require the requestor to submit additional evidence in support of the request for DACA. An RFE is issued when not all of the required initial evidence has been submitted or the adjudicator determines that the totality of the evidence submitted does not meet the DACA guidelines or other discretionary factors. A NOID is more appropriate than issuing an RFE when the officer intends to deny the request based on the evidence already submitted because the request does not appear to meet DACA guidelines or other discretionary factors, but the request is not necessarily incurable. Since August 15, 2012 through December 31, 2014, 188,767 RFEs and 6,496 NOIDs have been issued in the process of adjudicating DACA requests. Failure to respond may result in a denial. *See* Exhibit D (redacted DACA-related RFEs and NOIDs); Exhibit E. In addition, all DACA requestors must submit to background checks, and requests are denied if these background checks show that deferred action would be inappropriate. Information discovered in this process may be provided to ICE, CBP, and other law enforcement authorities for further action if appropriate. *See* Exhibit B (DACA FAQs 19 and 20).

22. If USCIS denies a DACA request, USCIS applies its policy guidance governing the referral of cases to ICE. Normally, if the case does not involve a criminal offense, fraud, or a threat to national security or public safety, the case is not referred to ICE for purposes of removal

proceedings. Many of the cases involving discretionary denials were referred to ICE due to public safety issues.

23. Since the inception of DACA through December 31, 2014, USCIS accepted as filed 727,164 initial requests for deferred action under DACA. An additional 43,174 requests were submitted to USCIS, but were rejected at the lockbox stage. Of the 727,164 initial requests that were accepted for filing, 638,897 were approved, 38,597 were ultimately denied, and the rest remain pending. All DACA requestors also submit applications for employment authorization. Of the 970,735 employment authorization applications received, 825,640 were approved.[5] *See* Exhibit E.

24. The reasons for these 38,597 denials vary. Most were based on a determination that the requestor failed to meet certain threshold criteria, such as continuous residence in the United States. Other denials involved cases in which the deciding official exercised further judgment and discretion in applying the criteria set forth in the policy, including where individuals were determined to pose a public safety risk based on the individual circumstances of the case. For example, DACA requests have been denied for discretionary public safety reasons because the requestor was suspected of gang membership or gang-related activity, had a series of arrests without convictions, arrests resulting in pre-trial diversionary programs, or ongoing criminal investigations. Requests have also been denied on the basis that deferred action was not appropriate for other reasons not expressly set forth in 2012 DACA Memorandum, such as evidence of immigration fraud. See supra ¶ 18 (citing examples). Until very recently, USCIS

[5] The total number of employment authorization document application receipts is higher than the number of DACA requests because USCIS systems do not distinguish between employment authorization document applications made by initial requestors, renewal requestors, or those seeking to replace an employment authorization document.

lacked any ability to automatically track and sort the reasons for DACA denials, and it still lacks the ability to do so for all DACA denials except for very recent ones.

25. DACA is funded exclusively through the fees requestors submit with their DACA request. No Congressional appropriations are used to administer DACA.

2014 DACA Modifications and
Deferred Action for Parents of U.S. Citizens and LPRs (DAPA)

26. On November 20, 2014, Secretary Johnson issued a memorandum directing DHS to implement certain modifications to DACA and to create a process for certain parents of U.S. Citizens and LPRs to apply for deferred action (DAPA). The DACA modifications include: (1) allowing individuals over 31 to request deferred action; (2) increasing the period of deferred action and work authorization from two to three years; and (3) adjusting the date regarding the beginning of the continuous residence period from June 15, 2007 to January 1, 2010. These modifications will not change the case-by-case process for reviewing DACA requests described above. USCIS is in the process of determining the procedures for reviewing requests under DAPA, and thus USCIS has not yet determined whether the process to adjudicate DAPA requests will be similar to the DACA process. However, as with DACA, DAPA will be funded through fees submitted by requestors, and USCIS will not use Congressional appropriations to administer DAPA.

27. The 2014 DACA modifications and DAPA do not restrict the longstanding authority of USCIS to grant deferred action in the exercise of its discretion. Accordingly, if a requestor is denied DACA or DAPA, USCIS may consider deferred action for the requestor if such action is considered appropriate in the agency's discretion. *See* Exhibit B (DACA FAQ 71).

28. USCIS has taken some steps to implement the expanded DACA and DAPA, such as securing adequate office space and beginning to develop a form, among others. In taking these

steps, USCIS has counted on receiving the fees that will be generated by requestors when submissions commence in February for DACA and May 2015 for DAPA. USCIS has carefully calibrated expenses incurred in light of anticipated revenues to ensure the continuing fiscal integrity of our budget. USCIS's budget contemplates that we will begin receiving fees from requestors soon to cover some of the expenses we have already incurred and fund the process as it continues to go forward.

