PRESIDENT OBAMA'S EXECUTIVE OVERREACH ON IMMIGRATION

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BEFORE THE

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HOUSE OF REPRESENTATIVES

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PRESIDENT OBAMA'S EXECUTIVE OVERREACH ON IMMIGRATION

TUESDAY, DECEMBER 2, 2014

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 1:52 p.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Sensenbrenner, Coble, Smith of Texas, Chabot, Bachus, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Marino, Gowdy, Labrador, Farenthold, Holding, Collins, DeSantis, Smith of Missouri, Conyers, Nadler, Scott, Lofgren, Jackson Lee, Cohen, Johnson, Pierluisi, Chu, Deutch, Gutierrez, Bass, Richmond, DelBene, Garcia, Jeffries, Cicilline.

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

Mr. GOODLATTE. Good afternoon. This hearing of 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 President Obama's executive overreach on immigration, and I will begin by recognizing myself for an opening statement. But I also want to point out to the Members and to the audience in attendance today, you are all welcome to be here, but Rule 11 of the House rules provides that the Chairman of the Committee may punish breaches of order and decorum by censure and exclusion from the hearing.

President Obama has just announced one of the biggest constitutional power grabs ever by a President. He has declared unilaterally that by his own estimation almost 5 million unlawful immigrants will be free from the legal consequences of their lawless actions. Not only that, he will in addition bestow upon them gifts such as work authorization and other immigration benefits. This, despite the fact that President Obama has stated over 20 times in the past that he doesn't have the constitutional power to take such steps on his own and has repeatedly stated that "I'm not a king." We will now ask that the video be rolled.

[Video shown.]

Mr. GOODLATTE. As The Washington Post's own fact checker concluded, "Apparently he's changed his mind." President Obama admitted last week that "I just took an action to change the law," and, I should add, a jewelled crown worthy of King James of England who precipitated the glorious revolution by dispensing with the laws passed by parliament.

The Constitution is clear. It is Congress' duty to write our Nation's laws, and once they are enacted, it is the President's responsibility to enforce them. Article II, Section 3 of the Constitution requires the President to "take care that the laws be faithfully executed." President Obama wants a special pathway to citizenship for 11 million unlawful immigrants and without any assurance that our Nation's immigration laws will be enforced in the future, and he is upset that Congress won't change America's immigration laws to his liking. Thus, he has decided to act unconstitutionally, under the guise of "prosecutorial discretion."

While 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, this power must be judiciously used. Clinton administration INS Commissioner Doris Meissner told her agency that prosecutorial discretion "is a powerful tool that must be used responsibly" and that "exercising prosecutorial discretion does not lesson the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law."

Even President Obama's Department of Homeland Security Secretary Jeh Johnson has admitted to the Committee that there are limits to the power of prosecutorial discretion and that "there comes a point when something amounts to a wholesale abandonment to enforce a duly enacted constitutional law that is beyond simple prosecutorial discretion." The Obama administration has crossed the line from any justifiable use of its authority to a clear violation of his constitutional responsibility to faithfully execute the laws.

There is a difference between setting priorities, focusing more resources on those cases deemed more serious, and setting enforcement-free zones for millions of unlawful aliens. By boldly proclaiming that there will be no possibility of removal for millions of unlawful aliens, President Obama eliminates entirely any deterrent effect our immigration laws have. He states plainly that those laws can be ignored with impunity. Such actions will entice others around the world to come here illegally, just like his Deferred Action for Childhood Arrivals program encouraged tens of thousands of unaccompanied alien minors and families from Central America to make the dangerous trek to the United States.

The President relies on a memo prepared by his Justice Department's Office of Legal Counsel to proclaim that his actions are 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 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, sometimes themselves abusing the power of prosecutorial discretion. However, usually 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 in 1989 and Haitian orphans who were in the process of being adopted by U.S. citizens before the devastating Haitian earthquake of 2010 were granted humanitarian parole to come to the U.S. What about President George H.W. Bush's Family Fairness policy, which the White House cites to justify his power grab? Size and scope matter, and only about 80,000 aliens applied for that program.

As to the White House's claim that it covered more than 1.5 million aliens, The Washington Post fact checker concluded that, "The 1.5 million figure is too fishy to be cited by either the White House or the media. Indeed, the 100,000 estimate that the INS gave on the day of the announcement might have been optimistic." The Washington Post assigned the White House claims three Pinocchios.

Without any crisis in a foreign country to justify his actions and in granting deferred action to a totally unprecedented number of aliens, President Obama has clearly exceeded his constitutional authority. No President has so abused and misused the power of prosecutorial discretion as has President Obama.

By acting lawlessly and 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. President Obama has entered the realm of rewriting the laws when he can't convince Congress to change them to match his personal taste.

As law professor David Rubenstein has written, "The more broadly or generally a systematic policy applies, the more it takes on the hue of law." Rather than working constructively with the new men and women Americans elected to represent them in Congress, the President is making his relationship with Congress increasingly toxic by unconstitutionally acting on his own. Tragically, President Obama's shortsighted actions have further set back congressional efforts to enact legislation to reform our broken immigration system.

I look forward to today's hearing and the testimony of our eminent witnesses. And now I am pleased to yield to the gentleman from Michigan, the Ranking Member of the Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you.

Ladies and gentlemen——

[Disturbance in hearing room.]

Mr. GOODLATTE. Presently we do not have order in the hearing room. Members of the audience must behave in an orderly fashion or else they will be removed from the hearing room. The Capitol Police will remove the disruptive members from the audience immediately. The Capitol Police will remove the members of the audience from the hearing room.

The Chairman apologizes to the gentleman from Michigan for the interruption, but he is now advised to proceed with his opening statement without penalty for the delay in starting.

Mr. CONYERS. Mr. Chairman and Members of the Committee and those who have joined us here this afternoon in the House Judiciary Committee, I would respectfully disagree with a number of assertions by our Chairman, Mr. Goodlatte.

President Obama did not change the law. He acted within the law consistent with the Constitution and past precedent. Now, I have not noticed that there were many constitutional law professors on the Committee, and I am certain that when President Obama decided 2 weeks ago to use his authority under existing law to do what he can to fix our broken immigration system, I could have not been more pleased.

I defy any of my colleagues on this Committee or anyone in Congress to tell me our immigration system is not broken. We know that it is. But I am disappointed that this Congress, like a number of them before it, has done nothing to fix the problem. Republican leaders in the House won't allow us to vote on a bipartisan bill, S. 744, that passed the Senate last year with 68 votes out of 100. This Committee has marked up a series of bills, each one of them less palatable than the next, but hasn't even reported them to the floor.

And so I would urge that you consider that the only bills that we have seen on the floor would have deported dreamers and the parents of United States children denied basic protections to children fleeing violence and persecution.

Now, faced with this congressional inaction, the President of the United States decided it was time to take action. The President's reforms will help to secure the border, focus our resources on deporting felons, not families, and require undocumented immigrants to pass a criminal background check and pay for their fair share of taxes in order to register for temporary protection from deportation. Now these actions will keep millions of families with United States citizen children from being torn apart, families led by hard-working mothers and fathers. And finally, these actions are not only appropriate, but they are lawful. There is a great deal of information available publicly to support the President.

On November 20, eleven prominent legal scholars wrote a letter explaining the President's action, and I quote, "explaining that the President's actions are within the power of the executive branch and that they represent a lawful exercise of the President's authority." I ask unanimous consent to include that in the record.

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

[The information referred to follows:]

We are law professors and lawyers who teach, study, and practice constitutional law and related subjects. We have reviewed the executive actions taken by the President on November 20, 2014, to establish priorities for removing undocumented noncitizens from the United States and to make deferred action available to certain noncitizens. While we differ among ourselves on many issues relating to Presidential power and immigration policy, we are all of the view that these actions are lawful. They are exercises of prosecutorial discretion that are consistent with governing law and with the policies that Congress has expressed in the statutes that it has enacted.

1. Prosecutorial discretion—the power of the executive to determine when to enforce the law—is one of the most well-established traditions in American law. Prosecutorial discretion is, in particular, central to the enforcement of immigration law against removable noncitizens. As the Supreme Court has said, "the broad discretion exercised by immigration officials" is "[a] principal feature of the removal system." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

Even apart from this established legal tradition, prosecutorial discretion in the enforcement of immigration law is unavoidable. According to most current estimates, there are approximately 11 million undocumented noncitizens in the United States. The resources that Congress has appropriated for immigration enforcement permit the removal of approximately 400,000 individuals each year. In these circumstances, some officials will necessarily exercise their discretion in deciding which among many potentially removable individuals is to be removed.

The effect of the November 20 executive actions is to secure greater transparency by having enforcement policies articulated explicitly by high-level officials, including the President. Immigration officials and officers in the field are provided with clear guidance while also being allowed a degree of flexibility. This kind of transparency promotes the values underlying the rule of law.

2. There are, of course, limits on the prosecutorial discretion that may be exercised by the executive branch. We would not endorse an executive action that constituted an abdication of the President's responsibility to enforce the law or that was inconsistent with the purposes underlying a statutory scheme. But these limits on the lawful exercise of prosecutorial discretion are not breached here.

Both the setting of removal priorities and the use of deferred action are well-established ways in which the executive has exercised discretion in using its removal authority. These means of exercising discretion in the immigration

context have been used many times by the executive branch under Presidents of both parties, and Congress has explicitly and implicitly endorsed their use.

The specific enforcement priorities set by the November 20 order give the highest priority to removing noncitizens who present threats to national security, public safety, or border security. These common-sense priorities are consistent with long-standing congressional policies and are reflected in Acts of Congress.

Similarly, allowing parents of citizens and permanent lawful residents to apply for deferred action will enable families to remain together in the United States for a longer period of time until they are eligible to exercise the option, already given to them by Congress, to seek to regularize the parents' status. Many provisions of the immigration laws reflect Congress's determination that, when possible, individuals entitled to live in the United States should not be separated from their families; the November 20 executive action reflects the same policy. The authority for deferred action, which is temporary and revocable, does not change the status of any noncitizen or give any noncitizen a path to citizenship.

In view of the practical and legal centrality of discretion to the removal system, Congress's decision to grant these families a means of regularizing their status, and the general congressional policy of keeping families intact, we believe that the deferred action criteria established in the November 20 executive order are comfortably within the discretion allowed to the executive branch.

As a group, we express no view on the merits of these executive actions as a matter of policy. We do believe, however, that they are within the power of the Executive Branch and that they represent a lawful exercise of the President's authority.

Lee C. Bollinger
President
Columbia University

Adam B. Cox
Professor of Law
New York University School of Law

Walter E. Dellinger III
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University of Chicago Law School

Laurence H. Tribe
Carl M. Loeb University Professor and
Professor of Constitutional Law
Harvard Law School

Affiliations are for identification purposes only

November 20, 2014

Mr. CONYERS. Thank you.

The letter was signed by a former head of the Department of Justice Office of Legal Counsel and a person who worked in the solicitor general's office. It was signed by liberal professors like Laurence Tribe and conservative professors like Eric Posner. Five days later, 135 immigration law professors echoed that conclusion and provided substantial constitutional, statutory, and regulatory authority for these actions. That letter also reviews the historical precedent that support the President's move. And I ask unanimous consent that the letter from 135 immigration professors be included in the record.

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

[The information referred to follows:]

25 November 2014

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

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

Prosecutorial discretion in immigration law enforcement

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

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

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

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

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

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

Statutory authority and long-standing agency practice

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

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

[4] 8 C.F.R. § 241.6.

[5] INA § 212(d)(5).

[6] 8 C.F.R. § 274a.12(c)(14).

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

[8] INA § 103(a).

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

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

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

[10] INA § § 237(d)(2); 204(a)(1)(D)(i)(II,IV).

[11] 8 C.F.R. § 274a.12(c)(14).

[12] Bernsen, *supra* note 3.

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

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

Judicial recognition of executive branch prosecutorial discretion in immigration cases

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

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

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

[15] *See e.g., Lennon v. Immigration & Naturalization Service*, 527 F.2d 187, 191 n.5 (2d Cir. 1975); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 197 6); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979).

[16] *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

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

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

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

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

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

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

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

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

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

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

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

The Constitution and immigration enforcement discretion

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

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

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

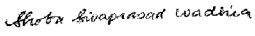
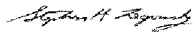
[25] U.S. Const. art. II, § 3.

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

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

Conclusion

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

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Mr. CONYERS. Thank you.

As people who were once charged with providing legal counsel to the government on this precise question, they write that, "We have all studied the relevant legal parameters and wish to express our collective view that the President's actions are well within his legal authority." And of course, the Administration requested a formal opinion by the Office of Legal Counsel and made the document public nearly 2 weeks ago, and I ask unanimous consent to include in the record the Office of Legal Counsel opinion.*

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

Mr. CONYERS. Thank you again.

And of course, the Administration requested a formal opinion by the Office of Legal Counsel and made this document public nearly 2 weeks ago.

Now, I know that many Members on the other side of the aisle are not pleased about the President's decision. We continue to hear calls for shutting down the government. Some have even talked about censoring the President or suing the President or even worse. But it seems to me, ladies and gentlemen, that the majority now has a choice. They can do what we were elected to do. They can come to the table and work to pass a real immigration reform bill. They can hold a vote. And that is exactly what I am prepared to do today.

I thank the Chairman for his tolerance, and I yield back any time that may be remaining.

Mr. GOODLATTE. The Chair thanks the gentleman and now recognizes the gentleman from Texas, Mr. Smith, for his opening statement

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman. I also want to thank Mr. Gowdy, the gentleman from South Carolina, for yielding me his time.

[Disturbance in hearing room.]

Mr. GOODLATTE. The Committee is not in order. The Capitol Police will remove the disruptive members from the audience immediately. You may leave now and the Capitol Police will escort you out as soon as they return.

The gentleman from Texas is recognized.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman.

Before he took office, President Obama swore an oath to "preserve, protect, and defend the Constitution of the United States." Yet he is now taking executive action to legalize millions of illegal immigrants all on his own, contrary to the Constitution. President Obama should remember his oath of office to uphold all laws, including immigration laws.

This Administration is undermining the separation of legislative and executive powers that our Founders wrote into the Constitution to prevent tyranny. And President Obama is violating the Constitution, which explicitly reserves immigration policy for Congress. Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have power to "establish a uniform rule of naturaliza-

*The submitted material is not reprinted in this hearing record but is on file with the Committee, and can be accesssed at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf

tion." The Supreme Court has long found that this provision of the Constitution grants Congress full power over immigration policy. In addition, by suspending the enforcement of our immigration laws against nearly half the illegal immigrants in the United States, President Obama is violating his constitutional obligation to take care that the laws be faithfully executed.

President Obama previously described the limitations that the Constitution places on his role as President. He has explicitly stated many times, as the Chairman noted, that he does not have the power to grant executive amnesty without the authorization of Congress. For instance, on March 28, 2011, he stated that, "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 . . . The executive branch's job is to enforce and implement those laws."

And constitutional scholars agree. Constitutional law professor John Hill of the Indiana University School of Law writes that, "There is a word for the President's plan to issue an executive order granting residency status for up to 5 million undocumented aliens now living in the U.S.: unconstitutional." This is unquestionably law making. President Obama has now apparently forgotten what any first-year law student understands: that the President cannot make a law without the consent of both houses of Congress.

Constitutional law professor Josh Blackman of the South Texas College of Law writes, "It cannot be the rule of law that the President can create arbitrary criteria of where the law will not apply and then exempt anyone who meets those criteria. This is the very type of a broad policy against enforcement that is so extreme as to amount to an abdication of the President's statutory responsibilities."

And the American people themselves are opposed to President Obama's latest executive amnesty. Despite the heavy media bias in favor of amnesty, a recent NBC News/Wall Street Journal poll found that Americans oppose his executive amnesty by 48 percent to 38 percent.

The American people know the President's executive amnesty grants work permits to millions of illegal immigrants which hurts many hard-working Americans who struggle to find full-time work and good paying jobs. The Obama administration has placed the interest of illegal immigrants above the needs of millions of unemployed and underemployed Americans. This amounts to a declaration of war against American workers.

The Constitution is not a technicality. It is the document that has preserved our freedoms for more than two centuries. Ever American should be very concerned about President Obama's violating the Constitution and not enforcing the laws of our Nation.

Thank you, Mr. Chairman, and I will yield back.

Mr. GOODLATTE. The Chair thanks the gentleman and is pleased to recognize the Ranking Member of the Subcommittee on Immigration and Border Security, the gentlewoman from California, Ms. Lofgren, for her opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman.

When President Obama spoke from the East Wing of the White House 2 weeks ago about the steps he would take to improve our

broken immigration system, he was responding to loud and sustained calls for action from people all over the country. He can't change the law, but he can take certain actions within the law.

The President recognized what we all know: Our immigration system is badly broken. Millions of families face the threat of separation by deportation every day, parents from children, husbands from wives. Entrepreneurs and highly skilled immigrants from around the world want to drive innovation and create jobs and opportunities here, but instead we erect barriers and make them go elsewhere to create their companies. Farmers rely on the work of undocumented immigrants to support their industry. We all rely on their food. I was thinking with my family at Thanksgiving how much we have to be grateful for, but I'm not grateful that the farm workers who put that food on our table are living in fear.

Now, before I entered public service, I practiced and taught immigration law, and throughout my 20 years in Congress I have worked across the aisle to enact sensible immigration reforms, and we have come close several times. In 2006, the Senate passed a bipartisan bill, but the House Republicans squandered the opportunity to close the deal and instead passed an enforcement-only bill.

Last year the Senate again passed a bipartisan immigration reform bill that brought historic adversaries, the Chamber and the AFL-CIO, growers and farm workers, everybody together with a 68 vote in the Senate, and again we did nothing with that opportunity here on the House side. In fact, I was part of our own group of eight here in the House where we tried to craft a bipartisan House bill. We did actually write a bill, but in the end we were unable to move forward.

So it was only in the face of congressional inaction that the President decided to do something. He recognized there are costs to doing nothing, and he looked for opportunities that are permitted in current law to avoid some of the costs. There are many things the President can't do to fix our immigration system, and nothing the President did either alleviates the need for legislative action or prevents Congress from acting.

Now, the focus of the President's legal authority is allegedly the topic of this hearing, and I think it's important to remember that the President announced reforms in many different parts of the immigration system, including a new strategy to focus enforcement on the southern border, pay reforms for ICE personnel, several different efforts to make the immigration system work better for entrepreneurs. I haven't heard anybody complaining about those efforts of the President. No, it is only about the families of American citizen children. And this talk of executive overreach really is about deporting, I think, the parents of U.S. citizen children, and I think it's a darn shame.

By this point, much has already been said about the legal authority going back to really Eisenhower in the 1950's. Every President has used the similar or same authority in the immigration context. The authority stems from the President's constitutional duty to take care that the laws be faithfully executed. In *Heckler v. Chaney*, the Supreme Court explained that this duty does not require the President to act against each technical violation of law,

and when the Supreme Court in *Arizona v. the United States* struck down the majority of Arizona's SB 1070 law, the court specifically reaffirmed that, "broad discretion" exercised by Federal immigration officials extend to "whether it makes sense to pursue removal at all."

In 1999, Members of the Congress from both parties, including Members who still serve on this Committee, wrote to then Attorney General Janet Reno and asked her to issue specific instructions to guide in the use of prosecutorial discretion, and several years later Congress in the Homeland Security Act specifically directed the Secretary of Homeland Security to establish national immigration enforcement policies and priorities. That is precisely what Secretary Johnson has done.

Now to the Family Fairness program, which serves as an important historical precursor to the Deferred Action for Parental Accountability program. President Reagan's Family Fairness program was announced at a 1987 hearing before the House Immigration Subcommittee and it offered protection from deportation to certain spouses and children of persons who were legalized in the 1986 act. When the program was expanded under George H.W. Bush in 1990, the INS Commissioner estimated that as many as 1.5 million people would be eligible for protection from deportation and work authorization.

I heard the Chairman's comment about Pinocchios in The Washington Post, but I recently discovered two documents that I would ask unanimous consent to put into the record. The first is the decision memo that announced the Family Fairness policy dated February 8, 1990, where the Department estimates that the Family Fairness policy provides voluntary departure and employment authorization to potentially millions of individuals, and the other document, also dated February 8, 1990, which indicates that the intention or expectation is that greater than 1 million IRCA-ineligible family members will file for the benefit.

Mr. GOODLATTE. Without objection, those documents will be made part of the record.

[The information referred to follows:]

February 8, 1990

Decision Memo

To: Gene McNary, Commissioner

Subject: The implementation of the Family Fairness Policy -- Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the spouses and children of legalized aliens (section 245a and section 210).

The family fairness policy provides voluntary departure and employment authorization to potentially millions of individuals. The Service must establish specific procedures to ensure consistency of processing requests for voluntary departure and employment authorization from ineligible family members of temporary resident aliens legalized under the legalization (section 245a) and special agricultural (section 210) programs. The following processing options are submitted for consideration.

Traditional processing pursuant to 8 CFR 242.5 (voluntary departure) and 8 CFR 274a.12 (employment authorization).

- o request for voluntary departure will be made in writing to the district director in whose jurisdiction the ineligible spouse or child resides.

- o the district's records section will create an A-file, if a file has not been previously opened.

- o the district's investigations section will prepare form I-213, "Record of Deportable Alien" for each ineligible spouse or child, a determination will be made to grant or deny voluntary departure, and the aliens will be placed under docket control.

- o the district's deportation section will control both granted and denied cases that have been placed under docket control. One year call-ups will be maintained for granted cases. Requests for extensions will be processed by deportation personnel. Denied cases will be processed for Orders to Show Cause if the alien has not departed the United States within the required time frame.

- o application for employment authorization will be made on form I-765, "Application for Employment Authorization", with fee.

PROS

- o follows established regulatory procedures and guidelines.

- o utilizes personnel experienced in processing requests for voluntary departure, employment authorization, and file creation.

o does not "link" to legalization's promise of confidentiality and "no risk" if alien comes forward to request voluntary departure. (alien can be denied and placed into deportation proceedings, etc.)

o does not impact on legalization processing, thus complying with Congressional intent for a temporary legalization program that will continue to phase down (adjudicating the remaining 700,000+ Phase I 245a and 210 cases, the remaining 800,000 Phase II 245a cases, replacement card applications, processing the 60,000 ongoing litigation cases etc.)

o allows for maximum use of district director's exercise of discretion.