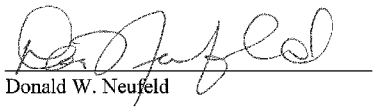
29. Based on our experience implementing DACA in 2012, we anticipate that fewer than the total number of estimated persons who might meet the guidelines for DAPA would submit requests. The total estimated population for DACA was projected to be approximately 1.2 million individuals in 2012. To date, approximately 720,000 initial DACA requests, or roughly 60% of the total estimated population, have been received by the agency. The projected total population for DAPA is estimated at approximately 3.85 million. USCIS currently anticipates approximately 50% of this population will submit requests in the 18-month period after USCIS begins accepting requests.

30. As the foregoing paragraphs explain, the DACA program requires case-by-case consideration of each request and provides for individualized adjudicatory judgment and discretion. Each case is first reviewed by lockbox contractors who reject requests that are incomplete. All non-rejected cases are then forwarded to a USCIS Service Center for a case-by-case review. Upon careful review of the case, adjudicators regularly issue RFEs and NOIDs for additional evidence, where after initially reviewing the request, adjudicators determine the request is deniable, but also curable with additional evidence. In making a decision on each case, adjudicators must carefully evaluate the weight of the submitted evidence to ensure compliance with the discretionary guidelines broadly outlined by the Secretary when establishing DACA.

They must also make determinations on individual requests based on non-prescriptive guidelines such as "public safety" and "national security." Finally, in DACA, USCIS exercises its discretion by otherwise denying a request where other factors not included in the guidelines would make the grant of deferred action inappropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of January of 2015.



Donald W. Neufeld

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF SARAH R. SALDAÑA

I, Sarah R. Saldaña, hereby make the following declaration with respect to the above-captioned matter.

1. I am the Director of U.S. Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS or Department). I have held this position since December 23, 2014. My current work address is: 500 12th Street Southwest, Washington, D.C. I am a graduate of Texas A&I University, currently Texas A&M University, and hold a Bachelor of Science degree. I also hold a Juris Doctorate from Southern Methodist University.

2. Before becoming ICE Director, I served as United States Attorney for the Northern District of Texas for more than three years. I was previously an Assistant United States Attorney in the Northern District of Texas and a partner in the trial department of a law firm in Dallas, Texas.

3. In my current position as ICE Director, I lead the largest investigative agency within DHS, overseeing nearly 20,000 employees in 400 offices across the country.

4. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

The DHS and ICE Immigration Enforcement Mission

5. ICE is one of the three DHS components with responsibilities over the administration and enforcement of the nation's immigration laws. The other two agencies are: U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. In working to achieve its mission, ICE coordinates closely with CBP, which includes the Offices of Border Patrol, Field Operations, and Air and Marine Operations, and employs the uniformed corps of officers and agents charged with patrolling our nation's ports and borders. ICE also partners with USCIS immigration adjudicators who decide eligibility for immigration benefits and certain other forms of immigration relief.

6. Within ICE, the Office of Enforcement and Removal Operations (ERO) is responsible for identifying, apprehending, detaining, and removing inadmissible or deportable aliens from the United States, as appropriate. ERO also removes aliens transferred to ICE by CBP officers and agents, and aliens against whom removal proceedings are initiated by USCIS. Based on limited resources, DHS does not have the capacity to investigate, detain, and remove all individuals who violate our immigration laws. For the last several years, ERO has consistently removed between 300,000 and 400,000 aliens annually from the United States. In light of DHS's limited resources and statutory mandates, ICE prioritizes the apprehension and removal of persons who pose a threat to national security, persons apprehended while attempting to illegally cross the border or who recently did so ("recent border crossers"), and persons convicted of serious crimes or who

otherwise threaten public safety. The vast majority of individuals removed by ICE fall into one of these categories.

ICE Enforcement Challenges

7. Besides limited resources, ICE faces several challenges in accomplishing its enforcement mission. One challenge requiring ICE to spend more resources conducting removals is the changing demographics of the immigrant population entering the country. Since FY 2010, the number of Mexican nationals apprehended by the Border Patrol has fallen by 43 percent, while the number of apprehensions of nationals from El Salvador, Guatemala, and Honduras has increased by 423 percent, in FY 2014. In general, removing Central Americans is more resource-intensive than removing Mexican nationals. While a Mexican national apprehended by CBP may, in many cases, be removed in a matter of hours, often without entering ICE custody, a national of a non-contiguous country apprehended at the border must generally be transferred to ICE and may need to remain in ICE custody for weeks or months until travel documents can be obtained from that country and removal arrangements via aircraft can be arranged.[1]

8. Another important demographic change impacting Department operations was the unprecedented surge of children and families from El Salvador, Guatemala, and Honduras intercepted at the border during FY 2014. Such cases present unique challenges for ICE given the special care needed and the legal obligations imposed by applicable laws and court orders

[1] Although inadmissible aliens apprehended at the border are often subject to the "expedited removal" process, those who demonstrate a "credible fear" of persecution or torture if returned to their countries are legally entitled to formal removal proceedings before an immigration judge, which can take many months, if not years, to complete. Because nationals of some Central American countries are more likely than Mexican nationals to claim a fear of return, the increased percentage of Central American apprehensions increases DHS's costs in managing and deterring border violations.

with regard to providing housing for alien children in immigration proceedings,[2] as well as the stringent standards applicable to ICE family residential centers.[3] In order to respond to these developments, ICE has significantly expanded its family-appropriate housing, which must be designed and operated in a manner appropriate for the unique needs of this population and compliant with applicable legal requirements and residential standards, which are far more expensive to satisfy than those applicable to adult detention facilities.

9. As mentioned above, ICE's mission includes both the removal of aliens from the interior of the country and the removal of aliens apprehended by CBP while attempting to illegally enter the United States. To address the demographic changes in illegal immigration (i.e., increases in Central Americans and families requiring ICE involvement), and to do our part to ensure border integrity, ICE has detailed resources from the interior of the country to the border. This, in turn, results in fewer resources available to identify, detain, and remove individuals in the interior of the country. For instance, over the course of FY 2014, ERO detailed over 800 of its officers and support personnel (over 10 percent of the ERO workforce) to support southwest border operations. ICE also reallocated increased detention capacity, transportation resources, and other assets to support those operations.

10. Additionally, the fact that many state and local jurisdictions have restricted or prohibited their law enforcement officers from cooperating with immigration detainers, which are used by ICE to facilitate the transfer of a removable alien from criminal custody, has also required ICE to expend additional resources in attempting to gain custody of these individuals before they are released or shortly thereafter.

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[2] *See* William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, Pub. L. No. 110–457 (Dec. 23, 2008); *Flores* settlement agreement, *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal. Jan. 17, 1997).

11. Another factor significantly impacting the ability of ICE to remove individuals from the United States is the backlog of the nation's immigration courts, which are under the jurisdiction of the Department of Justice. At the end of FY 2014, there were 418,861 cases pending before the immigration courts, up from 262,622 at the end of FY 2010. In particular, cases on the non-detained immigration court dockets now routinely take years or more to complete.

Establishment of Department-Wide, Coordinated Enforcement Efforts

12. Given DHS finite resources, Secretary Johnson issued Department-wide immigration enforcement priorities on November 20, 2014. Under the Secretary's November 20, 2014 guidance, all DHS immigration components operate under the same three enforcement priorities: Priority 1, for aliens who pose a threat to national security, are apprehended at the border, are members of organized criminal gangs, or have been convicted of felony offenses; Priority 2, for aliens who have been convicted of certain misdemeanors, have recently entered the country, or have significantly abused the visa or visa waiver programs; and Priority 3, for certain aliens with final orders of removal. To further ensure that DHS's limited resources are available to pursue such aliens, the memorandum directs that resources "be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified." This memorandum ensures that the three DHS immigration components have the same removal priorities, which enhances coordination and efficiency.

13. In conjunction with this prioritization memo, the Secretary also issued on November 20, 2014, the memorandum that has now been enjoined that provides guidelines for the use of a form of prosecutorial discretion known as "deferred action," on a case-by-case basis, for certain aliens. The memorandum generally provides guidelines for two types of undocumented aliens who have

[3] *See* ICE Family Residential Standards, at http://www.ice.gov/detention-standards/family-residential.

been living in the United States since before January 1, 2010, who have significant ties to the country, who submit fingerprints and pass background checks, and who otherwise pose no danger to the country. First, the memorandum expands the 2012 "Deferred Action for Childhood Arrivals" (DACA) policy, which established guidelines concerning the availability of deferred action for such individuals who were brought to the country as children (*i.e.*, before the age of 16). Second, the memorandum establishes "Deferred Action for Parents of Americans or Lawful Permanent Residents" (DAPA), which provides guidelines on the availability of deferred action for those who are parents of U.S. citizens or lawful permanent residents.

Effects of the Injunction

14. The expansion of DACA and the implementation of DAPA represent an effort by DHS to better prioritize its limited resources against individuals who pose threats to national security, public safety, or the integrity of the border. Among other things, the policies are intended to: incentivize certain non-priority aliens to present themselves to DHS, submit biographic and biometric information, and undergo background checks; and provide temporary relief from removal, which is expected to assist state and local law enforcement agencies with community-policing efforts, as explained in the amicus brief submitted in this case by numerous sheriffs and police chiefs. These policies are intended to complement and support DHS's effective, priority-based use of its resources.

15. Enjoining the policies would prevent ICE from benefitting from the efficiencies that such policies are intended to create. For instance, when state and local law enforcement agencies encounter an alien who has received deferred action under these policies, ICE personnel would be able to quickly confirm the alien's identity through a biometric match. This is because USCIS collects fingerprints and conducts background checks for DACA and DAPA requestors.

The availability of such information allows ICE to more efficiently work with our law enforcement partners to promote public safety.

16. Similarly, when ICE officers are engaged in at-large enforcement operations, such as to locate criminal and fugitive alien targets, they often encounter non-target aliens who may also be removable from the United States. If such aliens have received deferred action under these guidelines and have documentary proof of this on their persons, ICE officers would be able to ascertain more quickly whether enforcement resources should be expended to detain and initiate removal proceedings against the individuals. This would also allow ICE to further focus its resources on priority aliens.