CONS

o places large workload on in place INS structure, that will strain existing resources.

o jeopardizes the Regional Commissioners and the District Directors performance goals in other operational activities.

o operational budgets do not contain sufficient funds for this effort. (a "user fee" may have to be charged generating negative publicity and charges that the Service's policy was a ruse to raise money)

o large numbers of individuals will visit in place INS offices that already experience unacceptable crowds and long waiting times. (Again, the risk of negative publicity is great)

o congressional complaints are likely to increase as resources are diverted from other activities, slowing the disbursement of benefits and services associated with these activities)

o the morale of personnel in investigations and deportation is likely to suffer in that the perception of this program will not "fit" with their regular mission assignments. (Low morale can translate into inadequate processing and poor service and consequently reflecting badly on the Service)

o not an efficient way to consistently process large numbers.

DRAFT PROCESSING PLAN

RPF PROCESSING OF FAMILY FAIRNESS APPLICATIONS

UTILIZING DIRECT MAIL PROCEDURES

This proposal identifies one feasible method for accomplishing the initial receipt of documents required for an alien to request coverage under the Service's recently announced policy shift on family fairness. As a result of this change in policy, current estimates are that greater than one million IRCA-ineligible family members will file for this benefit.

Because of the anticipated scope of this workload on the Service, it is advisable to identify cost-efficient and effective methods to receive and process applications for inclusion under the Family Fairness Policy (FFP). Therefore, it is recommended that one viable option will incorporate many of the resources currently in place throughout the Service. One such plan, which can be activated with a minimum lead time and effort is to have aliens direct mail their applications to Service Regional Processing Facilities (RPF).

ALIEN MUST FILE BY MAIL WITH THEIR RPF:

1. One Form I-765, Application for Employment Authorization

   - Instructions are modified for this form to tell aliens to enter
     "F F P"
     in the three ( ) located in item #16 on the I-765

   Money order or bank check for $35.00 made out to INS, if employment authorization is required

   Affidavit of family membership, using the required format

THE RPF WILL USE THE IAPS SYSTEM TO DO THE FOLLOWING:

Note: Simply stated, the RPF will handle the I-765 with accompanying documentation, in very much the same manner as the current I-698, used by temporary residents under § 245a to apply for adjustment to permanent resident status.

1. If application is complete, as required, process. If not, it is returned to the alien until it is perfected.

2. If processable, the I-765 is forwarded to data entry. Here, a new A-number will be assigned to the application and the resulting record.

3. IAPS will be used to capture all data from the I-765 for which there is a comparable field in IAPS. For starters, the form type will be I-765, the fee amount $35.00, etc. Information for which there is no comparable field

in LAPS will not be able to be keyed until modifications are made to the system. The resulting electronic record will enable the Service to track individual cases, produce timely management reports, and send notices to the alien.

4. After data entry, all paperwork is placed in the appropriate A-file folder.

5. The fee, if indicated, is processed with monies deposited to X accounts.

6. LAPS will preempt all other interviews which have been scheduled and will schedule I-765 applicants to appear for interview instead, at the earliest practicable date.

7. LAPS prints an automated mailer to the applicant. This mailer tells the alien that their request for coverage under FFP has been received. The mailer states that it is a replacement I-689 document and grants employment authorization until the date of a scheduled interview. Suggested text:

"We have received your request for relief from deportation under the Family Fairness Policy. You must appear at the office listed below on _____ for an interview so we may make a decision on this application. If we approve your application, you will receive employment authorization at that time. If you move, notify the INS of your new address using form I-697A, available at any INS office."

MESSAGE REPEATS IN SPANISH - MAXIMUM MAILER LINES = 12

7A. Alternatively, if policy requires that employment authorization be instantaneous, upon processing of the I-765, the suggested language is:

" We have received your request for relief from deportation under the Family Fairness Policy. You will be notified to appear at an INS office for an interview so we may make a decision on this application. This document replaces form I-689 and, combined with proper identification, authorizes employment until _____. If you move, notify the INS of your new address using form I-697A, available at any INS office."

MESSAGE REPEATS IN SPANISH - MAXIMUM MAILER LINES = 12

ALIEN RECEIVES NOTICE AND SHOW UP AT PHASE II OFFICE HAVING LAPS ACCESS

1. I-213 completed on alien. Decision on EVD is made.

2. Alien is interviewed to determine applicability of FFP relief and veracity of family relationship claim. Examiner uses online screen record of I-765 data.

3. If I-765 approved, alien processed at that office for EAD card.

4. If FFP coverage denied, alien notified in writing using Form I-210. IAPS

screen updated to reflect status.

5. Copy of I-210, I-213 sent to district Deportation and Investigation branches for issuance of an OSC if alien does not leave the country within 30 days voluntarily, as provided on the I-210.

ESTIMATED RESOURCES REQUIRED

		@1,000,000 interviewed in 100 workdays		
1.	Clerical staff at RPFs:	100	est cost.	$ 1,348,500
2.	Adjudicators at RPFs:	250		3,371,250
3.	Clerical staff in Field:	250		3,371,250
4.	Adjudicators in Field:	500		6,742,500
est. subtotal personnel costs:		1,100		$ 14,833,500
est. software modification costs:				200,000
est. miscellaneous support costs:				2,000,000
total estimated costs:				$ 17,033,500

PRO:

- Centralizes control, security and consistency.
- Requires less personnel than a more distributed plan.
- Buys the Service valuable time to get ready. The time normally wasted in mailing can work to our benefit.
- Diminishes the potential for a "circus atmosphere" created by the media or our critics, who will be avidly looking for signs of disorganization or inconsistency at our offices.

CON:

- Cost. This can be offset if the Legalization program is allowed to use the fees received from Form I-765 applications, without restriction, to accomplish this special project and to remedy disruption caused to the ongoing legalization , SAW and RAW programs.
- Holds the alien, and their representative at arms length. This may be perceived as negative by the public. However, given the emotional nature of

this issue, the Service cannot take the risk of exposing too much of itself to the public until we are ready to handle however many aliens come forward.

T. Andreotta (February 8, 1990)
RPF-1.FFP

Ms. LOFGREN. Now, when then Commissioner McNary stated in 1990 that the program would begin, he said, "It is vital that we enforce the law against illegal entry. However, we can enforce the law humanely. To split families encourages further violations of the law as they reunite." He understood that a smart enforcement strategy can also be a humane enforcement strategy, and that is no different than today.

Now, if there is one key difference between the Family Fairness program and the deferred action program announced by the President last month, it's that Presidents Reagan and Bush offered protections to people who were knowingly and intentionally denied protection by Congress when they passed the 1986 act. By contrast, the President is now acting in the face of historic intransigence by House Republicans who will, if no action is taken by the end of this month, have wasted two opportunities in 8 years to advance immigration reform bills.

The President's actions are lawful. They are also smart because they will allow DHS to focus limited resources on serious criminals, recent arrivals, and gang members. Finally, they are consistent with basic American values like accountability, family unity, and compassion.

I would note that H.R. 15 is sponsored by 201 Members, both Democrats and Republicans. There is still time to take this bill to the floor for a vote, and I hope that Republicans will do so.

And finally, I just want to respond very briefly to the argument in the video that we saw of the President making various comments about the limits of his authority. I guess if the President had said multiple times that 5 plus 5 equals 15 and then he finally says 5 plus 5 equals 10, he would not be wrong when he finally said 5 plus 5 equals 10.

Second, the timing of the President's statements were important. All of those statements were made before March.

Mr. ISSA. Mr. Chairman, how many finallys can we have? We are going to run out of time here shortly.

Mr. GOODLATTE. The Chair is giving some leniency because the Chair's own opening statement was in excess of 5 minutes.

Ms. LOFGREN. I did note that and I——

Mr. GOODLATTE. The gentlewoman can conclude.

Ms. LOFGREN. I am almost through. I would just note that those statements were made before the President asked the Secretary of Homeland Security to do a complete review of the immigration system to see what could be fixed administratively, which resulted in his memorandums and the formal opinion by the Office of Legal Counsel.

And finally, as we will see throughout this hearing, the legal question isn't even a close one. The President has clear legal authority to defer removals when it is in the national interest. Chief Justice Roberts reaffirmed that principle just 2 years ago. Our immigration laws recognize this authority. Past Presidents have used this authority regularly. Our President is doing so now, and I for one am grateful that he is. And I yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman.

Without objection, additional Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Forbes follows:]

Prepared Statement of the Honorable J. Randy Forbes, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary

Mr. Chairman, if you didn't enforce the rules of this Committee, people would break them as we have seen here today. More people would break the rules during the next hearing and even more the hearing after that. Soon those that strictly followed the rules will wonder if they should continue to do so if there are no consequences for breaking the rules and if they are treated the same as those who break the rules.

If you didn't enforce the rules, there would be no order. There would be no framework for conducting the business of the Committee.

Just weeks ago, we witnessed a staggering instance of non-enforcement. The President of the United States chose to act unilaterally to stop enforcement of our Nation's immigration laws. In 2012, he stopped enforcement of the law for children brought into the country illegally by their parents.

Now, he has stopped enforcement of the law for roughly 4 million more people living in this Nation illegally.

Meanwhile, we have people who have followed the rules—some waiting for years—to enter this country lawfully with the hopes of gaining legal status or ultimately citizenship. What incentive do people have to continue to do this?

Continued non-enforcement of the law will only lead to more of the same. The president has a constitutional duty to ensure that the laws of the United States are faithfully executed. Blatantly choosing to abdicate this duty and refusing to enforce the law rewards those that broke our laws, harms those that chose to come legally, and undermines the constitutional framework upon which this Nation was built.

Further, if the president refuses to enforce our immigration laws, he could choose not to enforce our property or criminal laws as well.

Under the precedent set by President Obama, a president could also unilaterally decide not to prosecute any of the 1.6 million people arrested annually for federal property crimes [1], choosing instead to focus federal resources on violent crimes.

Under President Obama's new precedent, a president could also grant prison amnesty to those 30,000 people who would otherwise have been charged for federal crimes for which they would serve terms of 3 years or less in federal prison.[2]

As the November 19, 2014, Department of Justice Office of Legal Counsel opinion [3] stated, "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences . . . 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."

We are a Nation of laws, and a foundational aspect of our government is the separation of powers. This unilateral action on the part of the President not only sets a dangerous precedent, it threatens to unravel that very foundation our Nation was built upon.

Mr. GOODLATTE. We thank our witnesses for joining us today, and if you would all please rise, we will begin by swearing you in.

Do you and each of you 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.

Let the record reflect that all the witnesses responded in the affirmative.

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[1] http://ojjdp.gov/ojstatbb/ezaucr/asp/ucr__display.asp.

[2] http://www.bop.gov/about/statistics/statistics__inmate__sentences.jsp.

[3] http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

Mr. Ronald D. Rotunda is the Doy & Dee Henley chair and distinguished professor of jurisprudence at Chapman University. Prior to joining Chapman, he was a professor of law at the George Mason University School of Law and the Albert E. Jenner Jr., professor of law at the University of Illinois. He is the coauthor of the seven-volume "Treatise on Constitutional Law," the author of "Modern Constitutional Law," a leading course book on constitutional law, and he has coauthored the most widely used course book on legal ethics, "Problems and Materials on Professional Responsibility." Mr. Rotunda received his BA and JD from Harvard University, where he was a member of the Harvard Law Review.

Mr. Jay Sekulow is the chief counsel for the American Center for Law and Justice, which advocates for the protection of constitutional and religious freedom. A distinguished professor of law at Regent University, Mr. Sekulow has argued 12 cases before the Nation's highest court, including *McConnell v. FEC*, where he ensured the constitutional rights of young people remain protected with a unanimous decision guaranteeing that minors can participate in political campaigns. Mr. Sekulow received his Ph.D. from Regent University with a dissertation on American legal history. He is an honors graduate from Mercer Law School, where he served on the Mercer Law Review, and an honors graduate of Mercer University.

Mr. Thomas H. Dupree is a partner in the Washington, D.C., office of Gibson, Dunn & Crutcher, where he is a member of the firm's litigation department and its appellate and constitutional law practice group. In 2013 and 2014, Chambers and Partners named Mr. Dupree one of the leading appellate lawyers in the United States. In 2014, Mr. Dupree argued and won by a unanimous vote a landmark personal jurisdiction case in the United States Supreme Court. Prior to joining Gibson, Dunn & Crutcher, Mr. Dupree served as deputy assistant attorney general in the Civil Division of the Department of Justice, ultimately becoming the principal deputy assistant attorney general. Mr. Dupree graduated *cum laude* from Williams College and with honors from the University of Chicago Law School, where he served as an editor of the University of Chicago Law Review.

Marielena Hincapié is executive director of the National Immigration Law Center. She is a public interest lawyer who specializes in protecting and advancing the rights of immigrant workers, particularly those who are undocumented. She has authored numerous publications and policy analyses, provided strategic assistance and training to thousands of legal and social service providers, labor unions, and community-based organizations. She holds a juris doctorate degree from Northeastern University School of Law, served on the American Bar Association's Commission on Immigration, and is currently a member of the board of directors of Jobs With Justice and Welcome.US.

I welcome all of you. I would ask that each witness summarize his testimony in 5 minutes or less. Your entire statement will be made a part of the record. 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 will have 1 minute to conclude your testimony. When the light turns red, that is it, time is up, and it signals that you should finish your sentence and your statement.

So thank you all. We will now proceed first with Mr. Rotunda.

TESTIMONY OF RONALD D. ROTUNDA, DOY AND DEE HENLEY CHAIR AND DISTINGUISHED PROFESSOR OF JURISPRUDENCE, CHAPMAN UNIVERSITY, DALE E. FOWLER SCHOOL OF LAW

Mr. ROTUNDA. Thank you, Mr. Chairman and respective Members of the Committee. I think it's important to explain that I favor increased immigration into the United States. If American Indians had strict immigration laws, perhaps none of us would be here.

People want to come here for the same reason my parents wanted to come here, the land of opportunity and freedom. My parents did not know the language. They did not know the customs. They were strangers in a strange land. My mother told me years later the first night in the United States, though she was well past the age of toilet training, she had an accident. She was so excited to be here. My father fought in World War II as a spy for the Americans. He was a good spy because he spoke Italian like a native.

When he was in his 90's, I remember taking him to the VA doctor, and the doctor said, looking at the paper, "so you're Italian." My father said, "No, American." You have to realize he did not know who was President. He did not know what year it was. He did not know my name, though he knew I was a friend. But he knew he was an American.

So I favor reform along the lines of the President. Whether Congress exercises comprehensive immigration reform or goes one step at a time isn't important. The government tells us there's over 11 million undocumented aliens here. We're not going to march 11 million people south of the border. Democracies just don't have mass deportations. But we also, I think, should all agree, we have to secure our borders. If a 15-year-old can cross our borders, an Al Qaeda agent can as well.

So the issue is not whether we agree with the President's goals. In general I share them. The issue is whether it is constitutional for the President to act unilaterally to rewrite our immigration laws and change the status of, he says, about 5 million Americans, almost half of them are here without papers. The President's executive power does not give him the power to govern by decree. It does not give him the power to suspend the law. If he can actually do this and get away with it, I guess future Presidents could say that they're going suspend more parts of the Affordable Care Act. Maybe they'll suspend it all. We don't need a Congress to repeal it. We just need a President to say, "I suspend it."

The President said repeatedly over the last several years, I think over 20 times, he iterated and reiterated he does not have the power to do this, and then he did it. Why? He says in his statement to the people, Congress has failed.

Congress doesn't fail when it fails to enact a presidential proposal. If the Constitution were a computer program, we would not say that the separation of powers is a bug. It's a feature of the program. The Framers wanted to make it difficult to enact laws, so we're going to have to learn to compromise. The President won't get all that he wants. Both sides of the aisle will have to compromise as well. There is going to have to be compromise.

Article II provides that the President shall take care that the laws be faithfully executed. This clause is not a general grant of powers. It's actually a limitation on the power. The President must execute the law faithfully. A whole series of opinions of the Office of Legal Counsel—I'll call them OLC opinions, and I refer to them in my paper have said this repeatedly, that the President cannot suspend the laws, that he has prosecutorial discretion for criminal acts, to refuse to prosecute criminally, but not civilly. Deportation, the court has told us, is civil and not criminal.

The President tells us that this deal doesn't apply to anyone who comes recently. He says, Congress has failed, and then asks "are we a Nation that accepts the cruelty of ripping children from their parents' arms? Are we a Nation that values families?" Apparently we'll accept this cruelty and rip children from their parents' arms if they came here illegally before the arbitrary date of January 1, 2010. No explanation about why that's okay. Why couldn't it be January 2nd or December 31?

The new DHS policy reads an awful lot, it looks like a statute. I mean, it is six single-spaced pages, it talks about provisos, benefits, an arbitrary date. It grants, apparently from the newspapers, it says repeatedly that these people will now get Social Security cards. We don't know how Social Security cards have anything to do with prosecutorial discretion. The OLC opinion spins a theory that relies on historical incidents, not legal precedents but historical incidents, and, secondly, reading a lot into a few selected segments of the statute. Case law is precedent. Historical examples are not.

In any event, others have already distinguished those examples. They're not about my theory. I'm not going to duplicate their efforts in any event. No other President has said he's acted because Congress has failed and then issued an immigration order. No other President has said that he's doing something that over the last several years he repeatedly said is unconstitutional. The President should at least explain, or the OLC opinion should explain why that was wrong. If somebody decided for years that 5 and 5 is 11 and suddenly it comes out to be 10, we'd like to know why. Was it on the road to Damascus he got hit by lightning or what made him change his mind?

The New York Times says, "Obama, Daring Congress, Acts to Overhaul Immigration," and he does have an overall immigration reform. The OLC opinion admits that a general policy of nonenforcement would foreclose exercise of case-by-case discretion. Anyone who looks at this——

Mr. JOHNSON. Mr. Chairman.

Mr. ROTUNDA [continuing]. It looks like a statute.

Mr. JOHNSON. Regular order, Mr. Chairman.

Mr. GOODLATTE. Mr. Rotunda, if you could summarize the remainder of your statement. It will all be part of the record.

Mr. ROTUNDA. Yes. In my papers I cite about 10 OLC opinions, as well as Supreme Court opinions that say the President does not have the discretion to refuse to enforce civil law, and the OLC opinion ignored all of that, even ignored the statements and the important footnote in the *Heckler* opinion on which they relied. Thank you.

Mr. GOODLATTE. Thank you, Mr. Rotunda.
[The testimony of Mr. Rotunda follows:]

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2 December 2014
HOUSE COMMITTEE ON THE JUDICIARY

Testimony of:
RONALD D. ROTUNDA
Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence
Chapman University, Fowler School of Law

THE PRESIDENT'S POWER TO WAIVE THE IMMIGRATION LAWS

Introduction

I think it is important to explain that I favor increased immigration into the United States. Remember, if American Indians had strict immigration laws, none of us would be here.

People want to come here for the same reason that my parents, both immigrants, came here. This country is the land of opportunity and freedom. My parents did not know the language; they did not know the customs. They were strangers in a strange land. Years later, my mother told me that when she first arrived, she was a little girl well past the age of toilet training, but she was so excited her first night in the United States that she had an accident. When my father fought in WW II, he was proud that the Army used him as a spy because he spoke Italian like a native. When he was in his 90s, I recall one incident when I brought him to the VA hospital for a check-up. The doctor looked at his name and asked if he was Italian. He said no, he was an American. His mind had deteriorated by then. He did not know what year it was; he did not know who was President. Nevertheless, he knew that he was an American.

I favor reform along the lines that the President has proposed. Whether Congress enacts "comprehensive" immigration reform or whether it moves one-step at a time, the important thing is reform. The government tells us that there are over 11 million undocumented aliens. This country is not going to march 11 million people across our border. Democracies do not engage in mass deportations. I think we also agree that we have to secure our borders. If a 15-year old can cross our borders without papers, an al Qaeda operative can do the same.

Hence, the issue is not whether one agrees with the President's goals. (In fact, I share his goals.) The issue is whether it is constitutional for the President, unilaterally, to rewrite our

immigration laws and change the status of about 5 million people. The President's executive power does not give him the power to govern by decree. If the President can get away with this action, future Presidents will be able, for example, to rewrite other laws. For example, if the next President does not favor the Affordable Care Act, he or she can simply grant a waiver to all of that law.

Our Constitution rejected the notion that the President can govern by decree. President Obama did not base his decision on any theory that he was merely implementing Congressional intent. He did not argue that any legal precedent supported his actions. He did not even say that he was incorrect when he earlier said, repeatedly, that he does not have the legal authority to deal with undocumented aliens. Instead, the President, in his address to the nation, said that he acted and issued his order because "Congress has failed."[1]

Congress does not fail when it refuses to enact a presidential proposal. If our Constitution were a computer program, we would not say that the separation of powers is a bug; instead, it is a feature of the program. The framers designed our Constitution to make it difficult to enact laws and to require compromise — all for protecting our liberty.

The Duty to "Faithfully Execute the Laws"

Article II provides that the President "shall take Care that the Laws be faithfully executed."[2] This clause is not a general grant of power. Rather, it reads like a restriction on Presidential power — an obligation imposed on the President to execute the laws faithfully, which is the way the Opinion Letters of the Office of Legal Counsel (OLC) have interpreted it — until now.

This case has remarkable similarities to *Youngstown Sheet & Tube Co. v. Sawyer*.[3] There, the Court rejected the argument that the President's power to "faithfully execute" the laws gives him power to create law. The President issued an Executive Order instructing the Secretary of

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[1] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[2] U.S. Constitution, Art. II § 3. *See*, Steven G. Calabresi & Saikrishna Bangalore Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Gary Lawson & Christopher Moore. *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Saikrishna Bangalore Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701(2003); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEORGETOWN L. J. 1613 (2008).

[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

Commerce to seize steel mills, which were subject to a strike by the workers. The mill owners argued that the President's order amounted to lawmaking, a legislative function, but the Constitution gives that power to Congress and not to the President. The President said the steel strike would impair the manufacture of steel, which was necessary to prosecute the Korean War, and that in meeting this "grave emergency, the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief" of the Armed Forces.[4]

Like a statute, President Harry Truman's Executive Order explained in its preamble why he believed his seizure of the steel mills was necessary. Again, like a statute, his Order proclaimed rules of conduct that the affected persons must follow, and it authorized government officials to promulgate additional rules and regulations consistent with the Order. "The President's order did not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[5] The Court could not sustain this Executive Order as an exercise of the President's power to execute faithfully the laws. The power to enforce the law is not the power to legislate.

President Obama's order and accompanying OLC Opinion also read like a statute, drawing lines that appear arbitrary. First, the President tells us:

> This deal does not apply to anyone *who has come to this country recently*. It does not apply to anyone who might come to America illegally in the future. It does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive – only Congress can do that. All we're saying is we're not going to deport you.[6]

He gives his reasons, as a statute gives its preamble. First, "Congress has failed."[7] Second, he asked, "Are we a nation that accepts the cruelty of ripping children from their parents' arms? Or are we a nation that values families, and works together to keep them

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[4] 343 U.S. 579, 582, 72 S.Ct. 863, 864. *See also, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 712, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893): The Constitution "has made it his duty to take care that the laws be faithfully executed."

[5] 343 U.S. 579, 582, 72 S.Ct. 863, 864.

[6] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration (emphasis added).

[7] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

together?"[8] Then he says *that we will accept this cruelty* and rip children from their parents' arms *if* they came to this country illegally before the arbitrary date of January 1, 2010.[9] Like a statute, he creates time limits, by granting benefits (permission to work; *i.e.*, a social security card[10]) only to those who arrived here *before* January 1, 2010.[11] The actual DHS new "policy" reads like a statute — it is six single-spaced pages, with sections, subsections, provisos, arbitrary dates, and the notice of the date when it is effective (January 5, 2015).[12]

In connection with the President's announcement, his Office of Legal Counsel ("OLC") has issued an Opinion[13] that seeks to justify the Presidential action. The OCL Opinion is a fine example of result-oriented jurisprudence. The OLC titles its opinion, in part, "Authority to *Prioritize Removal* of Certain Aliens Unlawfully Present"[14] but it never explains why assigning of social security cards has anything to do with setting priorities of deporting undocumented

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[8] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[9] http://www.npr.org/blogs/thetwo-way/2014/11/20/365519963/obama-will-announce-relief-for-up-to-5-million-immigrants

[10] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html ("they will receive Social Security cards, officials said.")

[11] By the way, the President's rationale — "cruelty of ripping children from their parents' arms" — raises cruelty problems of its own. The OLC Opinion states (at p. 2) that the President's proposal "would not 'legalize' any aliens," would only "remain in effect for three years, subject to renewal," and "could be terminated at any time at DHS's discretion"!

The President's speech urges undocumented aliens to "come out of the shadows" while the OLC Opinion says that, once out of the shadows, the DHS, in its "discretion" can them deport them! This sounds like bait and switch.

[12] http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial-_discretion.pdf (Nov. 20, 2014).

[13] http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf

[14] http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (emphasis added).

aliens. It tries to argue that the President is implementing the law, but it never deals with the President's own justification: "Congress has failed."[15]

The OLC Opinion spins together a theory first, by interpreting historical incidents broadly and second, by reading much into selected segments of the immigration laws. However, only case law (not historical incidents) constitutes legal precedent. In any event, others have already distinguished those historical examples[16] and I will not duplicate those comments here, except to note that they implemented Congressional policy; in contrast to President Obama, past Presidents did not issue their orders because "Congress has failed."[17] That alone distinguished past examples.

We know that the President, over the years, has proposed immigration legislation similar to what he decreed in November 20, 2014, but Congress did not enact it. Congress did not authorize the President to issue social security cards to 5 million undocumented aliens but the President's order will do that.[18] Congress has thus far not overhauled our immigration laws, but

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[15] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[16] See, e.g., Mark Krikorian, *Obama's Unprecedented Amnesty* (Nov. 18, 2014), http://www.nationalreview.com/article/392887/obamas-unprecedented-amnesty-mark-krikorian; Hans von Spakovsky & John G. Malcolm, *Obama's Unilateral Amnesty Really Will Be Unprecedented – and Unconstitutional* (Nov. 19, 2014), http://dailysignal.com/2014/11/19/obamas-unilateral-amnesty-really-will-unprecedented-unconstitutional/

However we interpret the prior historical examples, there is one major difference: in the present circumstances, President Obama does not rely on them; he does not say that he is cleaning up some unusual cases to implement Congressional intent, either express or implied. Instead, the President has said that he is issuing his Order because "Congress has failed." http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[17] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[18] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html ("they will receive Social Security cards, officials said.").

— as the New York *Times* reported — "Obama, Daring Congress, Acts to Overhaul Immigration."[19]

Even the OLC Opinion admits, "a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion."[20] In fact, the OLC Opinion makes this point about "general policies" *seven times* in the course of its Opinion. It argues that the President's new directive is not a general policy but it surely looks like one to its supporters and to anyone who reads it. As the New York Times reported, as noted in the prior paragraph, President Obama acted to "overhaul immigration."

This state of affairs replicates *Youngstown Sheet & Tube Co. v. Sawyer*,[21] where Justice Black said, for the Court, said that the President' "seizure technique" to "prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes."[22] The *Youngstown* Court noted that the President had conducted seizures in the past, but pursuant to specific laws dealing with the particular seizures. In *Youngstown*, the President was not acting to implement a congressional statute because Congress refused to enact it.[23] So too, here, Congress has not enacted the President's proposed statute.

As Justice Jackson, concurring, added, "When the President takes measures *incompatible with the expressed or implied will of Congress*, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the

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[19] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html.

[20] http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf at p. 7.

[21] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

[22] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952).

[23] "Congress had refused to adopt that method of settling labor disputes." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952).

matter."[24] There certainly is no doubt that the President is acting contrary to, at the very least, the implied will of Congress. The President appears to concede that fact because he said that he is acting because he did not persuade Congress to enact his proposal (even when his party controlled both Houses of Congress). "Congress has failed."[25]

The President's decree is valid only if he is acting pursuant to a power that the Constitution gives the President directly. Yet, when it comes to immigration matters, the Supreme Court has said, in *Galvan v. Press*,[26]

> In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that *the formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[27]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Galvan v. Press*? NOTHING.

The *Youngstown* decision rejects any theory that the President can act because Congress refused to act. Similarly, it distinguishes cases where the President is acting to deal with an unforeseen emergency. As Justice Frankfurter concurring, said:

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[24] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 871, 96 L. Ed. 1153 (1952) (emphasis added). The OLC Opinion, at p. 6, acknowledges this principle:

> "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. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.") [First emphasis added.]

[25] http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration

[26] *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954).

[27] *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954) (emphasis added)(internal citations omitted, citing *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 70 S.Ct. 445, 453, 94 L.Ed. 616 (1950).

> We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.[28]

Justice Black also made clear, "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[29]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF THESE POINTS BY JUSTICES FRANKFURTER AND BLACK? NOTHING.

Repeatedly, over the last several years, the President has iterated and reiterated that he does not have the constitutional power to do what he has just done. As he said last year:

> 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*.[30]

As the President said to Jose Diaz-Balart in an interview on *Telemundo*:

> If we start broadening that [his protection to "Dreamers" — people who came to the United States as young children], then essentially *I'll be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option*.[31]

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[28] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597, 72 S. Ct. 863, 890-91, 96 L. Ed. 1153 (1952).

[29] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588, 72 S. Ct. 863, 867, 96 L. Ed. 1153 (1952).

[30] (emphasis added). See, http://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law for the relevant quotations and citations.

[31] Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES, Nov. 17, 2014, http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html (emphasis added).

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF THE PRESIDENT'S REPEATED REPRESENTATIONS THAT HE CANNOT AND WILL NOT CHANGE THE IMMIGRATION LAW WITHOUT GOING THROUGH CONGRESS? NOTHING.

The principle of *Youngstown Sheet & Tube* extends beyond the facts of that case. Yet because we must not paint with too broad a brush, we must distinguish between the President who is legislating versus the President who is exercising delegated power.

First, there are times when the President may properly issue decrees that have the force of law. For example, Congress may provide that the certain things will (or will not) happen unless the President issues certain findings. In 1936, for example, the Supreme Court upheld a law that made it a crime to sell munitions to Bolivia (then engaged in an armed conflict) if the President made certain findings.[32] Congress expressly delegated certain specific powers to the President. The President, rather than initiating legislation, was following the legislation.

In addition, the Constitution itself gives the President a few unilateral powers, such as the power to decide which foreign countries to recognize,[33] or the power to grant a Presidential pardon,[34] even *before* a trial or conviction.[35]

The President can also refuse to prosecute someone criminally because the Constitution gives the Executive Branch absolute prosecutorial discretion not to prosecute. Cases going as far back as the Civil War have held that the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a criminal case.[36]

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[32] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216. 81 L.Ed. 255 (1936).

[33] U.S. Constitution, Art. II, §3. The courts derive this power from the brief reference in §3 providing that the President "shall receive Ambassadors and other public Ministers." *E.g., National City Bank of New York v. Republic of China*, 348 U.S. 356, 358, 75 S. Ct. 423, 99 L. Ed. 389 (1955): "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."

[34] U.S. Constitution, Art. II, §2, cl. 1. E.g., *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L.Ed. 640 (1833).

[35] *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380, 18 L.Ed. 366 (1867).

[36] *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974), citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1869); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965).

The OLC Opinion uses the phrase, "*prosecutorial discretion*," nine times! That is how important that concept is to its opinion. However, prosecutorial discretion relates to decisions not to enforce (or step up enforcement of) *criminal* laws.[37] Prosecutorial discretion is the decision whether or not to prosecute criminally. The President says he is using "prosecutorial discretion." Granted, the President has the power not to prosecute someone criminally. He can also pardon for a federal criminal offense. However, distributing social security cards[38] and granting permission to work has nothing to do with prosecutorial discretion.

The Courts have long held, since *Flemming v. Nestor*,[39] that a deportation proceeding is *not* a criminal prosecution and deportation is not a criminal punishment. Deportation is a civil proceeding, not a criminal proceeding. The President can decide not to prosecute someone criminally even though that person has entered the country in violation of the criminal laws, for example, through immigration fraud. The President has that power as the Chief Law Enforcement Officer, but the President's announcement of November 20th goes well beyond a decision to pardon someone for offenses. Prosecutorial discretion does not authorize the President to waive the provisions of civil law.

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Flemming v. Nestor*? NOTHING.

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[37] In dictum, *Heckler v. Chaney* [discussed below] states, "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, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831. However, the Court is not talking about a power of the agency. Instead, it is simply talking about standing — if the agency does not enforce through the civil process, no one may have standing to complain. In the very next sentence the Court makes that clear:

> "This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."

Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655, 84 L. Ed. 2d 714 (1985).

[38] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html ("they will receive Social Security cards, officials said.")

[39] *E.g.*, *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 136, 74 L.Ed.2d 1435 (1960).

Indeed, the *ex post facto* clause does not apply to deportation because deportation is not criminal and the *ex post facto* clause only protects against *ex post facto* criminal laws, as the Court so ruled in *Galvan v. Press.*[40]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Galvan v. Press*? NOTHING.

Finally, the President need not enforce a law that he believes is unconstitutional.[41] The President, as all executive, judicial, and legislative officers, both state and federal, take an oath to support the Constitution.[42] In addition, our Constitution, pithy as it is, provides the language for this mandatory oath or affirmation. It requires the President, before he takes office, to swear or affirm that he will, to the best of his ability, "preserve, protect and defend the Constitution of the United States."[43] The President's duty to execute the laws faithfully includes the duty to execute the Constitution itself, the organic law, and prefer it to contrary statutory law.[44]

The Framers understood this principle. During the Constitutional Convention, James Wilson, one of the drafters of the Constitution, said that the Courts, if they find a law "to be incompatible with the superior power of the Constitution, it is their duty to pronounce it *void*. . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that *violates* the Constitution."[45]

Historical precedent supports this power. President Jefferson, for example, relied on his "oath to protect the constitution," as justifying and requiring him not to enforce the Alien

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[40] *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954).

[41] See discussion in, e.g., Saikrishna Bangalore Prakash, *The President's Duty to Disregard Unconstitutional Laws*, 96 GEORGETOWN L.J. 1613 (2008).

[42] U.S. Constitution, Article VI, cl. 3.

[43] U.S. Constitution, Article II, §1. 8

[44] Senator Orin Hatch offers an extensive compilation and discussion of authorities, which he presented on the Senate floor. 151 Cong. Rec. S923-02, 151 Cong. Rec. S923-02, 2005 WL 264055 (Feb. 3, 2005).

[45] Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 445-46 (1836)(emphasis in original).

Sedition Act.[46] He believed he was obligated not to enforce a law that was "no law," *i.e.*, an unconstitutional law.[47] Later, Chief Justice Chase adopted this view. How, he asked, "can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress sincerely believed by him to have been passed in violation of it?"[48]

Various opinions of the Office of Legal Counsel (OLC) come to the same conclusion. The OLC is part of the Department of Justice. It is, in effect, the lawyer for the government. It issues Legal Opinions, on which courts sometimes rely. The OLC concluded that "the idea that the President has the authority to refuse to enforce a law which he believes is unconstitutional was familiar to the Framers. The Constitution qualifies the President's veto power in the legislative process, but it does not impose a similar qualification on his authority to take care that the laws are faithfully executed."[49]

The OLC has derived the Presidential power to refuse to enforce a law that he believes is unconstitutional from two clauses of the Constitution. One requires the President to "take Care that the Laws be faithfully executed," and the other requires him to "preserve, protect and defend the Constitution of the United States." The OLC agreed with Chief Justice Chase, who said in 1868, that the President's obligation to defend the Constitution authorizes him to decline to enforce statutes that he believes are unconstitutional.[50]

The OLC, in response to inquiries from Congress in 1980, opined, "the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the

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[46] See Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted in 1 THE ADAMS-JEFFERSON LETTERS 274, 275-76 (Lester J. Cappon ed., 1959).

[47] Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 253-54 (Paul Leicester Ford ed., 1897).

[48] Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, quoted IN J. W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 578 (1874) (Letter from Chief Justice Chase).

[49] Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 51, 1990 WL 488469, *10 (1990).

[50] Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 47-48, 1990 WL 488469, *9 (1990).

courts."[51] The President can also refuse to follow a law that he contends is unconstitutional even if that same President signed it into law.[52] President may refuse to enforce the law before the Court makes its final decision.[53]

Yet, the President's view of the constitutionality of a law does not override the final judicial determination. The Office of Legal Counsel, in 1980 made that quite clear:

> *The President has no "dispensing power."* If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute d*o not suspend its operation and do not immunize their conduct from*

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[51] The Attorney Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59, 1980 WL 20999, *4 (1980).

[52] Issues Raised by Section 129 of Pub. L. No. 102-138 & Section 503 of Pub. L. No. 102-140, 16 Op. Off. Legal Counsel 18, at footnote 18, 1992 WL 479539 (1992):

> The analysis of this question does not turn on the fact that the President has signed the two bills. As the Supreme Court has observed, "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983). That the President has signed a bill in no way estops him from later asserting the bill's unconstitutionality, in court or otherwise. See Letter for Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, from William French Smith, Attorney General at 3 (Feb. 22, 1985) ("Attorney General Smith Letter") ("[T]he President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects.").

[53] Issues Raised by Section 129 of Pub. L. No. 102-138 & Section 503 of Pub. L. No. 102-140, 16 Op. Off. Legal Counsel 18, at footnote 18, 1992 WL 479539 (1992), quoting an earlier Opinion:

> Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel at 1 (Sept. 27, 1977) ("Harmon Memorandum") ("[P]rior to a definitive judicial determination of the question of constitutionality a President may decline to enforce a portion of a statute if he believes it to be unconstitutional, even if he or one of his predecessors signed the statute into law.")

> *judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional.*[54]

This same Opinion also said:

> [T]he 17th century dispute between Parliament and the Stuart kings over the so-called 'dispensing power' [is] directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed.[55]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 4A U.S. Op. Office of Legal Counsel 55 (O.L.C.), 1980 WL 20999? NOTHING.

The President does not have *carte blanche* to refuse to enforce law that is constitutional. As the OLC earlier explained, in 1990,"Obviously," the President cannot "refuse to enforce a statute he opposes for policy reasons."[56]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 14 Op. Off. Legal Counsel 37, 1990 WL 488469, *11 (1990)? NOTHING.

There is little case law precedent on this issue. Sometimes, the only person who has standing will not file a lawsuit because he or she benefits from the Presidential dispensation. Still, there are a few cases. In, *Kendall v. United States*,[57] the Postmaster General refused to

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[54] The Attorney Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59-60, 1980 WL 20999, *4 (1980) (emphasis added).

[55] *The Attorney General's Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A U.S. Op. Off. Legal Counsel 55, 57, 1980 WL 20999, *3 (1980).

[56] Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 1990 WL 488469, *11 (1990):

> "Finally, we emphasize that this conclusion *does not permit the President to determine as a matter of policy discretion which statutes to enforce*. The only conclusion here is that he may refuse to enforce a law which he believes is unconstitutional. Obviously, the argument that the President's obligation to defend the Constitution authorizes him to refuse to enforce an unconstitutional statute does not authorize the President to refuse to enforce a statute he opposes for policy reasons." (Emphasis added.)

[57] *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

comply with a statute that ordered him to pay two contractors for mail carrying services. The Court rejected that argument, and explained, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[58]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Kendall v. United States*? NOTHING.

In another OLC Opinion, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 U.S. Op. Off. Legal Counsel 208, 1995 WL 917140, *11 (O.L.C. 1995), the OLC said: "The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that *the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes*." (Emphasis added.)

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 19 U.S. Op. Off. Legal Counsel 208, 1995 WL 917140? NOTHING.

When President Nixon refused to spend funds that Congress *ordered* him to spend, the Court, in *Train v. New York*,[59] held (without any dissent) that the President must follow the federal statute, not his policy preferences.[60]

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[58] 37 U.S. (12 Pet.) 524, 613.

[59] *Train v. New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

[60] See, Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President, Re: Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), reprinted in, Executive Impoundment of Appropriated Funds: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong. 279-91 (1971). The future Chief Justice said:

> "It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them." Reprinted in Impoundment Hearings at 279, 283.

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Train v. New York*? NOTHING.

On the other hand, courts do not have carte blanche to second-guess agency nonenforcement actions. In *Heckler v. Chaney*,[61] the Court held that there is a presumption of unreviewability of decisions of an agency not to undertake an enforcement action. It also held that the plaintiffs did not overcome this presumption. In this case, prison inmates sued to compel the Food and Drug Administration to take enforcement action under the Federal Food, Drug, and Cosmetic Act with respect to drugs used for lethal injections to carry out the death penalty. The Court rejected the inmates' claims. There were no dissents. The OLC Opinion of Nov. 19, 2014, relies on *Heckler v. Chaney* no less than 20 times! This case is the cornerstone and lynch pin of the OLC Opinion. The problem is that the Court wrote it in 1985 and there has been a major shift in the law since then.

For one thing, *Heckler v. Chaney* really focused on standing. As then-Justice Rehnquist said in *Heckler v. Chaney*: [62]

> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." [Emphasis in original.]

First, whether or not someone has standing is different from the question whether the President can waive certain provisions of a law for a class of individuals. Standing has nothing to do with the merits. Second, the law of standing has changed considerably since 1985 when the Court decided *Heckler v. Chaney*. The House of Representatives now appears to have standing if the House officially authorizes a lawsuit.[63] In addition, any individual charged with enforcing

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[61] 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

[62] *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656, 84 L. Ed. 2d 714 (1985).

[63] *United States v. Windsor*, __U.S.__, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) holding that the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives had standing to defend DOMA.

the law — whoever gives out the social security cards that the President has now authorized[64] — should be able to sue to determine if he or she will be disciplined if he or she follows the statute instead of the executive order.

Third parties now have more standing than in the past. Consider *Massachusetts v. E.P.A.*,[65] which the Court issued in 2007. Various states, local governments, and environmental organizations petitioned for review of an order of the Environmental Protection Agency that denied a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. The District of Columbia Circuit rejected the petitions but the Supreme Court reversed, saying:

> [W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.[66]

The Court held that the EPA *could not avoid taking regulatory action* under the Clean Air Act regarding greenhouse gas emissions from new motor vehicles. The EPA argued that, in its expert view, a number of voluntary executive branch programs already provided an effective response to the threat of global warming. Moreover, it had concluded that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions. It also argued that limiting motor-vehicle emissions would reflect an inefficient and piecemeal approach to address the problem of climate change. The majority rejected all those arguments.[67]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Massachusetts v. E.P.A.*? NOTHING.

Finally, *Heckler* was very careful to explain that the Agency does not have *carte blanche* to refuse to enforce the law. "We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general

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[64] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html ("they will receive Social Security cards, officials said.")

[65] *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

[66] *Massachusetts v. E.P.A.*, 549 U.S. 497, 534, 127 S. Ct. 1438, 1463.

[67] *Massachusetts v. E.P.A.*, 549 U.S. 497, 533-35, 127 S. Ct. 1438, 1462-63.

policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[68] At that point, the Court cites and quotes another case, where the court did in fact *require* the agency to enforce the law. *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc).

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Adams v. Richardson*? NOTHING.

In response to *Massachusetts v. EPA*, the EPA promulgated greenhouse-gas emission standards for not only new motor vehicles but also stationary sources. The statute provided that a "major emitting facility" is a stationary source with the potential to emit 250 tons per year of "any air pollutant" (or 100 tons per year for certain types of sources). However, the EPA recognized that requiring permits for all sources with greenhouse-gas emissions above these low statutory thresholds would drastically expand those programs and render them, in the EPA's word, "unadministrable." Hence, the EPA purported to "tailor" its programs by providing that sources would not become subject to the law if they emitted less than 100,000 tons per year of greenhouse gases.

In *Utility Air Regulatory Group v. EPA*,[69] the Court held that EPA lacked authority to "tailor" the Act's unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. "Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers." The Court added that under "our system of government, Congress makes laws," while the President executes them. "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise 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."[70]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Utility Air Regulatory Group v. EPA*? NOTHING.

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[68] *Heckler v. Chaney*, 470 U.S. 821, 832 n.4, 105 S. Ct. 1649, 1656 n.4.

[69] 573 U. S. ___, 134 S.Ct. 2427. 189 L.Ed.2d 372 (2014).

[70] 573 U. S. ___,__, 134 S. Ct. 2427, 2446. *See also, Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002), which held that the Commissioner of Social Security did not have the authority "to develop new guidelines or to assign liability in a manner inconsistent with the statute."

In *Barnhart v. Sigmon Coal Co.*, the Court held that that the Commissioner of Social Security did not have the authority "to develop new guidelines or to assign liability in a manner inconsistent with the statute."[71]

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Barnhart v. Sigmon Coal Co.*? NOTHING.