17. The DACA and DAPA policies are also intended to assist with the efficient processing of high-priority cases in the immigration courts. While ICE attorneys who represent DHS in removal proceedings before the immigration courts can and do exercise prosecutorial discretion to promote efficient handling of dockets by immigration judges, DAPA and expanded DACA, once implemented, can potentially further assist ICE attorneys and immigration judges in identifying non-priority cases. And, when an alien in removal proceedings receives deferred action from USCIS under DAPA or expanded DACA, the immigration judge may administratively close the case, thereby making additional docket time available for high-priority cases. Once the cases of aliens with deferred action under DAPA and expanded DACA are taken off the immigration dockets, immigration judges should be able to focus more time and effort on the adjudication of cases involving recent border entrants and national security and public safety threats.

18. Enjoining the DAPA and expanded DACA policies is also likely to limit, in certain circumstances, the ability of law enforcement officials to protect public safety. As I recently

wrote in an opinion editorial for the Dallas Morning News, "cooperation between police and community members is a cornerstone of modern law enforcement."[4] While ICE has long taken steps to ensure that prosecutorial discretion is appropriately used when the agency encounters individuals who are crime victims and witnesses,[5] I believe that DAPA and expanded DACA will further enhance the willingness of undocumented crime victims and witnesses to come forward and cooperate with their local law enforcement agencies, thereby bolstering efforts by police to address crimes that affect our communities, including domestic violence, human trafficking, and gang activity.

19. In sum, preventing the deferred action policies from going into effect interferes with the Federal Government's comprehensive strategy for enforcing our immigration laws. The halting of DAPA and expanded DACA jeopardizes the efficiencies that such policies can provide to ICE, making it more difficult to efficiently and effectively carry out its mission. The injunction also undermines the effectiveness of community policing in various jurisdictions, impedes the identification of non-priority aliens, and leaves in place a barrier to more efficient proceedings to remove threats from our country.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of February, 2015.

Sarah R. Saldaña
Director
U.S. Immigration and Customs Enforcement

[4] Sarah Saldaña and Gil Kerlikowske, *Obama's immigration initiative will make nation safer*, The Dallas Morning News, Jan. 20, 2015, http://www.dallasnews.com/opinion/latest-columns/20150120-sarah-saldana-and-gil-kerlikowske-obamas-immigration-initiative-will-make-nation-safer.ece.

[5] *See, e.g.*, ICE Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF R. GIL KERLIKOWSKE

I, R. Gil Kerlikowske, hereby make the following declaration with respect to the above-captioned matter.

1. I am the Commissioner of U.S. Customs and Border Protection (CBP). I have held this position since March 7, 2014. My current work address is 1300 Pennsylvania Ave., N.W., Washington, D.C. I hold a B.A. and an M.A. in criminal justice from the University of South Florida.

2. Prior to my tenure as CBP Commissioner, I had approximately four decades of experience with law enforcement and drug policy. From 2000 to 2009, I served as the Chief of Police for Seattle, Washington. From 2009 to 2014, I served as the Director of the Office of National Drug Control Policy, and from 1998 to 2000, I served as Deputy Director for the U.S. Department of Justice, Office of Community Oriented Policing Services. In addition, I served as the Police Commissioner for Buffalo, New York, from 1994 to 1998. I began my law enforcement career as a police officer in St. Petersburg, Florida, in 1972.

3. In my position as CBP Commissioner, I oversee approximately 60,000 employees. CBP officers protect our nation's borders and safeguard national security by keeping criminal organizations, terrorists, and their weapons out of the United States while facilitating lawful international travel and trade.

4. I make this declaration on the basis of my personal knowledge as well as information made available to me in the course of my official duties.

The DHS and CBP Immigration Enforcement Mission

5. DHS has three components with responsibilities over the administration and enforcement of the nation's immigration laws: CBP, U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). CBP secures the borders at and between ports of entry, preventing the admission of inadmissible aliens and the entry of illicit goods. CBP works closely with ICE, which is responsible for identifying, apprehending, detaining and removing inadmissible and deportable aliens from the United States, including many such aliens apprehended by officers and agents of CBP. CBP also works closely with USCIS, which, among other duties, determines on a case-by-case basis whether deferred action is appropriate under certain circumstances.

6. CBP Officers and Agents regularly encounter individuals who lack lawful status to enter or remain in the United States. For instance, in fiscal year (FY) 2014, Border Patrol apprehended 486,651 individuals who lacked lawful presence in the United States. While the vast majority of these individuals were apprehended while attempting to illegally cross the border, or after recently crossing the border into the United States, the Border Patrol also encounters individuals who are unlawfully in the country, often at checkpoints located at places of strategic importance, furthering the broader work of border security throughout the area.