CONCLUSION

In the summer of 2013, President Obama announced that he was "suspending" the employer mandate of the Affordable Care Act, popularly called ObamaCare.[72] He did not explain the source of his asserted power. The Affordable Care Act has no provision giving the President any power to suspend or postpone the mandate. The law requires employers with 50 or more full-time workers to give health-insurance coverage to their employees or pay a penalty. The section titled "Effective Date," stipulates that this mandate "*shall* apply" after "December 31, 2013."[73] Congress' use of the word "shall" does not suggest that the President the power to ignore that provision.

The President claim of power to change the date to December 31, 2014, apparently included the power to change the date yet again, along with other provisions of the law. Senator Tom Harkin of Iowa wondered how the President has the authority, unilaterally, to suspend or delay the employer mandate. "This was the law. How can they change the law?" he asked.[74]

That is a very good question and I have no answer to it. The President did not suggest that the law was unconstitutional. Indeed, his Solicitor General successfully defended the

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[71] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002).

[72] Zachary A. Goldfarb & Sandhya Somashekhar, *White House Delays Health-Care Rule that Businesses Provide Insurance to Workers*, WASHINGTON POST, July 2, 2013.

[73] Pub. L. 111-148, Title I, § 1513(d).

[74] Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, NEW YORK TIMES, July 10, 2013, at p. A15. Senator Harkin, as the chair of the Senate Health, Education, Labor and Pensions Committee, was an author of the health law.

constitutionality of the law before the Supreme Court.[75] Can another President waive all of the Affordable Care Act?

In 1998, in *Clinton v. New York*,[76] the Court held that it was unconstitutional to give the President a line item veto, which Congress could override. The power of the President to suspend or waive a constitutional law when the law itself does not provide for a waiver is much more powerful than a line item because there is no procedure to override a Presidential Decree. Congress can override a veto.

Now, President Obama says that he can change the immigration laws, to "overhaul" them, as the New York Times reported. Yet, earlier, the President offered very different legal advice:

> If we start broadening that [his protection to "Dreamers" — people who came to the United States as young children], then essentially *I'll be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option.*[77]

The OLC Opinion has not explained why the President changed his mind. Nor has it explained the rationale behind the President's considered judgment (22 times he made substantially similar statements for over a year) and why the OLC now thinks that President was so wrong.

One thing we do know is that the President is not acting to fill in some details in a legislative scheme. Nor is the President acting to implement what he in good faith believes is the will of Congress. In contrast, the President has said that he is acting because — in his own words — "Congress has failed." http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration. Not even the OLC Opinion never even purports to argue that the President can overhaul a statute because he thinks Congress has failed.

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[75] *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

[76] *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998).

[77] Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES, Nov. 17, 2014, http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html (emphasis added).

Mr. GOODLATTE. Mr. Sekulow, welcome.

TESTIMONY OF JAY ALAN SEKULOW, CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE

Mr. SEKULOW. Chairman Goodlatte, Ranking Member Conyers, distinguished Members of the Committee, on behalf of the American Center for Law and Justice and over 75,000 of our members, thank you for allowing me to appear before you today.

Determining presidential authority is a task which must be engaged in with only one question: Do the President's actions meet constitutional scrutiny? In this case, they do not.

It is humbling for this grandson of a Russian immigrant to be before this Committee today. My father is in the audience. His father, my grandfather, came to the United States in 1914. In 1929, he applied for citizenship and filed a petition for naturalization. My daughter-in-law found this online. Two years later, a United States district court judge in Brooklyn, New York, granted Sam Sekulow his status. She found that order as well.

I believe in immigration. I'm the grandson of that Russian immigrant. I get to argue cases before the Supreme Court of the United States and appear before this Committee. It's a humbling thing.

Immigration law was complex for my grandfather in 1931, and it is still complex today. The Constitution, however, is not. Our system of government is straightforward. Congress writes the law, the President executes the law, the judiciary interprets the law. This is the separation of powers mandated by our Constitution. The President does not make the law.

Now, with due respect, some of the statements that have been made, the President has stated that he changed the law, and I don't believe there's anyone on this Committee that believes the President has the authority to change the law. He was being heckled at an event similar to what we experienced today. There are passions on either side of the issues. I understand that. I think we all understand that. I join Professor Rotunda, and I believe in significant and complete immigration reform. I believe in a pathway to citizenship. But I believe to do that through the legal process set forth in the Constitution, and the President doesn't get to change the law. He actually said that, though, that he changed the law. That was how he handled the question that was asked.

He changed the law. Presidents cannot change the law. He can't do so constitutionally, he cannot do so under Supreme Court precedent, and he can't change the law to comport with his preferred public policy, much of which I share. The President's executive action really disrupts the delicate balance of separation of powers that is the hallmark of our constitutional framework.

Justice Frankfurter stated that, regarding immigration and immigration issues, talking about being the exclusive power of Congress, that the formulation of these policies is entrusted exclusively to Congress. Now, 5 and 5 does not equal 15 no matter how many times you say it, and when 5 and 5 then equals 10, which is correct, that past constitutional wrong is not what made that correct. So this reliance that we have seen on some that President Reagan and President Bush and even President Eisenhower made or issued executive action or executive orders, which in some cases may be

clearly distinguishable because they didn't set forth a new class, but even if they were not distinguishable, past constitutional acts do not get better with time. They are still just that, unconstitutional actions.

President Obama also misplaces his reliance on the authority generally granted to the Secretary of Homeland Security. It's very different to utilize your resources to determine the status of your prosecutorial mandates and how you're going to use your limited resources. The condition of entry, though, of classes of aliens and having that denied or granted, and creating a class, a new class, is not what the President has the authority to do. As sympathetic as it might be to the plight of people involved, he simply doesn't have that constitutional authority.

And I think that with all the emotion we have even seen today, you have to put that aside. The question is, it comes back to the same question, does the President have the authority? And by the way, if you look at the OLC memo and compare it to what the President said the deal was, quoting the President's word of what the deal is, I'd ask my colleague from the Immigration Law Center if she would recommend her clients accept the deal, because the deal the President talked about did not talk about unfettered discretion with the agency that could be terminated at any time with case-by-case determination.

That's not the deal the President talked about. That's not the deal the President put in place. And I would not recommend my client to accept the deal that the President's actually offered, which is very different than the deal outlined in the OLC memorandum.

I would ask that to my colleague because standardless, absolute discretionary review by government agencies has been something I've been dealing with for 30 years at the Supreme Court of the United States, and it generally does not go very well for the agency. OLC said it was required, though, for the President's actions to be deemed constitutional. I, as I said, I would not recommend my client to take the deal.

In conclusion, in our view President Obama's actions are unconstitutional, President Obama's actions are unlawful, President Obama's actions violate the separation of powers. And in conclusion, even with sympathy to the cause of immigration reform, inpatient Presidents may not violate the Constitution if they don't get their way.

Thank you, Mr. Chairman.

Mr. GOODLATTE. Thank you, Mr. Sekulow.

[The testimony of Mr. Sekulow follows:]

PREPARED WRITTEN TESTIMONY OF

Jay Alan Sekulow, J.D., PhD

Chief Counsel, American Center for Law and Justice

Committee on the Judiciary

December 2, 2014

"President Obama's Executive Overreach on Immigration"

Chairman Goodlatte, Ranking Member Conyers, and distinguished Members of the Committee, on behalf of the American Center for Law & Justice, thank you for allowing me to address the subject of whether the President's most recent executive action on immigration, which he carried out on November 20, 2014, is within the bounds of his constitutional authority. This hearing today is not about determining the merits of immigration reform or the wisdom behind the President's executive action. Instead, this hearing is about preserving the delicate balance of the separation of powers, a doctrine fundamental to the health of our republic.

Article I, Section 1, of the Constitution states that "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."[1] Specifically regarding immigration, the Constitution vested Congress with the exclusive authority to "establish an uniform Rule of Naturalization."[2] While the Constitution certainly vests considerable power in both the Executive and Judicial Branches, the exclusive authority to make and change law lies with Congress. Yet despite this exclusive grant to Congress, President Obama boldly proclaimed that his recent executive action was an action he took to "change the law."[3]

The founding fathers—after careful study of the writings of John Locke, Montesquieu, and Sir William Blackstone—intentionally separated powers among the branches, fearing that a

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[1] U.S. CONST. art. I, § 1.

[2] *Id.* § 8, cl. 4.

[3] Daniel Halper, *Obama Admits: 'I Just Took an Action to Change the Law'*, WEEKLY STANDARD, Nov. 25, 2014, *available at* http://www.weeklystandard.com/blogs/obama-admits-i-just-took-action-change-law_820167.html. Responding to a group of aliens, the President said, "Now, you're absolutely right that there have been significant numbers of deportations. That's true. But what you are not paying attention to is the fact that *I just took an action to change the law*." *Id.* (emphasis added).

concentration of power in any one branch, being unchecked, would become tyrannical. Their conscious design to strengthen the government through this separation of powers is articulated in *The Federalist Papers*[4] and visible in the structure of Articles I, II, and III of the U.S. Constitution. In this design, the powers were not separate to ensure governmental efficiency, rather the separation restrains the natural tendency of men, including presidents, to act as tyrants. On October 25, 2010, President Obama recognized his own limits:

> I am president, I am not king. I can't [legislate] just by myself. We have a system of government that requires the Congress to work with the Executive Branch to make it happen. . .The main thing we have to do to stop deportations is to change the laws. . . [T]he most important thing that we can do is to change the law because the way the system works – again, I just want to repeat, I'm president, I'm not king. . . 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. So the most important thing that we can do is focus on changing the underlying laws.[5]

Whether framed as an executive order or as mere "executive action" in the form of so-called "prosecutorial discretion," President Obama's recent action on immigration violates the Constitution. It is moored neither in his authority granted by the Constitution nor in authority delegated by a lawful statute passed by Congress.[6] First, by contradicting Congress's express and implied intent, President Obama's actions violate the test articulated in *Youngstown Sheet & Tube Co. v. Sawyer*.[7] Second, by enacting a sweeping new program under the guise of "prosecutorial discretion," President Obama has violated controlling precedent and defied clear instructions from his own attorneys at the Office of Legal Counsel. I will address each contention in turn.

Constitutional Analysis

Justice Jackson articulated a three-tier framework to measure executive actions in *Youngstown Sheet & Tube Co. v. Sawyer*.[8] Courts have applied this framework when the President

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[4] *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.").

[5] *Transcript of President Barack Obama with Univision*, LA TIMES, Oct. 25, 2010, *available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html.

[6] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999).

[7] 343 U.S. at 635-37 (Jackson J., concurring).

[8] *Id.*

acts within an area generally considered to be under the constitutional authority of Congress. According to *Youngstown*, when the President acts pursuant to an authorization from Congress, his power is "at its maximum."[9] When Congress is silent on the matter, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[10] Finally, when the President takes action in conflict with Congress's expressed or implied intent, the President's power is at its "lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter."[11] While Justice Jackson's classification of executive action into this three-tier framework is "analytically useful," the Supreme Court has been mindful in applying this framework that "[the] great ordinances of the Constitution do not establish and divide fields of black and white" and it is therefore rare when executive action falls "neatly in one of three pigeonholes."[12]

While I firmly believe the recent executive action falls under the third tier—where the President's power is at its lowest ebb—even if it fell somewhere closer to the second tier (as the President seems to claim in asserting he had to act because Congress refused to pass legislation on immigration) the executive action still fails this constitutional test. The President's executive action disrupts the delicate balance of separation of powers, obliterating the Constitution's Presentment Clause,[13] which requires bicameral action on legislation followed by presentment to the president for his signature, and ignores the exclusive authority of Congress to set laws and policy on immigration matters.

Few enumerated powers are more fundamental to the sovereignty of the United States than the control of the ingress and egress of aliens. Over two hundred years ago, in 1795, Congress claimed exclusive authority over naturalization, which was affirmed by the Supreme Court in 1817 in *Chirac v. Lessee of Chirac*.[14] Beyond naturalization, the Supreme Court has recognized that Congress has plenary power over immigration,[15] and has said that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration.[16] Similarly, the Supreme Court has recognized that it is in Congress's exclusive authority to dictate the policy

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[9] *Id.* at 635-36.
[10] *Id.* at 637.
[11] *Id.*
[12] *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (internal quotation marks and citations omitted).
[13] U.S. CONST. art. I, § 7, cl. 2.
[14] 15 U.S. (1 Wheat.) 259, 269 (1817) (holding that "the power of naturalization is exclusively in congress" and not delegated to any other authority or to the individual states).
[15] *See, e.g.*, *Sale v. Haitian Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'").
[16] *Reno v. Flores*, 507 U.S. 292, 305 (1993); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Hana v. Gonzales*, 503 F.3d 39, 43 (1st Cir. 2007).

pertaining to aliens' ability to enter and remain in the United States. As Justice Frankfurter aptly said:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the *formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[17]

While the Court has clearly articulated that Congress has exclusive authority to set immigration policy, the Supreme Court has expressed that the President has inherent authority over immigration-related matters that influence the nation's sovereignty and foreign affairs.[18] But the Supreme Court, in no ambiguous terms, has recognized Congress's "sole[] responsibility" for determining "[t]he condition of entry of every alien, the particular classes of aliens that shall be denied entry, the basis for determining such classification, [and] the right to terminate hospitality to aliens."[19] In this same vein, Congress also has exclusive authority to determine through legislation when hospitality should be extended to a broad class of aliens, such as through a categorical use of deferred action.

The recent executive action defies Congress's exclusive authority with the intention, as President Obama has admitted, of setting a new policy and creating new law. While Congress has authorized various forms of discretionary relief, including deferred action, for specific categories of aliens,[20] Congress has not authorized such relief for the class President Obama's action targets, to the parents of U.S. citizens and lawful permanent residents. Moreover, Congress's authorization of some forms of discretionary relief and deferred action for narrow categories in no way signifies that Congress acquiesced to the President setting his own broad new category, especially because the category created by the President is composed solely of illegal aliens who are, under the present law, removable.

Critically, Congress's refusal to enact the policy President Obama prefers is not "silence" or a "failure"; it represents our constitutional system working as intended. Our nation's immigration laws are quite extensive—they are simply not enacted in the manner President Obama prefers. Differing policy preferences do not provide license to, as President Obama said, "change the law."

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[17] *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added) (internal citations omitted).
[18] *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).
[19] *Fiallo*, 430 U.S. at 796 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)).
[20] Congress has exercised this authority by creating certain statutory mechanisms to extend, on a case-by-case basis, hospitable or discretionary relief, such as parole, INA § 212(d)(5); deferred action for eligible victims of violence, *id.* § 204(a)(1)(D)(i)(II), (IV); deferred action for eligible victims of trafficking, *id.* § 237(d)(2); and deferred action and advance parole for a spouse, parent or child of certain U.S. citizens who died as a result of honorable service, National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 1703(c), (d) (2003).

President Obama tries to rely on the history of the actions of past presidents, but an overwhelming majority of past executive actions on immigration granting broad deferred action were country-specific (thus implicating the President's authority under foreign affairs) or directly implemented existing law. Despite the President's claim that executive actions of this kind are rooted in history, only on rare occasions has a president defined a class of individuals for non-country specific relief from removal.[21] The President points to the "Family Fairness" program initiated by President Reagan and expanded by President H.W. Bush as grounds for why the current categorical deferred action program is constitutional. While there are differences in substance and scale between President Obama's action and President Reagan's and President H. W. Bush's actions, these prior actions were constitutionally suspect as well.[22] Past constitutionally suspect actions do not provide legal support for President Obama's present unconstitutional program. Indeed, neither past program was ever challenged or upheld by the Supreme Court and thus represents at most a mere political example—not a legal precedent—and is irrelevant to the constitutional analysis. Constitutional violations do not improve with age or time; thus President Obama's reliance on these historical executive actions is misplaced.

President Obama also misplaces his reliance on authority generally granted to the Secretary of Homeland Security in section 103(a)(3) of the INA.[23] Section 103(a)(3) specifically limits the delegated authority of the Secretary to those actions that are "necessary for carrying out [its] authority under the provisions of this chapter." The chapter in no way gives the Executive the authority to create an extensive, categorical deferred action program that grants affirmative legal benefits.[24] Nor would such a program be necessary to carry out the authority delegated to the Secretary. Similarly, while The Homeland Security Act does make the Secretary of DHS responsible for "[e]stablishing national immigration enforcement policies and priorities,"[25] there is a substantial difference between priorities for enforcement, which allow the agencies tasked with carrying out the law to focus their limited resources, and creating enforcement-free zones for a

[21] *See* Ruth Ellen Wasem, CONG. RESEARCH SERV., RS7-5700, DISCRETIONARY IMMIGRATION RELIEF 7 (2014). According to Congressional Research Service's review, most "discretionary deferrals have been done on a country-specific bases, usually in response to war, civil unrest, or natural disaster." *Id.*

[22] The Immigration Reform and Control Act of 1986 allowed immigrants who had been living continuously in the U.S. since at least Jan. 1, 1982, to apply for temporary, and later permanent, residency. The law explicitly authorized the Attorney General to grant waivers of deportation "in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." In 1987, President Reagan defined "family unity" through regulation, and granted deferred voluntary departure, a remedy available under law, for minor children whose parents qualified for the amnesty under the new law. In 1990, President H.W. Bush expanded the interpretation of "family unity" to include all spouses and children, granting deferred voluntary departure for up to a year and renewable thereafter.

[23] 8 U.S.C. § 1103(a)(3) (2012).

[24] With one exception, the INA under section 274A(h)(3) does allow the Attorney General (now the Secretary of DHS) discretion to grant work authorization and to define unlawful immigrant for purpose of granting a work authorization.

[25] 6 U.S.C. § 202(5) (2012).

category of unlawful aliens, which is not consistent with or set by congressional action.

The removal of unlawful aliens carries enormous importance to the overall statutory scheme, and rather than just articulating priorities for removal and ignoring an unlawful alien who is not a high priority, the President's recent action grants legal benefits (such as lawful presence during the deferred action for purposes of 8 U.S.C. §§ 1182(a)(9)(B), (C)(i)(I))[26] on a categorical basis to current illegal aliens. It is true that as a general policy, Congress has created certain benefits for close family members of U.S. citizens and lawful permanent residents. It is an incorrect presumption, however, that these past legislative actions, enacted through Congress's constitutional authority, justifies executive action to create a new deferred action program that affirmatively grants legal benefits to a broad category of illegal aliens.[27] President Obama's executive action stretches the enabling sections to their absolute breaking point in an effort to enact the President's agenda over that of Congress.

The President's recent immigration action is neither moored to his constitutional authority, either express or implied, nor can it be moored to a delegation of statutory authority. On no less than twenty-two occasions did President Obama expressly state that he lacked the constitutional authority to take this executive action. President Obama has subverted the very law that he was charged with enforcing and, as he admitted only days ago, created new law.

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[26] Memorandum from Karl R. Thompson, Dep't of Justice, Office of Legal Counsel, for the Secretary of Homeland Security and the Counsel to the President on 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 13 (Nov. 19, 2014) [hereinafter OLC memo] (stating that "aliens who receive deferred action will temporarily cease accruing 'unlawful presence' for purposes of 8 U.S.C. §§ 1182(a)(9)(B) and (a)(9)(C)(i)(I)"). The INA does provide the Secretary discretion to waive the bar under certain conditions for aliens who have been unlawfully present in the U.S. over 180 days. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (2012). However, to grant lawful presence during the time of deferred action for the purpose of section 1182(a)(9)(C), which applies to those unlawfully present for over a year or who had been previously removed, contravenes the spirit of the law. Unlike section 1182(a)(9)(B), the statute limits the authority of the Secretary to waive the accrual and bar. *See id.* § 1182(a)(9)(C)(iii) (authority to grant a waiver of admissibility only for individuals eligible under VAWA and for those individuals seeking lawful entry from outside the US with Secretary approval after 10 years from last departure).

[27] The President tries to justify the executive action, in part, because of the general policy of family reunification throughout U.S. immigration law. While the United States generally supports such a policy, there are numerous instances in which the law penalizes unlawful entry into the United States regardless of family ties to a citizen or lawful permanent resident. *See generally* 8 U.S.C. § 1255 (2012) (providing limits on discretion to adjust the status of aliens who entered the United States illegally to that of permanent residence even if they qualify for a green card by other means such as marrying a U.S. citizen); *id.* § 1182(a)(9)(B), (C) (providing that aliens who have been unlawfully present for certain periods of time are inadmissible to the United states, with limited waivers possible, even if they qualify for a green card by other means); *id.* § 1153(a) (setting forth the numerical limitations on many family-based green card categories).

Prosecutorial Discretion

Youngstown provides no constitutional refuge for President Obama and neither does "prosecutorial discretion." The President asserts that creating the deferred action program falls under his prosecutorial discretion; but claiming prosecutorial discretion does not mean that his action was constitutional, rather it simply begins a new analysis: Did the President abuse his discretion by creating a categorical deferred action program of this magnitude, which is not backed by any statutory authority? I conclude that despite the President's assertion, the creation of the categorical deferred action program exceeds the bounds of his discretion.

As the Executive, Article II, Section 3, of the Constitution declares that the President "shall take Care that the Laws be faithfully executed" (hereinafter "Take Care Clause").[28] From this obligation and the doctrine of separation of powers, [29] courts have recognized that the Executive Branch has broad prosecutorial or enforcement discretion,[30] even in immigration matters.[31] But this

[28] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

[29] *See, e.g.*, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." (internal citations omitted)). In addition to the Take Care Clause, Judge Kavanaugh has opined that prosecutorial discretion is also rooted in the Executive Power Clause, U.S. CONST. art. II, § 1, cl. 1, the Oath of Office Clause, *id.* § 2, cl. 8, the Pardon Clause, *id.* § 2, cl. 1, and the Bill of Attainder Clause, *id.* § 9, cl. 3. *In re Aiken County*, 725 F.3d 255, 262-63 (D.C. Cir. 2013).

[30] *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982))); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . " (citing the *Confiscation Cases*, 74 U.S. (1 Wall.) 454 (1869))). There arguably is a basis under the President's pardon power, U.S. CONST. art. II, § 2, cl. 1, which gives the president authority, notwithstanding his duty to faithfully execute, to pardon an offense even before a trial or conviction. Commentators have referred to the pardon authority as grounds for why the President need not enforce every law to its fullest extent. Some argue that even in this authority "the President can neither authorize violations of the law (he cannot issue dispensations) nor can he nullify a law (he cannot suspend its operation)." Heritage Foundation, *The Guide to the Constitution, Take Care Clause*, http://www.heritage.org/constitution#!/articles/2/essays/98/take-care-clause (last visited Nov. 24, 2014).

[31] *See Arizona*, 132 S. Ct. at 2498 ("A principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning 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"). In the immigration context, for example, immigration offers have discretion

discretion while broad is not unfettered.[32]

The Supreme Court has recognized in fulfilling the obligation to faithfully execute the laws, the Executive Branch may not be able to practically enforce "*each* technical violation of the statute."[33] As this language implies, prosecutorial discretion ordinarily requires a case-by-case determination whether the individual should be subject to an enforcement action, rather than categorical exemptions.[34] Moreover, the Supreme Court has warned that the conscious and express adoption of a categorical exemption may reflect a "general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[35]

This is not a radical assertion. Indeed the Office of Legal Counsel ("OLC")—in a memorandum purporting to justify President Obama's action—declared that the Executive cannot "under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preference."[36] According to the OLC memo and Secretary of Homeland Security Johnson's November 20th directive, "[a]s an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion."[37] Relying heavily on the Supreme Court's decision in *Heckler v. Chaney*, the OLC advised that "any expansion of deferred action to new classes of aliens must be carefully

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whether to initiate removal proceedings, *see, e.g.*, *Hanggi v. Holder*, 563 F.3d 378, 383 (8th Cir. 2009); cancel a Notice of Appearance, *see, e.g.*, *Akhtar v. Gonzalez*, 450 F.3d 587, 591 (5th Cir. 2006); or extend voluntary departure to an alien otherwise subject to removal, s*ee, e.g.*, *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992).

[32] *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

[33] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (emphasis added).

[34] Lower courts following *Chaney* have indicated that a non-enforcement decision applied broadly and not made on an individualized basis raise suspicion of whether the Executive has abdicated his statutory duty. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994). As the Office of Legal Counsel advised, "a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." OLC memo, *supra* note 26 at 7.

[35] *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted). The Presidential action may violate the Constitution if he "expressly adopt[s] a generally policy which is in effect an abdication of its statutory duty" by implementing a blanket ban on enforcement of a duly enacted statute. *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973). A general policy of non-enforcement that forecloses individualized review on a case-by-case basis, as a general rule, could indicate that an agency has exceeded its prosecutorial or enforcement discretion. *See, e.g.*, *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994).

[36] OLC memo, *supra* note 26 at 6.

[37] Memorandum from Jeh Charles Johnson, Sec. Dep't Homeland Sec., to Leon Ridriguez, Dir. Of U.S. Citizenship and Immigrant Servs., et al., on 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 2 (Nov. 20, 2014) [hereinafter DHS Deferred action memo].

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." [38] Furthermore, according to the OLC, "[t]he breadth of [class-based] programs . . . may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances."[39] Failure to comply with these general principles, the OLC warns, would "cross the line between executing the law and rewriting it."[40]

After laying out these limits on the Executive's prosecutorial discretion, the OLC stretches its reasoning to prove that the executive action will be implemented on a case-by-case basis. But as a constitutional law professor recently wrote, rather than clearly articulating how immigration officers might possibly exercise discretion on an individual basis, "[t]he last, best hope [for the] blanket non-enforcement policy is the *appearance* of an 'individualized assessment.'"[41] More importantly, "[i]t cannot be the rule of law that the President can create criteria that automatically apply to millions, then instruct[s] his agents to check off a few boxes that will always be checked, and call it an individualized assessment. The policy is designed to exempt everyone who correctly signs up. This is not an instance of executive discretion, but of clerical approval."[42]

Even a review of President Obama's statements since the release of the executive action reveals that he is defying OLC's legal advice and rewriting the laws to match his policy preference, not mandating true case-by-case review. President Obama did not promise more than 4 million illegal aliens discretionary, individual reviews. President Obama promised them a deal. In his own words from November 20th, which he has similarly stated in subsequent addresses: "So we're going to offer the following deal: If you've with been in America more than five years. If you have children who are American citizens or illegal residents. If you register, pass a criminal background check and you're willing to pay your fair share of taxes, you'll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That's what this deal is."[43] Never has the President stated that at any time his administration retains the power to terminate the deferred action, even if the applicant satisfies the listed eligibility requirements. In fact, how can this be so when the administration states it will not remove illegal aliens for three years upon grant of deferred action and the aliens will be given work authorizations valid of three years.[44]

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[38] OLC memo, *supra* note 26 at 24.
[39] *Id.* at 22.
[40] *Id.* at 24.
[41] Eugene Volokh, *The constitutional limits of prosecutorial discretion*, WASHINGTON POST, (Nov. 22, 2014) (quoting Professor Josh Blackman), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/22/the-constitutional-limits-of-prosecutorial-discretion.
[42] *Id.*
[43] *Transcript: Obama's Immigration Speech*, WASHINGTON POST, Nov. 20, 2014, http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html.
[44] DHS Deferred action memo, *supra* note 37 at 2-3.

Put simply, if President Obama is enacting the "case-by-case" review mandated by the OLC memo, he is misleading the four million illegal aliens he encouraged to come out of the shadows. If he is defying the attorneys at the OLC and giving illegal aliens the "deal" he promised, then he is misleading the American public.

The policy directive from Secretary Johnson clearly stated "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."[45] But again, this is not the deal President Obama promised. He promised illegal aliens that they could come out of the shadows for a deal and that if they met certain requirements, the deal applied to them.

So, why the dichotomy? It is likely that the OLC memo is a mere legal smoke screen. Does the administration truly have plans—or allocated the considerable necessary resources—to do case-by-case reviews of millions of illegal aliens? If the program is not stopped, hindsight will likely demonstrate that immigration officers lacked ultimate discretion to deny deferred action if the applicant met the list of eligibility requirements.[46] Thus, making the new deferred action program for roughly four million illegal immigrants nothing more than a conveyer belt of rubberstamping, or more aptly put, a categorical exemption, hidden under the guise of enforcement discretion. As discussed above, Congress has exclusive power to legislate categorical exemptions for removal for which the President may grant in his discretion. Yet through executive action, the President has created a remedy for a category of aliens that Congress has not statutorily allowed and the President lacks authority to create.

The Supreme Court has expressly recognized that in determining whether to initiate enforcement actions the President may consider a number of factors, including a lack of resources, something the President has expressed underlies, at least in part, the basis for his recent executive action.[47] There is no doubt that the President lacks the resources to remove all presently illegal

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[45] *Id.* at 5.

[46] In justifying President Obama's executive action that created DACA, the OLC memo "warned that 'granting deferred action *automatically* to all applicants who satisfied the threshold eligibility criteria' would be problematic." But as Professor Josh Blackman articulated, "[d]espite paying lip service to discretion, according to a Brookings report, only 1% of applicants were denied deferrals. I could not find any explanation for why, under the capacious standards set by DHS, the denial rate was even this high. A 1% denial rate seems awfully close to 'automatic' relief." Professor Blackman then opines that under the new deferred action program, DHS has provided absolutely "*no* guidance" by which an officer may exercise discretion and reject an application. Thus, "[t]hese factors are equally capacious as those under DACA, and are likely to yield a similar denial rate." Eugene Volokh, *The constitutional limits of prosecutorial discretion*, WASHINGTON POST, (Nov. 22, 2014) (quoting Professor Josh Blackman), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/22/the-constitutional-limits-of-prosecutorial-discretion.

[47] *Chaney*, 470 U.S. at 831 ("[W]hether 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 best fit

aliens in the United States. But there are obvious reasons to question the validity of whether "lack of resources" can be asserted, even in part, as a reason to create a deferred action program of this magnitude.[48] Though the OLC memo attempts to justify the potential costs for a program of this magnitude, there is little confidence in its statement that the program "might help DHS address its severe resources limitation" when it is apparent that millions of new reviews will tax already-limited resources.[49]

Indeed, a much smaller program like DACA has proven difficult to implement. Stephen Legomsky, chief counsel for USCIS in the first days of DACA, said that the President's order was a "heavy lift" for the agency because it meant "training the adjudicators, hiring them, and finding physical space for them."[50] A leaked draft of an internal DHS policy document entitled *Administrative Alternatives to Comprehensive Immigration Reform*, prepared for the Director of U.S. Citizenship and Immigration Services (USCIS), reveals that the administration contemplated years ago how it could use deferred action widely to achieve "immigration reform absent legislative action" and recognized that granting deferred action to "an unrestricted number of unlawfully present individuals" would be "expensive."[51] Not only did this leaked memo demonstrate the costs of the program, it also exposed the true nature of President Obama's action. Notably, top officials at

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the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.").

[48] Lack of resources was only one reason provided for the deferred action program, along with a humanitarian interest in promoting family unity (discussed internally above), and common sense. *See* DHS Deferred action memo, *supra* note 37 at 1, 3; *see* OLC Memo, *supra* note 26 at 26. If lack of resources was a proper defense to the President's breach of his duty of enforcement, the executive action would not apply to an individual who is already in removal proceedings or subject to a final order of removal, where substantial resources have already been expended and would need to be expended again should the program truly be temporary as the President has asserted. *See* DHS Deferred action memo, *supra* note 37 at 5.

[49] *See* OLC Memo, *supra* note 26 at 26.

[50] Interview on NPR, *After Obama's Action, Immigration Agency Awaits 'A Real Challenge'* (Nov. 24, 2014), http://www.npr.org/2014/11/24/366352953/after-obamas-action-immigration-agency-awaits-a-real-challenge.

[51] Draft Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs. et al., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs., on Administrative Alternatives to Comprehensive Immigration Reform 2, 10 [hereinafter Draft Memorandum], *available at* http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf (last visited Nov. 24, 2014). The memo is marked draft, and according to one of the drafter's, Roxana Bacon, at the time USCIS chief counsel, the views expressed in the draft were "not new ideas." She confirmed sending the draft memo to the agency's director in April 2010. *See* Andrew Becker, *Obama End-Run Amnesty Claim Is 'Nuts,' Immigration Official Says*, HUFFINGTON POST, Aug. 10, 2010, http://www.huffingtonpost.com/andrew-becker/obama-end-run-amnesty-cla_b_676442.html. The memo specifically states that deferred action, when "widely available to hundreds of thousands . . . [is] a non-legislative version of 'amnesty'" and suggests that the President make the action available to "particular groups such as individuals who would be eligible for relief under the DREAM Act." *See* Draft Memorandum at 11.

USCIS referred to categorical deferred action offered to "hundreds of thousands" as a "non-legislative version of 'amnesty'" and notes that "[p]eriods of time in deferred action . . . may be extended indefinitely."[52] Through these revelations, it is apparent that the administration knew and intended to rewrite the immigration laws to its liking without Congress and further show that the President is hiding behind the guise of enforcement discretion.

In conclusion, the intent to rewrite immigration law, by the President's own admission, demonstrates that this executive action was not created out of prosecutorial discretion. The deferred action program, for all intents and purposes, will apply categorically to such a large section of illegal aliens that the President has effectively made what is illegal, as proscribed by statute, now legal. Neither a lack of appropriated funds to remove the estimated 11.5 million illegal aliens, nor a disagreement with congressional policy, are grounds to subvert federal law and create new law.[53] Through the recent executive action the President has created a general policy "so extreme as to amount to an abdication of [his] statutory [and constitutional] responsibilities."[54] President Obama's actions are unconstitutional, violating the separation of powers and exceeding even his considerable prosecutorial discretion. Congress's refusal to enact the President's preferred policies does not provide a lawful pretext for violating our nation's vital restraints on executive authority.

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[52] Draft Memorandum at 11.
[53] *Cf. In re Aiken Cnty.*, 725 F.3d at 259 ("But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections."). In *In re Aiken County*, the court expressly rejected the assertion that a lack of congressionally appropriated funds to complete the full project was grounds for the agency, and thus the President, not executing its obligations under the Take Care Clause. *Id.* ("Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project.").
[54] *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted).

Mr. GOODLATTE. Mr. Dupree, welcome.

TESTIMONY OF THOMAS H. DUPREE, JR., PARTNER, GIBSON, DUNN & CRUTCHER LLP

Mr. DUPREE. Thank you, Mr. Chairman. Good afternoon. Thank you for inviting me to testify and to share my thoughts on the constitutionality of the President's directive granting deferred action eligibility to approximately 5 million people who are currently here in the United States in violation of our immigration laws.

I served as principal deputy assistant attorney general under President Bush. In that role, I litigated many immigration cases and advised the White House on immigration policy and reform. In my view, President Obama's actions exceed his authority under the Constitution. The President was correct on the many occasions where he stated that he did not have the power to do what he has now done.

While reasonable people can disagree over how best to fix our immigration system, and while there can and should be a robust public debate about how to address the status of the approximately 11 million people who are here in this country illegally, there should be no doubt that by unilaterally acting through executive action rather than through the Congress, the President has circumvented the process our Founders envisioned.

The Framers of our Constitution were well aware of the dangers of executive overreach. That is why they wrote a Constitution providing for the separation of powers and why the first sentence of Article I, Section 1 of our Constitution states, "All legislative powers herein granted shall be vested in the Congress of the United States."

The Framers also spoke to the President's duty to enforce the laws enacted by this Congress. Article II, Section 3 provides that the President "shall take care that the laws be faithfully executed."

In my view, President Obama's actions on immigration violate these constitutional provisions. His actions violate Article I, Section 1, and the separation of powers by rewriting the laws of the United States not through legislative amendment but through executive fiat. They also violate Article II, Section 3 because they amount to an abdication of the executive's duty to faithfully execute the laws of the United States.

Let me say a word about the Take Care Clause. As its text makes clear, the President's duty is not optional. The Constitution says that he shall take care that the laws be faithfully executed. And the Constitution's use of the word "faithfully" underscores that the President is to execute laws in a way that maintains fidelity to congressional design. It is hard to see how an order directing that Federal law not be enforced as to approximately 5 million people amounts to faithful execution.

The Take Care Clause does not give a President discretion to choose which laws he will enforce and which he will not. As the head of the Office of Legal Counsel under President Clinton wrote, "The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes."

The consequences of this issue are not confined to immigration. If the President may use executive authority to simply ignore laws that he does not like, then it will be possible for future Presidents to unilaterally revise everything from Federal criminal law to tax law to environmental law and beyond.

Of course, President Obama's directive goes beyond mere non-enforcement of the law. It has the effect of affirmatively granting benefits, including the right to apply for work permits to those falling within its ambit. The Administration has invoked prosecutorial discretion in an attempt to justify the President's actions. Prosecutorial discretion is well established in our Nation's legal traditions. In fact, the concept predates the founding and finds its roots in the common law of England. Nowadays no one can dispute that prosecutors, or in this context executive branch officials with the constitutional duty to enforce immigration laws, may exercise discretion in setting enforcement priorities and in deciding what charges to bring or whether to bring charges at all.

But there are limits on prosecutorial discretion. Generally speaking, it applies to individual cases, situations in which, in the judgment of the prosecutor, it would be unjust or otherwise inadvisable to apply the full force of the law based on the circumstances of an individual case. When I served in the Justice Department, I can recall many instances where we or the Department of Homeland Security made a determination to exercise discretion in individual cases.

Prosecutorial discretion, however, is not so elastic a concept that it can stretch to encompass what the President has done here, granting blanket relief to a potential class of 5 million people. That is what makes President Obama's actions different from prior instances in which Presidents have granted immigration relief. The scale of the President Obama's directive significantly exceeds what past Presidents have done. Moreover, in prior instances, the executive was acting to implement a new statute consistent with the will of Congress. Here, in contrast, the executive is taking action precisely because Congress has refused to act in the way the President wants. Indeed, the President is attempting to write into law what Congress deliberately chose not to write into law.

Finally, as many on this Committee will recall, during the Bush administration we were strong advocates of immigration reform, and we sought to get a bill through Congress. When we were unsuccessful, many of us were disappointed and frustrated, but we did not attempt to achieve through executive fiat what we could not achieve through the legislative process. We respected the system the Framers established.

I thank the Committee for convening this hearing and look forward to your questions.

Mr. GOODLATTE. Thank you, Mr. Dupree.

[The testimony of Mr. Dupree follows:]

STATEMENT OF THOMAS H. DUPREE, JR.

FORMER PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL

Before the United States House of Representatives
Committee on the Judiciary
December 2, 2014

Good afternoon. Thank you for inviting me to testify and to share my thoughts on the constitutionality of the President's directive granting deferred action eligibility to approximately five million people who are currently in the United States in violation of our immigration laws.

I served as Principal Deputy Assistant Attorney General under President Bush. In that role, I litigated many immigration cases and advised the White House on immigration policy and reform.

In my view, President Obama's actions exceed his authority under the Constitution. The President was correct on the many occasions where he stated that he did not have the power to do what he has now done. While reasonable people can disagree over how best to fix our immigration system—and while there can and should be a robust public debate over how to address the status of the estimated 11 million people who are in this country illegally—there should be no doubt that by unilaterally acting through executive action rather than through the Congress, the President has circumvented the process our founders envisioned.

The framers of our Constitution were well aware of the dangers of executive overreach. That is why they wrote a Constitution providing for the separation of powers, and why the first sentence of Article I, Section 1 states that "All legislative Powers herein granted shall be vested in a Congress of the United States."

The framers also spoke to the President's duty to enforce the laws enacted by the Congress. Article II, Section 3 provides that the President "shall take Care that the Laws be faithfully executed."

In my view, President Obama's actions on immigration violate these constitutional provisions. His actions violate Article I, Section 1 and the separation of powers, by rewriting the laws of the United States not through legislative amendment but through executive fiat. They also violate Article II, Section 3 because they amount to an abdication of the executive's duty to faithfully execute the laws of the United States.

Let me say a word about the Take Care Clause. As its text makes clear, the President's duty is not optional: the Constitution says that he "shall" take care that the laws be faithfully executed. And the Constitution's use of the word "faithfully" underscores that the President is to execute laws in a way that maintains fidelity to the congressional design. It is hard to see how an order directing that federal law not be enforced as to approximately five million people amounts to "faithful execution."

The Take Care Clause does not give a President discretion to choose which laws he will enforce and which he will not. As the head of the Office of Legal Counsel under

President Clinton wrote, "the Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes." The consequences of this issue are not confined to immigration: if the President may use executive authority to simply ignore laws that he does not like, then it will be possible for future presidents to unilaterally revise everything from federal criminal law, to tax law, to environmental law, and beyond.

Of course, President Obama's directive goes beyond mere non-enforcement of the law. It has the effect of affirmatively granting benefits—including the right to apply for work permits—to those falling within its ambit.

The Administration has invoked prosecutorial discretion in an attempt to justify the President's actions. Prosecutorial discretion is well established in our nation's legal traditions. In fact, the concept predates the founding and finds its roots in the common law of England. Nowadays, no one can dispute that prosecutors—or in this context, executive branch officials with the constitutional duty to enforce immigration laws—may exercise discretion in setting enforcement priorities and in deciding what charges to bring, or whether to bring charges at all.

But there are limits on prosecutorial discretion. Generally speaking, it applies to individual cases—situations in which, in the judgment of the prosecutor, it would be unjust or otherwise inadvisable to apply the full force of the law based on the

circumstances of an individual case. When I served in the Justice Department, I can recall many instances where we, or the Department of Homeland Security, made a determination to exercise discretion in individual cases. Prosecutorial discretion, however, is not so elastic a concept that it can stretch to encompass what the President has done here—granting blanket relief to a potential class of five million people.

That is what makes President Obama's actions different from prior instances in which Presidents—Republicans and Democrats alike—have granted immigration relief. The scale of President Obama's directive significantly exceeds what past Presidents have done. Moreover, in prior instances, the Executive was acting to implement a new statute consistent with the will of Congress. Here, in contrast, the Executive is taking action precisely because Congress has refused to act in the ways that the president wants. Indeed, the President is attempting to write into law what Congress deliberately chose not to write into law.

Respect for Congress and for federal law is particularly warranted when it comes to immigration. Article I, Section 8 of our Constitution gives Congress the power to "establish a uniform Rule of Naturalization." And the Supreme Court has held that "over no conceivable subject is the legislative power of Congress more complete" than it is over immigration.

As many on this Committee will recall, during the Bush Administration, we were strong advocates of immigration reform and we sought to get a bill through Congress.

When we were unsuccessful, many of us were disappointed and frustrated. But we did not attempt to achieve through executive fiat what we could not achieve through the legislative process. We respected the system the framers established.

Regardless of one's views of the merits of the President's policy, he does not have the power to enact it unilaterally and he does not have discretion to abdicate his duty to enforce the laws that the Congress has enacted. I thank the Committee for convening this hearing and look forward to your questions.

Mr. GOODLATTE. Ms. Hincapié, we are pleased to have you with us as well.

TESTIMONY OF MARIELENA HINCAPIÉ, EXECUTIVE DIRECTOR, NATIONAL IMMIGRATION LAW CENTER

Ms. HINCAPIÉ. Thank you Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee. Thank you for the opportunity to appear before you today.

My name is Marielena Hincapié. I'm the executive director of the National Immigration Law Center, an organization that is dedicated specifically to helping families, low-income immigrant families like mine to contribute their best to our country and achieve the American dream.

I'm an immigrant from Colombia. I arrived as a child to Central Falls, Rhode Island when my father was recruited to work at a textile factory there. My parents, like the parents of those who might be eligible for deferred action under the President's executive authority, came here in pursuit of the American dream for their children.

Last month, President Obama announced policy changes that bring much needed humanity and transparency to our immigration system. The President's actions are well within the scope of his authority. He is relying on the Doctrine of Prosecutorial Discretion which you have heard about which provides the Department of Homeland Security, as well as every law enforcement agency in this country, the authority to set enforcement priorities, to target resources, and to shape how the law will be implemented. The Doctrine of Prosecutorial Discretion is well-established with solid constitutional, legal, and historical grounds.

First, it is well settled in the courts that the executive officials have wide latitude in exercising this prosecutorial discretion. In the seminal case of *Heckler v. Chaney* the Supreme Court held that the agency's decision to enforce or prosecute in either a civil or criminal matter is a matter of the "agency's absolute discretion." This includes the agency's decision to prosecute or not to prosecute.

In 2002, in enacting the Homeland Security Act, Congress expressly charged the executive branch with, "Establishing national immigration enforcement policies and priorities."

Secondly, exercising prosecutorial discretion to deprioritize the deportations for certain individuals is consistent with the Take Care Clause in Article II, Section 3 of the Constitution. Again, the Supreme Court held very clearly in *Heckler v. Chaney*, that because the executive branch is rarely provided enough funding to enforce every provision of every law against every single person in our country, the executive branch must develop enforcement priorities. The *Heckler* court specifically says, "Fateful execution of the law does not necessarily entail acting against each technical violation of the statute."

Finally, in addition to the legal authority, there is ample historic precedent to the Obama administration's actions. Again, every Administration, Republican and Democrat since President Eisenhower, have exercised prosecutorial discretion to protect immigrants from deportation.