Benefits of Deferred Action for CBP Immigration Enforcement Efforts

7. When a Border Patrol Agent at a checkpoint or other location encounters an individual whose lawful status is not apparent after initial questioning, that alien is taken to the nearest location where the Agent can more fully question and process the alien. During processing, an alien's biographic information and biometrics (i.e., fingerprints) are collected. Records checks are run through CBP and other law enforcement systems. Agents review all of the pertinent facts and circumstances to determine whether or not the alien is a priority for removal, consistent with Secretary Johnson's memorandum of November 20, 2014, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, including whether the alien poses a threat to national security, border security (including those who recently unlawfully entered the United States), or public safety. Processing individuals (which involves questioning the individuals, collecting biographic and biometric information, and conducting background checks) takes Border Patrol Agent time that could otherwise be spent at the checkpoint or on other enforcement duties.

8. Individuals who were granted deferred action under the 2012 Deferred Action for Childhood Arrivals (DACA) guidelines are, at times, encountered by Border Patrol Agents at checkpoints or other locations. When a DACA recipient is encountered at a checkpoint or other location and is able to provide DACA documentation or a work authorization document, a Border Patrol Agent can more efficiently verify the identity of the individual, as well as the authenticity of the documentation provided. Absent other facts and circumstances meriting further inquiry, upon verifying the information provided, Border Patrol Agents normally take no further action with respect to that individual. Instead, Border Patrol Agents rely on the determination made by another component of DHS, USCIS, that the encountered individual is not a priority for an

immigration enforcement action. Thus, DACA facilitates CBP more efficiently identifying those individuals who are not a priority for removal and better concentrate its limited enforcement efforts on those who pose a threat to national security, border security, and public safety.

9. I expect that the Deferred Action for Parents of Americans or Lawful Permanent Residents (DAPA) guidelines, as well as the guidelines that expanded DACA, announced by Secretary Johnson in November 2014, would create the same resource efficiencies that DACA, as announced in 2012, created, as they involve conducting background checks and providing similar documentation to certain aliens who have strong ties to the United States and are not enforcement priorities. Because policies like DACA and DAPA encourage certain aliens to come forward and identify themselves to USCIS, these policies create an efficient mechanism for CBP to quickly identify aliens who are not priorities for removal and thus focus limited resources on high priority aliens. DACA and DAPA thus support CBP's overall mission to secure the border.

10. I am aware that this Court has temporarily enjoined implementation of DAPA and the 2014 modifications to DACA. By preventing certain aliens who are not a priority for deportation from obtaining DAPA documents (or DACA documents under the expanded guidelines), the temporary injunction interferes with the agency's ability to obtain the enforcement efficiencies that DAPA and the expansion of DACA are anticipated to create, for the time that the injunction remains in place. The injunction is thus expected to impair CBP's ability to ensure that its limited enforcement resources are spent in the most effective and efficient way to safeguard national security, border security and public safety.

Effects of Injunction

11. Based on my years of experience in law enforcement, I believe that DACA and DAPA substantially benefit the overall safety of our communities, and that the temporary injunction the Court has entered detracts from those benefits.

12. As a former police chief and now the Commissioner of one of the world's largest law enforcement organizations, I understand the critical need to prioritize law enforcement resources. If law enforcement organizations do not ensure that their limited resources are directed to their highest priorities, overall public safety might be compromised. Focusing limited immigration enforcement resources on aliens who are eligible for DACA and DAPA is anticipated to divert resources from recent border crossers and real national security and public safety threats, such as those who may be terrorists, smugglers, drug traffickers, or engaged in transnational organized crime.

13. Another anticipated law enforcement benefit of DACA and DAPA is that, by temporarily eliminating the immediate fear of detention and deportation, recipients might be more inclined to cooperate with federal, state, and local law enforcement in reporting crimes or serving as witnesses in criminal cases. As the numerous law enforcement officials have made clear in an amicus brief filed in this case, DAPA and DACA are expected to support community policing efforts and help law enforcement agencies safeguard their communities.

14. DAPA and the expansion of DACA would allow a significant number of otherwise law-abiding aliens with strong ties to the country to step forward and request deferred action. By halting implementation of DAPA and the expansion of DACA, the temporary injunction undermines these potential law enforcement benefits for the duration of time that the injunction remains in place.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of February of 2015.

R. Gil Kerlikowske
Commissioner

Written Statement of Farmworker Justice
Submitted to the House Judiciary Committee Hearing on "The Unconstitutionality of Obama's Executive Actions on Immigration"
February 25, 2015

Contact:
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Farmworker Justice submits this statement for inclusion in the record of the February 25, 2015 House Judiciary Committee hearing titled "The Unconstitutionality of Obama's Executive Actions on Immigration." For over thirty years, Farmworker Justice has engaged in policy analysis, education and training, advocacy and litigation to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety and access to justice. Since its inception, Farmworker Justice has played an important role in immigration policy discussions, monitored the H-2A agricultural guestworker program throughout the country and helped farmworker organizations participate in policy debates.