President Obama's executive actions are also good policy. Not only will the President's actions bring order and transparency to DHS' enforcement priorities, it will also add billions of dollars to our coffers. Removing the threat of retaliatory deportation for workers will also improve working conditions for American workers. Moving workers from the informal economy, to the formal economy will improve America's economy. And by creating a process by which individuals can come forward, apply, register with the Government, the Government will be able to refocus its enforcement priorities instead of separating families.

Most importantly, this is not about politics or abstract numbers. This is about our families. This is about our communities. It is about our country. One cannot underestimate the significant impact that this policy change will have on those who might benefit. The mothers, fathers, young immigrants who are here, who are working, who are studying, will be able to contribute even more fully to our society. Reasonable minds might disagree on the politics or whether this is even real good policy. But what is undeniable is that the status quo is wholly unacceptable.

Lupita, a brave 13-year old who is in the audience today, understands the psychological trauma the threat of deportation can cause. I met her over 6 years ago when her father was detained in a large Los Angeles-area raid. During the years that followed, Lupita suffered and struggled. Most Americans understand that U.S. citizens like Lupita need their parents to help them grow. The President's actions are good news for Lupita and her little sister Marisol, because her mother Isabel who is also here today should qualify under this new deferred action program.

Every daughter needs their mother. And our Nation's laws should support strong families rather than rip them apart. What is truly at stake here today is the fight for the soul of our Nation. Are we going to continue ripping away parents from their children? Are we going to deport young immigrants who want to contribute their best to helping make America great or are we going to use existing law to bring order, fairness, and equality to our immigration system so that immigrants with strong ties to our communities can fulfill their full human potential.

Our country can, and must do better. The American people have long supported the principles behind these new immigration policies because they recognize that they are good for our Nation. I trust that in your hearts and minds, you and I share a desire to do what is best for our country and I look forward to working with you toward that end.

Thank you again for the opportunity to testify today and I look forward to answering your questions.

Mr. GOODLATTE. Thank you.

[The testimony of Ms. Hincapié follows:]

Testimony of

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Executive Director
National Immigration Law Center

Hearing on the
"President Obama's Executive Overreach on Immigration"

Before the
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C.

December 2, 2014

I. Introduction

Chairman Goodlatte, Ranking Member Conyers, and members of the committee:

Thank you for the opportunity to appear before the committee today and provide testimony on behalf of the National Immigration Law Center (NILC).

I am Marielena Hincapié, the Executive Director of the National Immigration Law Center, the primary organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. At NILC, we believe that all people who live in the U.S. – regardless of their race, immigration, and/or economic status – should have the opportunity to achieve their full human potential and contribute their very best to our nation. Over the past thirty-five years, NILC has won landmark legal decisions protecting fundamental civil rights and advocated for policies that reinforce our nation's values of equality, fairness, and justice for all.

NILC utilizes a core set of integrated strategies – litigation, advocacy, and strategic communications – to focus on key program areas that affect the lives and well-being of low-income immigrants and their families, including: access to justice, education, healthcare and economic opportunities, and immigration reform. We also conduct trainings, publish educational materials, and provide legal counsel and strategic advice to inform a wide range of audiences about complex legal and policy matters affecting immigrants and to help strengthen other groups' advocacy work.

On November 20, 2014, President Obama announced the Immigrant Accountability Executive Actions which amount to significant immigration policy changes aimed at bringing about fairness and accountability to a dysfunctional immigration system. Among other new policy directives, the Department of Homeland Security (DHS) will "implement a new department-wide enforcement and removal policy that places top priority on national security threats, convicted felons, gang members, and illegal entrants apprehended at the border; the second-tier priority on those convicted of significant or multiple misdemeanors and those who are not apprehended at the border, but who entered or reentered this country unlawfully after January 1, 2014; and the third priority on those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014."[1] Although the plan is comprehensive in that it establishes these more targeted border and interior enforcement priorities, among other policy changes, much of the public debate is focused on the Deferred Action for Parental Accountability (DAPA) program, and the changes made to the Deferred Action for Childhood Arrivals (DACA) program. Under the new DAPA program, individuals who have been continuously residing in the U.S. since January 1, 2010 and who can establish they are the parents of a U.S. citizen or lawful permanent resident, will be able to come forward and affirmatively apply for a temporary reprieve from deportation. If after an adjudication conducted on a case-by-

[1] Memo from Jeh Charles Johnson, Secretary, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," November 20, 2014.

case basis, including a national security and criminal background check, the DHS determines that the individual meets the criteria and merits a grant of deferred action, she will be able to also obtain an Employment Authorization Document if she has an economic necessity.

In the absence of House consideration of the Senate bipartisan legislation, S. 744, or similar immigration reform bills, the president's new executive actions on immigration bring a measure of much-needed order, fairness, and sanity to a system that everyone agrees is broken. Soon, many of our family members, friends, and loved ones will finally go about their daily lives knowing they can live, work, and remain united with their family members in this country without the fear of deportation. They will be able to work lawfully, pay more taxes, and participate more fully in their communities. Parents will be able to actively contribute to their children's education by attending school activities, freely participating in their place of worship, and engaging in their local communities. Fewer workers will be subjected to abuse by employers who retaliate against them for lack of work authorization. There will be increased workplace fairness as the economic incentive for unscrupulous employers to hire undocumented workers will have been removed.

While the DAPA and the expanded DACA programs are not a legalization program and only provide a temporary reprieve from deportation, one cannot understate the significant impact this policy change will have on the estimated 4.4 million individuals who might qualify. Most importantly, this will lift the traumatic and paralyzing experience of living in fear of deportation that has robbed individuals with deep ties to our country of their humanity and dignity. In sum, these mothers, fathers, and young immigrants who are already here, working, part of the social fabric of our country, will be able to contribute even more fully to our great nation. Until Congress finally establishes a long-term solution that addresses the needs of 11 million immigrants currently living on the margins of society, President Obama's administrative changes represent a partial and temporary, but necessary, measure.

Latinos, Asian Pacific Islanders, Afro-Caribbean and other immigrant communities have been calling on the Obama administration to adopt much-needed administrative reforms and restore a sense of balance and fairness to the immigration system. Americans who care deeply about civil rights and civil liberties have criticized the Obama administration for the aggressive detention and deportation policies which have been well documented in the Migration Policy Institute's *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* report.[2] Spending for the federal government's two main immigration enforcement agencies surpassed $17.9 billion in fiscal year 2012 which amounted to 15 times the spending level of the Immigration and Naturalization Service when the Immigration Reform and Control Act was passed in 1986.[3] Despite the dramatic increase in funding for immigration enforcement, the nation's laws have not been updated to address failing aspects of the nation's immigration system. Despite several attempts to pass comprehensive

[2] Meissner, Doris; Kerwin, Donald; Chisti, Muzaffar and Bergeron, Claire, "Immigration Enforcement in the United States." Migration Policy Institute, January 2013.
[3] *Id.* at 2.

immigration reform, America's system has not been significantly updated in over twenty years. This has led to a situation where our nation focuses solely on enforcement rather than addressing the system as a whole.

Accordingly, the president's announcement is welcome news not only to the estimated 4.4 million eligible Americans in waiting but to their U.S. citizen and lawful permanent resident family members who have been enduring the instability that a broken immigration system has created. Moreover, the much-awaited immigration policy changes have been applauded by Latinos, 89 percent of whom approve of the President's executive action.[4] Faith, business, and civil rights leaders lauded the move, calling it an important step toward fixing a system that has long failed to meet our economic and societal needs.

II. Commonsense Temporary Solution

These much-needed immigration policy changes are a commonsense – albeit temporary – solution that 1) is constitutional and rests on solid legal ground, 2) represents good sound policy, and 3) benefits our economy.

1. Legal Authority

The title of this hearing suggests that there are constitutional concerns related to the president's actions. The fact is the president has strong legal and historical precedent to act. This legal authority of the executive branch is derived from statutes, regulations, Supreme Court decisions, and historic precedence.

a. Executive officials have wide latitude to engage in prosecutorial discretion

As chief prosecutor, the president and his administration not only have a duty to enforce laws, but also the authority to decide how to do so. Every law enforcement agency, including the agencies that enforce immigration laws, has "prosecutorial discretion" – the power to decide whom to investigate, arrest, detain, charge, and prosecute. Agencies properly may develop discretionary policies specific to the laws they are charged with enforcing, the population they serve, and the problems they face.

There is a great deal of agreement in the courts about the wide latitude that Executive officials have when determining whether to prosecute apparent violators of the law. For hundreds of years, the judicial branch has been reluctant to permit judicial review over prosecutorial discretion.[5] Since the Confiscation Cases in the nineteenth century, the

[4] "National Poll Finds Overwhelming Support for Executive Action on Immigration," Latino Decisions, November 24, 2014, available at http://www.latinodecisions.com/blog/2014/11/24/new-poll-results-national-poll-finds-overwhelming-support-for-executive-action-on-immigration/.
[5] Wadhia, Shoba S., "The Role of Prosecutorial Discretion in Immigration Law" (2010). *Scholarly Works.* Paper 17.

Supreme Court has been reluctant to permit courts to review prosecutorial discretion.[6] More recently, in *Heckler v. Chaney*, the Supreme Court held that an agency's decision to enforce or prosecute, in either a civil or criminal matter, is a matter of the agency's "absolute discretion," noting that the agency was "better equipped" to handle the balancing of its own resources and interests.[7] Similarly, in *Lincoln v. Vigil*, the Court explained that "the allocation of funds from a lump sum appropriation is another administrative decision traditionally committed to agency discretion."[8] The Court has repeatedly affirmed the long-standing principle that the Executive Branch has virtually unfettered discretion in deciding how and whether to enforce the law against individuals.

The *Heckler* Court also stated that the "agency's decision not to take enforcement action should be presumed immune from judicial review," unless a substantive statute "has provided guidelines for the agency to follow in exercising its enforcement powers."[9] As summarized below, this exception in *Heckler* does not control in the immigration context as the Immigration and Nationality Act (INA) does not include relevant guidelines for the agency to follow in enforcing the law.

Recent federal cases have noted the Executive's broad powers to exercise prosecutorial discretion. In a recent case from the DC Circuit Court of Appeals, Judge Kavanaugh's opinion, in dicta, stated that "[o]ne of the greatest unilateral powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior."[10] The court went on to state that the Executive Branch has the power not to initiate criminal charges against violators of controversial laws, such as federal marijuana or gun possession laws, just as the President may pardon violators of these laws.[11] No matter how controversial or unpopular the lack of enforcement, the only remedy "comes in the form of public disapproval, congressional 'retaliation' on other matters, or ultimately impeachment in cases of extreme abuse."[12]

In the area of immigration enforcement, the power of deportation, which is a civil matter, has been treated similarly to a prosecutor's power to pursue criminal charges. In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court stated that the concerns that make prosecutorial discretion "ill-suited to judicial review" are "greatly magnified in the deportation context.[13] The AADC Court expressly referenced deferred action as a long-standing practice, and noted that the purpose of §242(g) of the INA was in part to shield immigration authorities from judicial review of their decisions about whether to grant deferred action.[14]

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[6] Pierce, Richard J. Jr., Administrative Law Treatise 1252 (4th ed. 2002) (citing to the Confiscation Cases, 74 U.S. 454 (1868)).
[7] Heckler v. Cheney, 470 U.S. 821, 831 (1985).
[8] *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).
[9] *Id.* 470 U.S. at 832-33.
[10] In re Aiken County, 725 F.3d 255, 264 (D.C. Cir. 2013).
[11] *Id.* 725 F.3d at 265.
[12] *Id.* 725 F.3d at 266.
[13] 525 U.S. 471, 489-90 (1999).
[14] *Id.*525 U.S. at 500.

In *Arizona v. United States*, the Supreme Court also recently weighed in on the scope of prosecutorial discretion. The Court stated:

> A principal feature of the removal system is the broad discretion exercised by immigration officials [citations omitted]. 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.[15]

Stopping or suspending the deportation of immediate family members certainly seems encompassed within the "immediate human concerns" discussed in *Arizona*.

b. Prosecutorial discretion to stop or suspend the deportation of immediate family members of U.S. citizens and lawful permanent residents is consistent with the Take Care Clause of the Constitution

The Take Care Clause of the Constitution states that the Executive "shall take Care that the Laws be faithfully executed." When evaluating whether this requirement has been met, courts ask if the Executive has "adopted a general policy which is in effect an abdication of its statutory duty."[16] No court, however, has struck down an Executive policy of non-enforcement on Take Care Clause grounds.[17]

Some commentators argue that the number of people who are affected by the lack of enforcement is a factor when determining if an Executive's lack of enforcement is an abdication of statutory duty.[18] For example, in *Crane v. Napolitano*, the Plaintiffs argued that because an estimated 1.76 million people would be eligible for deferred action under DACA, the Executive's decision not to enforce the INA for this group of people constituted an abdication of its duty.[19] However, in *Heckler v. Chaney*, the Supreme Court stated that "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute."[20]

Moreover, because the Executive is rarely provided enough funding to enforce the law against all whom the law could be enforced, "[t]he President performs his full constitutional duty, if, with the means and instruments provided by Congress and

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[15] 132 S. Ct. 2492, 2499 (2012).
[16] Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).
[17] Manuel, Kate and Garvey, Tom, Congressional Research Service, "Prosecutorial Discretion in Immigration Enforcement" (January 17, 2013) at 17.
[18] Id. at 17 (discussing the 1.76 million people who would eligible to receive deferred action under DACA).
[19] Crane v. Napolitano, No. 3:12-cv-03247-O, Amended Complaint (filed N.D. Tex., Oct. 10, 2012), at ¶ 101.
[20] Heckler v. Chaney, 470 U.S. 821, 831 (1985).

within the limitations prescribed by it, he uses his best endeavors to secure his faithful execution of the laws enacted."[21] As in any law enforcement context, some immigration enforcement activities are far more costly than others and some discretion must be exercised. The large gap between the number of people who could be removed and the resources required to remove them demonstrates the inherent necessity for the Executive to develop enforcement priorities. Enforcement priorities, in the context of immigration, have been used for decades for this very reason. The President can continue to prioritize serious criminals and still use the resources that Congress has appropriated.

c. *Prosecutorial discretion to stop or suspend the deportation of immediate family members of U.S. citizens and lawful permanent residents is consistent with the INA*

Under *Heckler*, as mentioned above, prosecutorial discretion may be limited "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[22] However, the INA does not require immigration officials to initiate removal proceedings against all individuals unlawfully present in the United States. Section 103(a) of the INA expressly delegates to the Secretary of Homeland Security the "administration and enforcement of the INA and all other laws relating to immigration and naturalization of aliens."[23] Moreover, the Homeland Security Act of 2002 expressly charged the Secretary of Homeland Security with the responsibility of "establishing national immigration enforcement policies and priorities."[24] In determining whom to remove, DHS is entitled to *Chevron* deference, which only requires an agency's reasonable interpretation of the statute. Under this level of deference, the Executive's decision to stop or suspend deportation of these groups will be permissible. The president's executive actions are therefore simply a matter of statutory interpretation in accordance with the Homeland Security Act.

d. Previous administrations have utilized this authority

In addition to the broad authority granted by the courts and immigration statutes, there is ample historical justification for Executive action in this area. In fact, every president since Dwight Eisenhower, including Ronald Reagan, George H.W. Bush, and George W. Bush, have taken similar action to protect immigrants.

Administrations have often granted relief to groups of individuals including those who could benefit from potential legislation or who were considered for relief from deportation by Congress: for example, DACA recipients in 2012 who would have benefited from enactment of the DREAM Act; Deferred Enforced Departure (DED) to Haitians in 1997 before the Haitian Refugee Immigration Fairness Act passed in 1998, allowing Haitian nationals in the country since before 1995 to apply for a green card[25];

[21] Myers v. United States, 272 U.S. 52, 84 (1926) (Brandeis, J., dissenting).
[22] *Heckler*, 470 U.S. at 832-33.
[23] INA Section 103(a).
[24] Homeland Security Act of 2002, Sec. 402(5), codified at 6 U.S.C. § 202(5) (emphasis added).
[25] U.S. Citizenship and Immigration Services, "Green Card for a Haitian Refugee," March 22, 2011.

deferred deportation of unauthorized spouses and children of individuals legalized under IRCA in 1987, and then expanded in 1990, before the Legal Immigration Family Equity, or LIFE, Act, which allowed certain people without status to adjust to permanent residence, passed later in 2000[26]; and Nicaraguans in 1987, ten years before the Nicaraguan Adjustment and Central American Relief Act, which allowed certain people from Guatemala, El Salvador, and other countries to apply for permanent residence, passed in 1997.[27]

The Family Fairness program implemented by Presidents Reagan and H.W. Bush provides important historical precedent for the program announced by President Obama. The "family fairness" policy that the former Immigration and Naturalization Service adopted from 1987-1990 after the 1986 Immigration Reform and Control Act (IRCA) provided indefinite voluntary departure to spouses and children of people who legalized under IRCA even though they themselves were left out of the statutory amnesty program signed into law by President Reagan. In announcing an expansion of the program in 1990, then INS Commissioner McNary said "It is vital that we enforce the law against illegal entry. However, we can enforce the law humanely. To split families encourages further violations of the law as they reunite."[28] The Family Fairness program required individuals to apply affirmatively and included the creation of a new form, just as the DACA program requires.[29] Just months later, Congress enacted The Immigration Act of 1990 that essentially codified the executive action and granted protection from removal and employment authorization by statute.

2. Sound public policy

It has been nearly thirty years since Congress has reformed our legalization system. And since that time, we have witnessed an explosive growth in immigrant enforcement, detention and deportation. The United States now spends $3.5 billion more on immigration and border enforcement than it does on all other federal law enforcement combined.30 The impact on communities, businesses and the economy of the United States is severe. Two-thirds of all unauthorized immigrants currently living in the United States have resided here for more than a decade and are long settled and well integrated into our communities.31 Yet immigrants are being deported in record numbers: More than 4 million people have been removed from the United States since

[26] U.S. Citizenship and Immigration Services, "Green Card Through the Legal Immigration Family Equity (LIFE) Act," March 23, 2011.
[27] U.S. Citizenship and Immigration Services, "Immigration Through the Nicaraguan Adjustment and Central American Relief Act (NACARA) Section 203." April 7, 2011.
[28] 67 Interpreter Releases 153 (Feb. 5, 1990).
[29] 67 Interpreter Releases 204 (February 26, 1990).
[30] In FY 2012, the combined budget for Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) was almost $18 billion. In stark contrast, the combined budget for the Federal Bureau of Investigations (FBI), Drug and Enforcement Administration (DEA), Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) was $14.4 billion for the same year.
[31] Taylor, Paul, and others, "Unauthorized Immigrants: Length of Residency, Patterns of Parenthood, Pew Hispanic Center, 2011.

2001, with 2 million people removed during the Obama administration alone.32 The removal of these 2 million people is numerically equivalent to wiping out the entire combined populations of Boston, Miami, Seattle, and St. Louis.33

Uprooting these communities takes a tremendous toll on churches and other religious institutions, schools, businesses and families. U.S. citizen and lawful permanent resident children are often separated from one or both parents who may be subject to deportation. This leads children to seek care from extended relatives placing a burden on many families as they struggle to care for children who remain in the U.S. without a parent. Tearing children away from their parents also strains the foster care system at the state level, all while a parent is able and willing to care for the child if only he/she was not deported.

Some of the interior enforcement has been directed at increasing collaboration between immigration agents and local and state law enforcement authorities. As a result, non-citizens pulled over for a simple traffic stop could end up fighting for their right to be able to remain in the country. Moreover, this has resulted in undermining community policing as many undocumented immigrants fear that coming forward to report a crime as a victim or witness will result in their deportation.

While the Obama administration sought to enforce a broken immigration system, the administration recognized the failure of the system to account for individuals who had lived in the U.S. for years and contributed to the community. As an initial step toward addressing the impact of deportations on individuals and families, President Obama announced the DACA program over two years ago. Since that time, statistics have proven that this program is an undeniable success. Young adults who participated in DACA are more integrated into the nation's economic and social institutions.[34] DACA beneficiaries work at levels comparable to or higher than their peers. 45 percent of DACA beneficiaries have increased their earnings.[35] Before DACA, their ability to pursue a career and educational opportunities was severely limited.[36] Additionally, work permits allow this population to better provide for themselves and their families and pay taxes.

The benefits of the DACA program will only be magnified in the newly expanded DACA and DAPA programs. The new programs will allow even more individuals will be able to engage in steady employment, contributing to our gross domestic product (GDP) and our tax base. Better working conditions for non-citizen workers who will now be able to pursue healthy work environments means American workers will also be treated better by employers and wages for everyone will rise. Employers who have employed immigrant workers for decades, investing in their workforce and providing training, will

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[32] U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2012, Table 39, Aliens Removed or Returned: Fiscal Years 1892 to 2012. 2012.
[33] U.S. Bureau of the Census, "Annual Estimates of the Resident Population for Incorporated Places Over 50,000, Ranked by July 1, 2010," June 2014.
[34] Immigration Policy Center, "Two Years and Counting: Assessing the Growing Power of DACA." June 2014, p. 2.
[35] *Id.* at p. 5.
[36] *Id.*

now have made a secure investment in workers who are able to remain in the U.S., putting their training and knowledge into growing the U.S. economy. Moving workers from the informal economy to the formal economy will ensure that America's competitiveness, GDP and tax base continues to grow. Moreover, the president's executive action included important elements to allow businesses to more easily retain high-skilled talent and it also included important provisions to allow entrepreneurs grow new businesses in the United States.[37]

3. The economic case for executive action

Not only will expanding deportation relief and work authorization bring millions of people out of the shadows thereby enhancing our national security, it will also inject positive growth in our local, state and national economies. When immigrants are able to work legally, they can better shield themselves from workplace abuses and move freely across the labor market. According to a study by the Center for American Progress (CAP), expanding deferred action for 4 million people will raise an additional $3 billion in payroll taxes in the first year alone, and $22.6 billion over five years, as workers and employers get on the books and pay more taxes. Individual states will experience similar tax gains for the same reasons. In Virginia, CAP estimates that expanding deferred action will lead to a $106 million increase in tax revenues, over five years. In Texas, tax revenue would increase by $338 million, and in California by $904 million.

But the economic benefits go beyond taxes. The executive actions will increase our GDP by up to 0.9 percent, or an additional $210 billion; reduce the federal deficit by $25 billion through increased economic growth; and raise the average wage for all U.S. workers by 0.3%. The economic benefits described here are not as robust as those predicted under the immigration reform bill passed by the Senate last year (S. 744), which would have raised the GDP by more than 5.4 percent over the next 20 years and reduced the deficit by $832 billion but it is still represents substantial economic benefits.

III. Moral Imperative

While the legal and historical grounds for executive action on immigration are very clear, the president also has the moral responsibility to act. Although reasonable minds may disagree on whether the president's actions are good public policy, what is undeniable is that the status quo is unacceptable and the President has the authority to make changes to the manner in which the immigration laws are enforced. Indeed if there is any valid criticism of the president's executive actions it is that they do not go far enough and exclude millions of aspiring Americans who also have deep ties to our country but who are not the parents of U.S. citizen or lawful permanent resident children. The current political gridlock and legislative inaction is having a devastating impact on human beings. What is truly at stake here is a fight for the soul of our nation.

[37] Memo from Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, "Policies Supporting U.S. High-Skilled Businesses and Workers," November 20, 2014.

The number of immigrants detained and deported by U.S. immigration authorities has reached historic highs in recent years, at a time when overall migration to the U.S. has decreased. Since 2009, nearly 400,000 people have been deported from the U.S. each year, compared with just 189,000 in 2001. In early 2014, the number of individuals removed from the United States thus far under the Obama administration hit 2 million.[38]

Significant numbers of U.S. citizen children are impacted by these enforcement activities. Data from DHS reveals that 72,410 parents of U.S. citizen children were removed in 2013.[39] This data only reflects those parents who reported having U.S. citizen children and therefore fails to account for those individuals who did not voluntarily report parental status out of fear that they would lose their children. Using deportation data, researchers estimate that at least 152,000 U.S. citizen children experience the deportation of a parent each year.[40] Children suffer immensely when a parent is arrested or deported, facing years of separation, decreased economic support, and social and psychological trauma. For some, the trauma of separation can have even more devastating consequences: as of 2011, 5,100 children were living in our foster care system due to their parents' detention or deportation.[41]

Lupita, a brave young lady who is in the audience today, understands the stress and psychological trauma the threat of deportation can cause. I met her more than eight years ago after she watched the news, horrified as she saw her father being detained in a large Los Angeles-area workplace raid. During the stressful months that followed, Lupita, a US citizen, struggled in school, and her grades plummeted (however, I should note that Lupita has worked hard since then and now has a 4.0 GPA).

Last summer, Lupita asked me to deliver a letter to Speaker Boehner. The letter asks the Speaker to grant her a birthday wish: a vote on pending immigration reform legislation, which would allow her mother and father to earn their citizenship. I promised Lupita that I would deliver the letter, but I also warned her that the Speaker was unlikely to act on immigration any time soon. She reflected, and said, "That's OK. If Boehner doesn't vote for immigration reform, I'll tell the president about my birthday wish. He has two daughters, so I'm sure he'll understand."

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[38] Caplan-Bricker, Nora, The New Republic, "Who's the Real Deporter-in-Chief, Bush or Obama?", April 17, 2014 .ICE Press Release. (December 18, 2013) FY2013: ICE announces year-end removal numbers. Retrieved from https://www.ice.gov/news/releases/1312/131219washingtondc.htm; Print edition. (2014, February 8). The Great Expulsion: Barack Obama has presided over one of the largest peacetime outflows of people in America's history. *The Economist*. Retrieved from http://www.economist.com/news/briefing/21595892-barack-obama-has-presided-over-one-largest-peacetime-outflows-people-americas.

[39] Foley, E. "Deportation Separated Thousands of U.S. Citizen Children from Parents in 2013." *Huffington Post*, June 25, 2014.

[40] Farhang, Lili; Heller, Jonathan; Hu, Alice; and Satinsky, Sara, "Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families," June 3, 3013 at i.

[41] Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System. Race Forward, the Center for Social Justice Innovation, November 2, 2011.

President Obama, along with most Americans, understand that U.S. citizen children like Lupita need their parents to help them grow into successful, responsible community members. Current immigration laws that threaten to tear Lupita's mother from Lupita and her younger sister aren't just immoral, they hurt our society and economy. This is why I am so hopeful that Isabel, Lupita's mother, who is also here today will qualify under the new DAPA program so that she can be there for Lupita and Marisol, her 8-year old sister who was born just days after that workplace raid. Every daughter needs her mother, and our nation's laws should help support strong families rather than rip them apart.

Our nation's workforce will also benefit from the president's expansion of deferred action. By allowing all people who came to the U.S. as children to apply for relief, we will unlock the earning and innovation potential that many of these immigrants, who were raised in this country and educated in American schools, possess. Jong Min You, also in the audience today, came to the U.S. when he was just one year old. A stellar student, Jong Min excelled in school and graduated from college with honors. He dreams of one day becoming a federal judge, but his immigration status stymied him in these efforts, and he currently works in his family's grocery store.

Jong Min, like so many other aspiring Americans, narrowly missed the cutoff date for the DACA program that was announced in June 2012. Now, he'll be able to use his education and ambition to pursue his passions and improve our economy. His family's good news doesn't end there: his parents, who have a lawful permanent resident son, will be able to apply for DAPA and finally visit Korea, which they left more than thirty years ago.

The policy announced in November will affect members of every segment of our society. Aly Wane, for example, came to the U.S. from Senegal to finish high school at the prestigious Georgetown Prep and earned his B.A. from Le Moyne College in Syracuse, New York. Aly is a passionate community organizer who spends his time fighting to improve living conditions for the homeless and those suffering from HIV or AIDS. This New Yorker will finally be able to come forward and apply to work legally in the country he has called home for more than 25 years.

As Americans have learned over the last years about the shattered lives and broken dreams that are the real victims of our dysfunctional immigration system, there has been increasing support for solutions and changes. This is not about numbers or political parties but about our core values as a nation and what it means to be an American – including Americans in waiting.

IV. Conclusion

The president's action, while much needed, is only a partial and temporary solution to a complex problem. The DAPA and expanded DACA programs outlined by the Obama administration do not lead to permanent residence or a path to citizenship. They will have clear, defined limits with strict cut-off dates and eligibility criteria. There is no adjustment of status process, only a deferral of deportation. The only way to fix the

broken immigration system once and for all is for Congress to pass and the President to sign comprehensive immigration reform legislation. We at the National Immigration Law Center look forward to working with members of this committee and others in Congress to make that a reality.

In the interim, President Obama has announced a deferred action program for millions of immigrants who are American in every way except on paper. I commend the president for taking this action, and look forward to working with his administration and community stakeholders to ensure that the program is implemented fairly and fully. In order to ensure these new policy changes are implemented successfully and benefit our country, it will take every institution – schools, employers, policymakers, state and local governments, utility companies, and many others – to help these 4.4 million community members be one step closer towards realizing the American Dream. I believe this will lead to stronger families, economic benefits for our country, more taxes paid, and stronger national security.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. GOODLATTE. We will now begin the questioning, and I'm going to reserve my questions at this time.

I recognize the gentleman from Wisconsin, Mr. Sensenbrenner for his questions.

Mr. SENSENBRENNER. First of all, I think I should emphasize the point that this hearing is on whether the President's action is constitutional.

The policy questions are not within the scope of this hearing, and I think will end up being debated at a later point, probably ad nauseam. What I would like to do is ask a couple of questions.

First of all, why do you think the President on 22 occasions said that he didn't have the power to do what he did, and then did a 180? Maybe Ms. Hincapié, you can start out with an answer to that.

Ms. HINCAPIÉ. I would be happy to, Representative Sensenbrenner.

So unfortunately, I think the President was talking politics. He made those comments, much to our dismay, because we believe for many years now that the President did and does in fact have the legal authority. The President on a number of those occasions was specifically talking about immigration reform. He has been so focused on getting immigration reform done with Congress that he continually told the immigrant rights community that he would not do——

Mr. SENSENBRENNER. Okay. Let me ask Mr. Sekulow what his opinion is on this subject.

Mr. SEKULOW. I think the President was correct when he said he could not make the law or change the law. He was speaking correctly. I think when he made the statement that he has changed the law, he recognized also that he did something. He thought he changed the law. He doesn't think, by the way, it was simply a policy decision. He stated, he changed the law. And I don't, as I said in my testimony, Congressman, I don't believe there is anybody on this Committee that believes the President has the authority to change the law. He knew he did not when he made the statement 22 times. And then he changed the law. He doesn't get to do that.

Mr. SENSENBRENNER. Okay, now, his own DHS secretary Jeh Johnson has stated there comes a point when something amounts to a wholesale abandonment to enforce a dually enacted constitutional law that is beyond simple prosecutorial discretion. I think that at least three of our witnesses believe that the President has crossed that line? Could you be more specific, and let me start with Mr. Dupree, be brief, and then work that way.

Mr. DUPREE. Well, thank you, Mr. Sensenbrenner. I think that Secretary Johnson was correct when he says that there is a line. I think in this case the President not only crossed the line, but that line is far, far, far in the distance.

Mr. SENSENBRENNER. Well, that's kind of like the line he drew on Syria, right?

Mr. DUPREE. I think that is an apt analogy.

Mr. SENSENBRENNER. Thank you.

Mr. DUPREE. And I don't know that the Constitution requires a certain number of people beyond which he could not grant deferred action to. I don't think the Constitution speaks to that degree.

Mr. SENSENBRENNER. Okay. My time is limited. Mr. Sekulow.

Mr. SEKULOW. I'm going to just quote very quickly from the opinion that has been quoted by Members of this Committee and some of the witnesses, and that is the Chaney opinion. This is the part that is conveniently ignored. "Presidential action violates the Constitution"—this is the quote—"if he expressly adopts a general policy which is in effect an abdication of his statutory duty." And I think that's exactly what's happened here. The President changed the law.

Mr. SENSENBRENNER. Mr. Rotunda, briefly.

Mr. ROTUNDA. Two things.

Mr. GOODLATTE. Turn on your microphone.

Mr. ROTUNDA. I'm sorry. *Heckler v. Chaney*, it said the agency's decision not to prosecute or enforce, whether civil or criminal process, is generally committed to an agency's absolute discretion. The OLC does not quote the next sentence that says basically, the reason for this is because of lack of standing. The law of standing has changed dramatically. *Massachusetts v. EPA* is an example and so maybe now we will get a test of this.

But the President, it is mind-boggling that the President's supporters say that when he told us earlier that he didn't have the power, he was just lying. That was politics. That was political campaign. My jaw is dropped.

Mr. SENSENBRENNER. Okay. Good.

Now, the final question I have, and somebody can step up and be first, is: Doesn't a wholesale application or prosecutorial discretion to thousands, or millions, or maybe several millions of people, amount to a repeal of a duly enacted law, and does the President have the power to do that through prosecutorial discretion?

Mr. SEKULOW. Mr. Congressman, the President could and certainly could pardon people. Prosecutors exercise discretion on a case-by-case basis every time. You do see a situation where someone's alleged violations of SEC laws and there is a prosecutorial decision made to not move forward on that case. That's called prosecutorial discretion.

What you don't see, is a decision being made, we are not going to enforce the SEC laws in the United States. That would be rewriting the laws, which a President or the executive can't do.

Mr. DUPREE. I agree with that and I would add to it that our Constitution does confer discretion on the executive to exercise discretion in individual cases. When do you what the President has done here, you cross the line from permissive action under the executive's rights under Article II, entrenches on this Congress' authority under Article I to say what the law is. It is a legislative act.

Mr. SENSENBRENNER. Thank you, my time is up.

Mr. GOODLATTE. The Chair recognizes the gentleman from Michigan, Mr. Conyers, for his questions.

Mr. CONYERS. Thank you.

Attorney Hincapié, you have talked about prosecutorial discretion and whether it can really encompass a program that allows people to come forward and affirmatively apply for protection. Do you consider this a form of prosecutorial discretion, ma'am?

Ms. HINCAPIÉ. Yes, Congressman. Basically, prosecutorial discretion in the immigration context, there are over 20 different types

of discretion. And here what the Administration has done is simply identified what the levels of priorities are, and has determined that parents of U.S. citizen children, and lawful permanent residents should not be deported and they will be given an opportunity to come forward. There is individual adjudication. This is not a massive blanket, giving people work authorizations simply because they are a parent of a U.S. citizen.

Individuals will have to come forward. They will have to pass a criminal background check. They will have to show that they meet all of the eligibility criteria. And only after an individual adjudicator determines that that person merits deferred action will they be able to, under existing regulations, nothing new, existing regulations apply for an employment authorization document.

Mr. CONYERS. Of course.

Now, let me talk about deferred action which has existed for decades. Dating back more than 40 years, INS exercised prosecutorial discretion to grant non-priority status based upon humanitarian consideration. But in this case the Administration says that it will also offer work authorization to people who receive deferred action, not amnesty, or anything else. Can you recall any legal authority for that, and is that a break in tradition?

Ms. HINCAPIÉ. Absolutely not. Again, the President has not created any new laws. The deferred action, as you mentioned yourself, Congressman, has existed—deferred action has existed for decades on the books. And in fact, the regulations, the immigration regulations section—8 CFR Section 274a.12 specifically lists out who is eligible for work authorization.

And subsection (c)(14) explicitly says that—I will just quote, "An alien who has been granted deferred action, an act of administrative convenience to the Government which gives some cases lower priority, if the alien establishes an economic necessity for employment; is eligible for work authorization."

So this is, again, this is existing regulations on the books for many years prior to the Obama administration. There is nothing new in what the President has done.

Mr. CONYERS. Now, turning to Chief Counsel Sekulow, can you tell me what new statute Presidents George H.W. Bush, and Clinton were implementing when they granted deferred enforced departure and employment authorization to hundreds of thousands of Salvadoran, Haitians, Liberians, after Congress chose not to extend their temporary protected status?

Mr. SEKULOW. Mr. Conyers, the Supreme Court is recognized when it comes to matters of foreign concern, national security, there are issues where they have allowed deferred action. However, I reiterate what I said at the hearing in my testimony. I don't believe and I still believe, actually, that the actions of President Bush, and President Reagan, as President Obama's are constitutionally suspect, and I don't think the fact that you have got a 30- or 40-year history of action that is unconstitutional doesn't get better with time.

I think it is important to point out that this is not an enforce-free zone creation here. This is different than even those cases.

Mr. CONYERS. I get your drift. Let me ask you about whether—this goes to you, Mr. Dupree, as well. Can you tell me what new

statute George H.W. Bush was implementing when he granted deferred enforcement departure and employment authorization to approximately 80,000 Chinese nationals at the Tiananmen Square massacre?

Mr. DUPREE. Mr. Conyers, the first President Bush, I think, was doing two things in his grants of immigration relief. One is, he was following on certain actions taken by his predecessor, President Reagan in interpreting the Immigration and Reform Control Act of 1986. And I think that both President Reagan and President Bush were faithfully implementing the will of Congress in issuing regulations pursuant to ICRA.

With regard to particular grants, either of Chinese nationals, Tiananmen Square, as Mr. Sekulow said, that is well recognized authority that when you have a foreign crisis, often one that generates a large number of refugees, that the President in large part owing to his duties under the Constitution to engage in foreign affairs and oversee the Nation's foreign relations, often will grant temporary protected status to persons from affected Nations.

Mr. CONYERS. Well, the answer in both of these instances were none. But I appreciate your interpretation.

My time is exhausted, and I thank the Chairman.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you with us today.

Mr. Rotunda, let me start with you. Some of the defenders of the President's unilateral actions have asserted that his actions were merely an exercise of prosecutorial discretion. Are these assertions correct, or is there indeed a fundamental difference between prosecutorial discretion, and many of the President's unilateral actions?

Mr. ROTUNDA. The short answer, if I can be short, is prosecutorial discretion, the case is referred to criminal prosecutions. The refusal to not prosecute somebody who enters the United States fraudulently in violation of its criminal laws.

The Office of Legal Counsel has said, the 1990 opinion, it says, the President's powers do not permit the President to determine as a matter of policy discretion which statutes to enforce. Obviously, the President cannot refuse to enforce a statute he opposes for mere policy reasons. Now, you would think the present OLC opinion would distinguish that. They don't even cite it. And there is a whole series of other ones where they don't cite it. In *Galvan v. Press*, the Supreme Court said Congress is the authority in immigration matters, not the President. The President implements the law. You would think that the OLC opinion would try to distinguish that. They ignore it.

Mr. COBLE. I thank you, Mr. Rotunda.

Mr. Sekulow, let me bring one of the President Bushes into the hearing room here. President H.W. Bush proposed that Congress should lower the tax on capital gains, you may recall. Congress did not enact his proposal. Under President Obama's assertion of executive power, could President Bush simply have ignored or instructed the IRS not to enforce the tax code on capital gains greater than 10 percent?

Mr. SEKULOW. If President Bush would have done that, he would have been exercising an unconstitutional policy that he would be implementing. It would not be legal and it would be unlawful. Having said that, I think it's a great analogy to what's happened here. I keep going back to this, but the truth of the matter is, the President, you can play the 22 times the President said, I'm not a king and I have to work with Congress. But the President of the United States, and I want to read this because this addresses this, made this exact statement.

Mr. COBLE. If you will, be terse. I have got one more question for you. Go ahead.

Mr. SEKULOW. Okay, very quickly. The President said, I just took an action to change the law. And as I keep saying, no one on this Committee can possibly believe that the President has that authority. He just doesn't. You couldn't do it for taxes. You can't do it for immigration.

Mr. COBLE. I thank you, sir.

Mr. Dupree, and Madam, let me put this question jointly to you all. I am advised that there may be approximately 5 million who are waiting in line, complied with the law, who may fall victims of double standards. Is my concern justified?

Mr. DUPREE. I think it is. I fear, and I feel badly for people who have been waiting in line, waiting their turn, and now, unfortunately, may be penalized and that they are moved farther back in the line, precisely because they had the bad judgment to respect our laws and play by the rules.

Mr. COBLE. Is 5 million an accurate count?

Mr. DUPREE. That sounds right to me. I don't profess to have personal knowledge of that, but that sounds right.

Mr. COBLE. Madam, do you want to be heard on that question?

Ms. HINCAPIÉ. Sure. I completely agree that there is a need to address the backlog, the visa backlog, and frankly, this is where Congress needs to act and pass immigration reform so that families can be reunited.

However, we do have 11 million people in this country, and what the President has done has said individuals who are parents of U.S. citizens, lawful residents, are low level priority. However, he will continue enforcing the law based on the appropriations you have provided. So there is no abdication of his authority. Let's remember, only about 4 or 5 million people are estimated to benefit from this deferred action program and other changes. There are another 6 million plus individuals who will be subject to deportation and detention under the appropriations that the Congress has allocated.

Mr. COBLE. I thank you.

Mr. Sekulow.

Mr. SEKULOW. Yes, sir?

Mr. COBLE. I cut you off earlier. We have a few moments. Maybe you want to reclaim your time.

Mr. SEKULOW. Yes, sir, if I may. I am just going to—it is in response to my colleague. Here is the problem: Under the President's plan, what lawyer would recommend to their client who was an unlawful immigrant in the United States that even fit under this plan, what lawyer would recommend that their client register for

this knowing that to be constitutional, OLC said, you have to have absolute discretion and that the President on his own can cut this program off at a moment's notice.

So now you have disclosed yourself publicly. You may have come out of the shadows, but the light at that point will be so bright you could end up in a situation worse than you were in to begin with.

Mr. COBLE. Thank you.

The red light is about to illuminate. Thank you all again.

Mr. GOODLATTE. Would the gentleman yield? Would the gentleman from North Carolina yield to the Chair?

Mr. COBLE. I will be pleased to.

Mr. GOODLATTE. I thank the gentleman and without objection, the gentleman is recognized for an additional 30 seconds.

I just want to make one important point here. The gentlewoman, Ms. Hincapié, stated that the other 6 million would be subject to deportation. But the President, the same time he signed the Executive Order that made it clear that those 5 million would be entitled to a legal, administrative legal status, also changed other rules that made it clear that the vast majority of the remaining 6 million who are already here will not be subject to action to deport them because——

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. I will recognize the gentleman for an additional 30 seconds so he can yield to the gentlewoman from California.

Mr. COBLE. I have the time and I will yield.

Ms. LOFGREN. I will just note that it is indeed correct that the other 6 million have fallen into the new categories.

However, we have 11 million undocumented individuals. Congress only appropriates sufficient funds to remove 400,000 a year. Surely, the Chairman is not suggesting that there should be no policy on who should come first of the 400,000 of the 11 million.

And I yield back.

Mr. COBLE. Well, reclaiming my time, I don't want to penalize those who have complied with the law. That's the direction from which I was coming.

I reclaim and yield back.

Mr. GOODLATTE. The Chairman recognizes the gentleman from New York, Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you.

Thank you, Mr. Chairman. I am glad that this is not a hearing on the policy because if it were a hearing on the policy, I would point out that in the last Congress, this Committee reported four bills—I'm sorry, voted for four immigration bills, none of which had report language or went to the floor. So that's how active this Committee has been, or the House has been in trying to deal with the policy problem which everybody agrees with.

But let me ask a few very specific legal questions about the President's power.

First of all, Professor Rotunda, you quoted *Heckler v. Chaney*. In *Heckler v. Chaney* the Supreme Court explained that "An agency's decision not to prosecute or enforce, whether it is a civil or criminal process is a decision generally committed to an agency's absolute discretion."

In your written remarks you distinguished Chaney by saying it really focused on standing and by saying the law on standing has evolved significantly since that decision. But do you know how many times the court in Chaney mentioned standing in its opinion? Zero. The decision actually had nothing to do with standing. The case involved a lawsuit against the FDA brought by prisoners who were due to be executed by lethal injection. They sued to force the FDA to ban the use of these particular drugs for executions after the FDA denied their petition for enforcement. It is hard to imagine that even the most conservative judge would find standing lacking in that situation.

So given the fact I don't see how you find standing there. And the case does stand for the proposition that the agency's decision to prosecute or enforce is at its discretion.

Mr. ROTUNDA. Yeah, please look at 470 U.S.——

Mr. NADLER. I can't hear you, sir.

Mr. ROTUNDA. I'm sorry. Please look at 470 U.S. page 831, the text at note 4—as well as note 4. In note 4, the court says: "We don't 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 to amount to an abdication of the statutory responsibilities." It then cites with approval *Adams v. Richardson*, a DC case in 1973, which found standing and ordered the agency to act.

Now, I would have thought the OLC, since it relied on this case, I think 20 times, would have pointed out why somehow that footnote was irrelevant to them.

Secondly, you are absolutely right. It does not use the word standing, but it talks about the course—what it says in the paragraph before the text at footnote 4, is that generally the agency exercises coercive power over an individual. That's how the courts get standing.