Farmworker Justice seeks public policies and private conduct that treat the men and women employed on our ranches and farms with dignity. The wages and working conditions of most farmworkers deserve improvement and immigration policy plays an important role in the ability of farmworkers to win such improvements. Immigration status is not only an important determinant of job terms, but also of the health and safety of farmworkers, their family members and their communities. For these and other reasons, immigration policy has been at the core of the mission of Farmworker Justice for its entire existence.

We applaud President Obama for taking action to address our broken immigration system. The President's deferred action programs will allow hundreds of thousands of qualifying farmworkers and millions of other aspiring Americans to come forward, submit to background checks and properly document themselves with the federal government and in their workplaces. It also represents a step toward desperately-needed, comprehensive reform of our immigration system that Congress should enact.

The Administration took action because Congress has failed to address the urgent need for comprehensive immigration reform. Although the Senate last Congress passed a bipartisan

comprehensive immigration reform bill, S.744, by a strong bipartisan majority, the House failed to move legislation addressing our broken immigration system forward.

The President's actions are a prudent and proper exercise of his authority to enforce immigration laws. Since the 1950's, every President, including both Republican and Democratic Presidents, has used his authority to grant temporary immigration relief to groups of individuals in the country without status.[1] As part of the President's existing authority to enforce the law, he can and must set priorities, target resources, and shape how laws are to be implemented. Within that responsibility, the President has discretionary authority to execute the laws in a manner that most effectively utilizes limited resources, including through the use of prosecutorial discretion.[2] The deferred action programs in combination with the Department of Homeland Security's new enforcement priorities will better enable Immigration and Customs Enforcement and Customs and Border Patrol to target their resources towards serious criminals and recent border crossers. This will result in an even more secure border than we have today.[3]

The need for administrative immigration relief in the absence of Congressional action is acute in farmworker communities. There are an estimated 2.4 million farmworkers laboring on our farms and ranches to bring food to our tables. Roughly one-half to up to 70% of farmworkers – at least some 1.2 million – are undocumented immigrants. Many family members of farmworkers also are undocumented. The broken immigration system inflicts harm on farmworkers, their family members, their communities, and the businesses that need their labor.

The presence of so many undocumented farmworkers in the labor force makes them vulnerable to exploitation and abuse; and has contributed to the pervasive violations of labor protections in agriculture. Unscrupulous employers take advantage of their undocumented workers, sometimes paying them less, or requiring them to do more difficult and dangerous work or work more demanding schedules. The rampant violations on farms and abusive working conditions are illustrated through reports and surveys across the country:

> A survey conducted by Pineros y Campesinos Unidos del Noroeste ("PCUN," Oregon's farmworker union) of approximately 200 Marion County, Oregon farmworkers paid by "piece-rate" in the 2009 berry harvests revealed widespread violations of the state's minimum wage law. Ninety percent of workers reported that their "piece-rate" earnings were consistently less than minimum wage, with an average hourly wage of about $5.30 – 37% below the hourly minimum wage at the time—and an average daily underpayment of about $25.00.

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[1] American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present*, http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf.

[2] *See* Hiroshi Motomura et al, *Executive authority to grant administrative relief for DREAM Act beneficiaries*, http://www.nilc.org/document.html?id=754.

[3] Net illegal immigration has been at record lows in recent years. *See* Doris Meissner et al., *Immigration Enforcement in the US: The Rise of a Formidable Machinery*, Migration Policy Institute.

> In New Mexico, a survey of farmworkers revealed the abusive conditions in the fields, including extremely low wages and high levels of wage theft.[4] Sixty-seven percent of field workers were victims of wage theft in the year prior to the survey; 43% of respondents stated that they never received the minimum wage and 95% were never paid for the time they waited each day in the field to begin working. The farmworkers surveyed also experienced dangerous working conditions, with 29% reporting work in a field with no drinking water; 52% reporting work in at least one field where they did not receive any breaks; and 47% reporting pesticide-related health problems as a result of pesticide exposure in the fields.
>
> Women farmworkers are uniquely vulnerable to sexual harassment and assault. According to one study of 150 Mexican farmworker women in CA, 80% of respondents experienced some form of sexual harassment.[5]

The presence of a majority undocumented workforce depresses wages and working conditions for all farmworkers, including the roughly 750,000 to 1.3 million United States citizens and lawful immigrants in agriculture.[6] U.S. farmworkers recognize that they can easily be fired and replaced by more exploitable workers if they speak up for their rights. They are aware of the impact that a majority undocumented workforce has on conditions in the fields. In the words of one Texas farmworker,

> "[w]*orking in the fields is very hard but it has taught [me] a lot of lessons on life. Sometimes I want to complain so bad, especially when it is raining and we are out there in the mud that makes our boots very heavy to walk in or when the rain has ceased and the sun comes out evaporating the rain making it so hard to breathe that you think you are going to faint. Then I remember those people that work with us but do not have documents. They have to do all this too but they are made to work longer hours and get paid less than us. Life as a farm worker is so hard but it is something we are always willing to do.*[7]

Farmworkers' incomes are very low. Poverty among farmworkers is more than double that experienced by other wage and salary workers. Farm work ranks as one of the three most dangerous occupations in the United States, with routine exposure to dangerous pesticides, arduous labor and extreme heat. In 2012, the injury rate for agricultural workers was over 40 percent higher than the rate for all workers. Despite these working conditions, farmworkers are excluded from many labor protections other workers enjoy, such as many of the OSHA labor standards, the National Labor Relations Act, overtime pay, and even the minimum wage and unemployment insurance at certain

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[4] New Mexico Center on Law and Policy, *Human Rights Alert: New Mexico's Invisible and Downtrodden Workers* (2013), http://nmpovertylaw.org/WP-nmclp/wordpress/WP-nmclp/wordpress/wp-content/uploads/2013/07/Report-FINAL-2013-07-23.pdf.

[5] Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, Violence Against Women (January 2010), http://www.ncfh.org/pdfs/2k9/8716.pdf.

[6] According to NAWS, about 33% of farmworkers are citizens, 18% are lawful permanent residents and another 1% have other work authorization. 52% of the total workforce of 2.5 million is 1.3 million. Even assuming that the number of undocumented farmworkers approaches 70% of the workforce, there would still be roughly 750,000 U.S. farmworkers.

[7] Farmworker Justice, *Who Works the Fields? The Stories of Americans Who Feed Us*, p. 2, http://www.farmworkerjustice.org/sites/default/files/WhoWorkstheFields-FJ%20Report%20June%202013.pdf

small employers. Such poor conditions and discriminatory laws serve to keep many farmworkers in a cycle of poverty. They also result in substantial employee turnover, and such instability in the workforce reduces productivity for businesses, in addition to creating a vacuum for new immigrants to fill.

In a Miami Herald op-ed published on April 9, 2014, Jaime explains the impact of being undocumented and the importance of administrative relief for his family:

> When you're undocumented, people take advantage. We show up for work as part of a crew of anywhere from 9 or 10 to 30 men and women. I'm lucky; I have a car so when I'm in a job with abusive supervisors, I leave. I have seen and heard of supervisors who take advantage of workers who don't have other options.
>
> This is particularly true for indigenous workers who don't speak much Spanish or have a car; they stay because of a lack of options. Sometimes they cheat us out of what we are owed, or pay less than the contract promises. Even if we could report it, we would have to hang around instead of hitting the highway to the next job.
>
> ...
>
> Farm work is the work I have. I like the idea that we feed other families. Where I come from, the family is the center of everything. I hope a new law will protect our families in the United States.

Jaime and his wife are potential DAPA beneficiaries. They came to the US from Mexico in 1995 and have worked in agriculture ever since. The Florida-based couple has three citizen children and two older undocumented children with families of their own who may also qualify for DAPA or DACA. Read Jaime's entire op-ed in appendix A.

The President's executive action is an important step toward achieving a greater measure of justice for families like Jaime's, who work hard to put food on our tables. Estimates indicate that roughly 784,000 undocumented farmworkers and their spouses and children are eligible for DAPA or DACA.[8] With protection against the constant fear of deportation, these farmworkers and other aspiring Americans will be able to contribute more fully to their communities and will be empowered in their workplaces. Eligible farmworkers will no longer have to tolerate poor or illegal working conditions; they can report abuse or find a better grower for whom to work. They will be able to open bank accounts and more easily invest in their communities. In many cases deferred action recipients will be able to obtain driver's licenses, making the roads safer for everyone and enabling eligible parents to bring their US citizen children to doctors' appointments, school meetings and community events without fear.

Even as we celebrate with those who will be eligible for relief, we are disappointed at the limits of the program. The eligibility criteria will deny administrative relief to many deserving farmworkers and their family members, including many long-time farmworkers who do not have U.S. citizen children.

[8] Ed Kissam and Jo Ann Intili, *Number, Distribution, and Profile of Farmworkers Eligible for DAPA or DACA*, (Revised/Expanded analysis), Werner-Kohnstamm Family Fund, Dec. 12, 2014, at p. 3.

Moreover, the relief is only temporary. Congress must create an opportunity for undocumented farmworkers, their family members and the rest of the 11 million to obtain permanent immigration status and an opportunity for citizenship. Immigrant farmworkers and other aspiring Americans deserve to be treated with respect and should be given the opportunity to earn immigration status and citizenship. Demands by some employer groups for exploitative guestworker programs should be rejected. Congress should pass immigration legislation that values our heritage as a nation of immigrants.

Appendix A

The Miami Herald

April 8, 2014

Life as an undocumented farm worker

Link: http://www.miamiherald.com/2014/04/08/4047311/life-as-an-undocumented-farm-worker.html?fb_action_ids=10203254592622621&fb_action_types=og.likes

LTE placed by Farmworker based on interview conducted by Farmworker Justice

This week in Washington, immigrant groups are protesting the Obama administration's deportation of immigrants — 2 million, they say, in five years. They want it to stop until Congress finishes passing immigration reform. Here is what it's like to be an undocumented farm worker, as told (using a pseudonym) by a migrant worker in Florida.

It has been nearly 20 years since I left Mexico and came to Florida — two decades of hard work without getting ahead that much. That's 20 years in orchards and vegetable fields here, or picking cucumbers in Ohio, apples in Michigan and Washington, tomatoes in Tennessee, melons in Georgia — always in fear of deportation. I've spent 20 years dreaming about becoming legal. For me, that's the American Dream: to be a United States citizen.

We couldn't make a go of it in Mexico in 1995, my wife and I; there wasn't enough work so we came here. There really is no way to do it legally — to get a visa that lets you work and stay, unless you have family here or know someone important. I didn't have any experience in the fields. Farm work was what I could get and so a farm worker is what I became, and that is what I am today. I'm good at it, but it's not what I want my children to do.

We'd been here a couple of years before we sent for our two kids. It was scary. We paid someone to bring them across the border but for a long time, about a month but it felt like an eternity — we didn't hear anything. We weren't sure where they were or even if they were alive. Eventually we got a call that they were safe, but we had to drive to get them at the border. They were about 3 and 5 years old then. Today they are 24 and 22, also working in agriculture, with families of their own. Our other three kids were born here and are citizens.

Farm work is hard. We start in the orchards early, when the humidity is high and the trees are wet. We're carrying bags and they get heavy, up to 90 pounds of oranges when full, as we climb up and down from tree to tree, reaching in and picking the fruit, placing it in the bag and moving on. We're soaked all day with moisture and sweat. There aren't many breaks for water or a bathroom, although some places are better than others. We work when it's hot and cold; if we can't work, we don't get paid.

I travel — always taking my family. In recent years, we have driven 3,000 miles to Washington state. We get to the area where we hear they need apple pickers and look for a contractor. Sometimes we can afford a motel; or we sleep in the car until we find housing. We are cautious; if you attract attention someone could call a cop or the immigration guys. One slip-up and you're caught in the system that takes you away from your family forever. Half of the people I work with are in the same situation.

When you're undocumented, people take advantage. We show up for work as part of a crew of anywhere from 9 or 10 to 30 men and women. I'm lucky; I have a car so when I'm in a job with abusive supervisors, I leave. I have seen and heard of supervisors who take advantage of workers who don't have other options.

This is particularly true for indigenous workers who don't speak much Spanish or have a car; they stay because of a lack of options. Sometimes they cheat us out of what we are owed, or pay less than the contract promises. Even if we could report it, we would have to hang around instead of hitting the highway to the next job.

We never go back to Mexico. My father died and my wife's father, but we didn't attend the funerals. We would have had to leave the kids behind and if we couldn't get back in, what would happen?

I know people who have been deported, even some married to legal residents or citizens. They tell us Congress might pass immigration reform. The most important thing is to stop breaking up families. I've tried to tell my children that the police are their friends, but they know that the police also can destroy our family. They've seen it happen with their friends. If we could get legal status or citizenship, none of that would be a problem.

Farm work is the work I have. I like the idea that we feed other families. Where I come from, the family is the center of everything. I hope a new law will protect our families in the United States.

Jaime Diaz is a pseudonym for a farm worker who lives in Florida.

Appendix I

Congress of the United States
Washington, DC 20515

Embargoed for release Monday
November 8, 1999

Contact: Allen Kay
Rep. Lamar Smith
202-225-4236 (O)
202-225-2659 (cell)
301-990-3749 (H)

November 4, 1999

The Honorable Janet Reno
Attorney General
Department of Justice
10th St. & Constitution Ave. NW
Washington, DC 20530

The Honorable Doris M. Meissner
Commissioner
Immigration and Naturalization Service
425 Eye Street, NW
Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefitting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

PRINTED ON RECYCLED PAPER

Appendix I, continued

Attorney General Reno and Commissioner Meissner
November 4, 1999
Page 2

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, 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. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

Rep. Henry J. Hyde

Rep. Barney Frank

Rep. Lamar Smith

Rep. Sheila Jackson Lee

Rep. Bill McCollum

Rep. Martin Frost

Rep. Bill Barrett

Rep. Howard L. Berman

Appendix I, continued

Rep. Brian P. Bilbray

Rep. Corrine Brown

Rep. Charles T. Canady

Rep. Barbara Cubin

Rep. Nathan Deal

Rep. Lincoln Diaz-Balart

Rep. David Dreier

Rep. Bob Filner

Rep. Eddie Bernice Johnson

Rep. Sam Johnson

Rep. Patrick J. Kennedy

Rep. Matthew G. Martinez

Rep. James P. McGovern

Rep. Martin T. Meehan

Rep. F. James Sensenbrenner, Jr.

Rep. Christopher Shays

Rep. Henry A. Waxman

Rep. Kay Granger

Rep. Gene Green

Rep. Ciro D. Rodriguez