Mr. NADLER. But generally, the agency may exercise coercive power over an individual at its discretion. It doesn't have to exercise discretion. That's what an agency has to do.

Mr. ROTUNDA. I'm sorry, the court says at text and footnote 4, that we emphasize, the decision is only presumptively unreviewable; but presumption may be rebutted where the substantive statutes provided guidelines for the agency to follow in exercising its enforcement power.

Mr. NADLER. Okay, so the court is saying that the agency has discretion, and in its enforcement power, and the statute gives it guidelines in how to exercise that discretion.

Mr. ROTUNDA. It says that it is presumptively unreviewable, but when it is exercising power in a way that has standing, it can be reviewed. I mean, that is basically what *Adams v. Richardson* said, if I can just finish the sentence, and if you fast forward to *Massachusetts v. EPA*, where the State of Massachusetts, forced the EPA to institute regulations with carbon dioxide pollution and global warming. Excuse me, and the Supreme Court said——

Mr. NADLER. Excuse me, you are wrong on that too. The holding of the court says very clearly, "We hold only that EPA must ground its reasons for action or inaction in the statute." That is, if the EPA wishes to deny a petition of rulemaking, it needs to do so in a mat-

ter that is "not arbitrary and capricious or otherwise not in accordance with the law." But it is its decision." All that is saying is, it can't be arbitrary and capricious, which is the normal standard.

Mr. ROTUNDA. If the court said that, they wouldn't say it was presumptively unreviewable. They would say it would always be unreviewable. And the court reviewed—the court reviewed the EPA in *Massachusetts v. EPA*.

Mr. NADLER. The court said that the EPA had that discretion.

Let me ask you a different question, though. The statute very clearly says that certain individuals shall upon the order of the Attorney General be removed. That would seem, the key words "upon the order of the Attorney General" would same to indicate that the executive branch official has discretion to decide whether those undocumented immigrants be deported or not.

Mr. ROTUNDA. You are dealing with a complex statute, and you are taking out a phrase.

Mr. NADLER. You are dealing with a lot of complicated court decisions and taking out phrases.

Mr. ROTUNDA. I'm sorry, what?

Mr. NADLER. You are dealing with a lot of complicated court decisions and taking out phrases.

Mr. ROTUNDA. I found pretty much due to it holding, and when I quote from the OLC, from their prior cases where the OLC says the President doesn't have the discretion to refuse to enforce laws he disagrees with as a matter of policy, maybe there is a way to distinguish that. But a good legal opinion would have done that——

Mr. NADLER. Let me read you from the case of *Arizona v. U.S.*, which is probably the most recent—probably the most relevant case. In *Arizona* the Supreme Court relied upon the broad discretion exercised by Federal immigration officials and let me read from you the decision. "Congress has specified which aliens may be removed from the United States and the procedures for doing so."

May be. "Aliens may be removed if they were inadmissible at the time of entry, had been convicted of certain crimes, and meet other criteria set by Federal law. Removal is a civil, not a criminal matter. 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." QED, end of discussion.

Mr. ROTUNDA. I wonder why the President for 6 years——

Mr. NADLER. Excuse me, I asked you about the Supreme Court ruling. The President may have been mistaken, and he may not have studied the issue. That is not the point. The point is, the Supreme Court has told us that Federal officials as an initial matter must decide whether it makes sense to pursue removal at all. A principal feature of the removal system is the broad discretion exercised by immigration officials. That would seem right there to justify almost any discretionary program that isn't arbitrary and capricious.

Mr. ROTUNDA. Now, I——

Mr. GOODLATTE. The time of the gentleman has expired. The gentleman may briefly answer the question.

Mr. ROTUNDA. Yeah. I would have thought the OLC would have at some point, rather than sitting on its haunches and vegetate, tell the President, for the last 6 years, you have been wrong.

Mr. NADLER. But you didn't answer what the Supreme Court just said here.

Mr. ROTUNDA. I wish I could——

Mr. NADLER. I wish you could too.

Mr. GOODLATTE. The Chair recognizes himself for his questions, and will give the gentleman Mr. Rotunda an additional few seconds, to respond again to that.

Mr. ROTUNDA. *Galvan v. Press*, page 531 of volume 347, the court said: "In the enforcement of these immigration policy" and I'm quoting now, "the executive branch of the Government must respect the procedural safeguards of due process, but the formulation of these policies is entrusted exclusively to Congress." That has become about as truly embedded in the legislative and judicial issues of our body politic as any aspect of our Government. Now, maybe you can distinguish that, too, but I thought——

Mr. GOODLATTE. Let met buttress your argument here.

In *Arizona v. U.S.*, the Supreme Court said: "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." But it goes on to say, "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 community," et cetera, et cetera.

So the issue really here is, what is the meaning of prosecutorial discretion? Has the President abused that discretion when he applies it in a blanket way to 5 million people or does it——

Mr. NADLER. Mr. Chairman.

Mr. GOODLATTE. For what purpose does the gentleman seek recognition?

Mr. NADLER. To make a 30-second comment on what you just said.

Mr. GOODLATTE. I am not going to yield to you. I'm going to ask my questions of the gentleman.

Mr. ROTUNDA. The President has dispensed the law, suspended the law until he says otherwise. That is not what you normally think of as prosecutorial discretion, which typically involve suspensions of the criminal law, not the immigration laws, at least the civil aspects of immigration.

Mr. GOODLATTE. And President Obama cites an opinion of the Justice Department's Office of Legal Counsel to justify his executive legalization of millions of unlawful aliens. Isn't it true that the Office of Legal Counsel doesn't have a particularly great track record when it comes to questions of executive power?

For example, in 2012 the Obama administration touted an OLC opinion justifying the President's controversial recess appointments. Didn't the Supreme Court subsequently rule that those appointments were unconstitutional, in a unanimous nine to nothing ruling?

Mr. ROTUNDA. He lost nine to zero.

Mr. GOODLATTE. The Justice Department Office of Legal Counsel states that the salient feature of class-based deferred action program, the establish of an affirmative application process with threshold eligibility criteria does not in and of itself cross the line between executing the law and rewriting it. This is because each program has also left room for case-by-case determinations giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

However, in President Obama's deferred action for childhood arrivals, DACA program, executive legalization for illegal immigrants who came to the U.S. as minors, the promise of discretion for adjudicators is mere pretense. In reality, DHS has admitted to the Judiciary Committee that if an alien applies and meets the DACA eligibility criteria, they will receive deferred action.

In reality, immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria. Thus, by the Office of Legal Counsel's own admission, the President's DACA program is constitutionally suspect. The rules——

Mr. CONYERS. Mr. Chairman, parliamentary inquiry. Are you using your own time?

Mr. GOODLATTE. I'm using my own time.

Mr. CONYERS. Well, I'm glad that you announced that.

Thank you very much.

Mr. GOODLATTE. The rules of the game will most assuredly be the same for President Obama's latest executive legalization. Thus, isn't it true that the OLC would also clearly find the President's latest gambit constitutionally suspect? Mr. Sekulow.

Mr. SEKULOW. Well, I think here is the situation. When you read the OLC memorandum and the justification for the case-by-case individual analysis, it goes on to state—now, I wish some of the people that were protesting would stay for the rest of this and see if they really like this deal so well, the deal the President put forward, because as he said, "As we previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residency or citizenship, and is revocable at any time in the agency's discretion."

Now, that is markedly different than what the President told the 4 million people to come out of the shadows, from what he actually told them, to what OLC said he can do. And when you look at the OLC memo, on the individual case-by-case determination and you look at it in the context of reality, there is no way that it can be handled on a case-by-case basis. So it is either a blanket exemption across the board, or it is not.

Mr. GOODLATTE. Thank you.

Mr. Dupree, did you want to add to that?

Mr. DUPREE. I agree with that. I think the language in there referring to the purported case-by-case analysis is simply window dressing and tend to confer a patina of constitutional legitimacy on this policy, which is plainly unconstitutional.

Mr. GOODLATTE. It's a blanket governance.

The Chair recognizes the gentleman from Virginia, Mr. Scott, for his questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, we could put an end to this debate by passing some kind of comprehensive immigration reform. Apparently, many on both sides of the aisle agree it's a policy, and so instead of arguing process, let's get on with comprehensive immigration reform. But in the meanwhile, it has been acknowledged that about 11 million people are potentially subject now to deportation. Congress has spoken, and has not appropriated anywhere close to enough money to deport everyone, as my colleague from California has said. And so Ms. Hincapié, we have to establish some policy as to priority. What is wrong with the policies articulated by the President?

Ms. HINCAPIÉ. So, there is nothing wrong with the policies announced by the President. In fact, they are based on Congress' will over the years to say that we should respect family unity and that the fact that the Administration has decided to focus on the parents of U.S. citizens, and lawful permanent residents is good policy and the Administration gets to decide. They have that executive discretion to decide who is a low-level priority so that they then can use and follow the law, the appropriations that have been provided by Congress, to focus on serious criminals and individuals who pose national security threats, et cetera.

Mr. SCOTT. Thank you.

Professor Sekulow, if the Administration said and states where the States have eliminated prohibitions against marijuana that they are not going to prosecute any low-level marijuana cases, would that be constitutional?

Mr. SEKULOW. Well, I think the Supremacy Clause, if there is a Federal law on marijuana use, the State can override it.

Mr. SCOTT. That is right, absolutely right. If the President says notwithstanding that reality, they are not going to prosecute cases would that be constitutional?

Mr. SEKULOW. On a case-by-case basis utilizing prosecutorial discretion, he could do that. What he could not do though, Congressman Scott, would be to say we are no longer going to enforce the drug laws in the United States, or even particularly the marijuana laws in the United States. That individual case-by-case determination is critical, but it is in this memo because it was the only way to justify the President's actions.

Mr. SCOTT. So it would not be constitutional to not prosecute in those States?

Mr. SEKULOW. If the President were to determine as a matter of executive action——

Mr. SCOTT. Right.

Mr. SEKULOW [continuing]. That he was not going to enforce the laws against utilization of marijuana as a criminal act, I believe that that would not be within his authority.

Mr. SCOTT. In those States.

Mr. SEKULOW. In those States. Saying on an individual basis he wants to exercise discretion, he can do that on an individual basis.

Mr. SCOTT. And if you disagree with that, then that's pretty much where we are on this debate?

Mr. SEKULOW. Pretty much.

Mr. SCOTT. Okay. Now the Family Fairness Program, I understand that President Bush covered about 42 percent of the undocumented population; the Obama administration, this Executive Order covers about 35 percent.

Can you explain, Mr. Sekulow, how Presidents Reagan, Bush, Clinton and Bush, can you remind us how they can do something, but all of a sudden President Obama can't do essentially the same thing?

Mr. SEKULOW. As I said in the written testimony, Congressman Scott, and as I said in my opening statement, I don't believe that President Bush, President Clinton, President Bush, and President Obama have the constitutional authority to do what they did. And the fact that it has been done for 4 Administrations and over 25 or 30 years, as I said, constitutional violations don't get better with time.

I mean, some have argued that there is statutory determination distinctions that are at play here. I don't take that position. I take the position that if you look at it just constitutionally, was there a constitutional basis upon which those actions were taken? And I'm frankly, I don't see it, and I'm sympathetic to what they are doing. It's just, I don't see it to be done that way. And these percentages should make—constitutionality is not determined by the percentage of violations. If there is a violation of 1 percent, it is as bad as a violation of 99.

Mr. SCOTT. Is there any constitutional legal distinction from a general deferment and a country-specific action?

Mr. SEKULOW. Yes, because the President has inherent—and the Supreme Court has recognized this—has inherit ability to deal with matters of foreign affairs and national affairs of the country.

Mr. SCOTT. And if there is a violation, who has standing to complain?

Mr. SEKULOW. The great question. The standing question. I think some of the States are going to try to have standing in this particular case. Standing always are difficult in these kind of challenges.

Mr. SCOTT. If the President had just done it without talking about it, what would be the result there?

Mr. SEKULOW. He would have been found out. You can't do it to 4 million people. And I will be, again, brutally honest here, as someone who is in favor of comprehensive immigration reform, as a lawyer, I would not recommend my client take a deal where their status is revokable at any time at the agency's discretion. So maybe he would have done it. I question how many people are going to actually take part in this.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from Alabama, Mr. Bachus for 5 minutes.

Mr. BACHUS. Thank you.

I think maybe listening to everyone on the panel, I think, and most of the Members on the dais, we all agree that our country, its citizens, and even our immigrants need comprehensive immigration reform.

And Mr. Dupree said, you have been frustrated for years over our inaction. So let's agree on that just for purposes of argument. Does that make what the President did constitutional if it is unconstitutional?

Mr. SEKULOW. Well, in my view, Congressman, no, it would not. And I think, to Congressman Scott's point, I think it actually has hurt the debate because as you see here and you hear, there is a lot of agreement of the need for, you know, a constitutional path, a legal path of immigration reform.

And look, when I hold my grandfather's naturalization papers up, it means a lot to me. Me when they call my name at the Supreme Court and say, Mr. Sekulow, we will now hear from you, and I am the grandson of that Russian immigrant, I get it.

But the process has to be right. And I think, unfortunately, the President's action which I still think is not only constitutionally suspect, but dangerous for the potential client, I don't think that advances the debate because we are talking about, as Congressman Scott said, we are talking about this, instead of getting real comprehensive immigration reform through, which would include border security.

Mr. BACHUS. Yeah, and I think I know Mr. Sensenbrenner said we are here to figure out why he did what he did. I don't think that's helpful at all. I mean, we would probably come up with 100 different variations on why he did it. I don't think that's material. I think it's whether it is constitutional or unconstitutional.

And I think we go back to, you know, this little book here, How Our Laws Are Made.** I mean, you know, fifth grade, and I want to introduce this.

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

Mr. BACHUS. And then we back that up with not only Section 1 of Article I, but Section 8 which actually says to establish uniform rules and naturalization. And it didn't give it to the President; clearly, and simply gave it to the Congress. Now, some of us may disagree with that. But it's the Constitution.

Mr. ROTUNDA. Mr. Bachus, a brief comment. Justice Jackson in *Youngstown Sheet & Tube v. Sawyer* said, "The President's power is at its lowest when he is acting contrary to the express or implied will of Congress." And the President has basically admitted the implied will of Congress, if not expressed, is not to act in this area at least not yet. So his power should be at the lowest.

Justice Jackson—or Justice Frankfurter, rather, in that opinion also said that we are not dealing with a situation where there is a temporary emergency and the President is acting until he can persuade Congress to act. That ends on its own. Neither one of those statements was discussed in the OLC opinion.

Mr. BACHUS. Thank you.

And let me say this: You know, the question has been asked, and I think it's answered in the question: Can the President create, amend, suspend, or ignore an act of Congress? I think the answer is right there, an act of Congress.

**The material referred to is not reprinted in this hearing record but is on file with the Committee and can be accessed at http://thomas.loc.gov/home/lawsmade.toc.html.

Mr. DUPREE. I would also point out——

Mr. BACHUS. And the answer is no.

Mr. DUPREE. One of the many grievances articulated against British rule in the Declaration of Independence was the kings' propensity to suspend or disregard the lawful enactments of parliament. And so it really goes back to the very foundations of our country.

Mr. BACHUS. Right.

Mr. DUPREE. In fact, I think it was Mr. Scott who referred to, let's discuss policy rather than process, but the point is, process matters. It mattered to our Founders and it should matter to——

Mr. BACHUS. And let met tell you why it ought to matter to those who are in our country without legal status. Many of them came here because there was no rule of law in their country. And they came here because we have rule of law.

And to come, or even for us to allow them to come and start with a violation of rule of law actually degrades not only our citizens, but those who are here, who we all owe the protection of our laws, whether you agree or disagree with this, are for everyone's benefit.

And they are, our liberty, liberty, liberty. That's what they talked about when they wrote these things. And this is a loss of liberty. And it just doesn't matter why the President did this, or his motivation, or whether we think it is reasonable. It is not. It violates the rule of law.

Does anyone disagree with that?

Ms. HINCAPIÉ. I respectfully disagree, Congressman Bachus, and the reason, again, is I think we are going back and forth between is the President following the Constitution, and——

Mr. BACHUS. Well, let me ask you this:

Mr. GOODLATTE. The gentleman's time is expired. He can state his question very quickly and you can respond very quickly.

Mr. BACHUS. Does the President have the right to create an act of Congress, to amend an act of Congress, or to suspend an act of Congress, or to ignore an act of Congress? And you know, this is 50 pages.

Mr. GOODLATTE. That's the question.

Ms. HINCAPIÉ. Absolutely not. And that is not what the President is doing here. The President is continuing to follow the act of Congress by enforcing and using the appropriations for 400,000 deportations a year, and secondly, exercising——

Mr. BACHUS. So he has the power to legalize what is illegal?

Ms. HINCAPIÉ. No, he is not providing any legal status to individuals. This is simply temporary reprieve from deportation. There is no legal status that is being conferred.

Mr. GOODLATTE. The Committee is advised that we have three votes on the floor and we will stand in recess and we will reconvene immediately after those votes.

It's my understanding that Mr. Rotunda has some concerns with a flight that he doesn't want to miss, and the Committee will certainly work with him to accommodate that. If you can stay as long as possible, great. But if you need to leave during this vote period which is going to last at least a half-hour, we understand.

And the Committee will stand in recess.

Mr. MARINO [pesiding].I am going to call this hearing back to order. Thank you for waiting. I apologize. I don't think we will have anymore interruptions. And the Chair now recognizes the Congresswoman from California, Ms. Lofgren.

Ms. LOFGREN. Well, thank you very much, Mr. Chairman, and I am glad that the—obviously the last votes of the hour have resulted in a much smaller panel back from the votes, so we will not be here that much longer. I do want to make a couple of comments.

First, since all of this is submitted to the record under oath, I want to make a correction I am sure was inadvertent. Mr. Sekulow, in your written testimony, on page 5, footnote 22, you assert that there was a provision that allowed for—in the statute—that allowed for humanitarian relief for family members. When I read that, I thought, Did I get this wrong? And so I went and reread IRCA, and I just want to correct the record because it is exactly incorrect.

The statute—well, let me just read what the Committee said when they passed the vote. This is the Committee report for IRCA: It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning right by virtue of the legislation. They will be required to wait in line as the same manner as immediate family members of other new resident aliens.

The provision that you referenced in the footnote relates to humanitarian waiver but only for those individuals, if you look at 8 U.S. Code 1401, who are ineligible for other reasons, and so it specifically does not provide relief to individuals who were made intentionally ineligible for leave under the statute. I am sure that was inadvertent, but I would ask unanimous consent to put the public record into the record.

[The information referred to follows:]

Public Law 99-603
99th Congress

An Act

To amend the Immigration and Nationality Act to revise and reform the immigration laws, and for other purposes.

Nov. 6, 1986
[S. 1200]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Immigration Reform and Control Act of 1986.
8 USC 1101 note.

SECTION 1. SHORT TITLE; REFERENCES IN ACT.

(a) SHORT TITLE.—This Act may be cited as the "Immigration Reform and Control Act of 1986".

(b) AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT.—Except as otherwise specifically provided in this Act, whenever in this Act an amendment or repeal is expressed as an amendment to, or repeal of, a provision, the reference shall be deemed to be made to the Immigration and Nationality Act.

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any problems with the implementation of such projects, particularly as they may apply to implementation of the system referred to in subsection (c)(1).

(2) REPORT ON IMPLEMENTATION OF VERIFICATION SYSTEM.—The Comptroller General shall—

(A) monitor and analyze the implementation of such system,

(B) report to Congress and to the appropriate Secretaries described in subsection (c)(4)(D)(ii), by not later than April 1, 1989, on such implementation, and

(C) include in such report such recommendations for changes in the system as may be appropriate.

TITLE II—LEGALIZATION

SEC. 201. LEGALIZATION OF STATUS.

(a) PROVIDING FOR LEGALIZATION PROGRAM.—(1) Chapter 5 of title II is amended by inserting after section 245 (8 U.S.C. 1255) the following new section:

"ADJUSTMENT OF STATUS OF CERTAIN ENTRANTS BEFORE JANUARY 1, 1982, TO THAT OF PERSON ADMITTED FOR LAWFUL RESIDENCE

8 USC 1255a.

"SEC. 245A. (a) TEMPORARY RESIDENT STATUS.—The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

"(1) TIMELY APPLICATION.—

"(A) DURING APPLICATION PERIOD.—Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after the date of enactment of this section) designated by the Attorney General.

"(B) APPLICATION WITHIN 30 DAYS OF SHOW-CAUSE ORDER.—An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 242, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 18-month period or on the date of the issuance of such order, whichever day is later.

8 USC 1252.

"(C) INFORMATION INCLUDED IN APPLICATION.—Each application under this subsection shall contain such information as the Attorney General may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 204(a).

8 USC 1154.

"(2) CONTINUOUS UNLAWFUL RESIDENCE SINCE 1982.—

"(A) IN GENERAL.—The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

"(B) NONIMMIGRANTS.—In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such

date through the passage of time or the alien's unlawful status was known to the Government as of such date.

"(C) EXCHANGE VISITORS.—If the alien was at any time a nonimmigrant exchange alien (as defined in section 101(a)(15)(J)), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 212(e) or has fulfilled that requirement or received a waiver thereof. 8 USC 1101. 8 USC 1182.

"(3) CONTINUOUS PHYSICAL PRESENCE SINCE ENACTMENT.—

"(A) IN GENERAL.—The alien must establish that the alien has been continuously physically present in the United States since the date of the enactment of this section.

"(B) TREATMENT OF BRIEF, CASUAL, AND INNOCENT ABSENCES.—An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

"(C) ADMISSIONS.—Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

"(4) ADMISSIBLE AS IMMIGRANT.—The alien must establish that he—

"(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2),

"(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

"(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

"(D) is registered or registering under the Military Selective Service Act, if the alien is required to be so registered under that Act. 50 USC app. 451.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 shall be considered to have entered the United States and to be in an unlawful status in the United States. 8 USC 1522 note.

"(b) SUBSEQUENT ADJUSTMENT TO PERMANENT RESIDENCE AND NATURE OF TEMPORARY RESIDENT STATUS.—

"(1) ADJUSTMENT TO PERMANENT RESIDENCE.—The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

"(A) TIMELY APPLICATION AFTER ONE YEAR'S RESIDENCE.—The alien must apply for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status.

"(B) CONTINUOUS RESIDENCE.—

"(i) IN GENERAL.—The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.

"(ii) TREATMENT OF CERTAIN ABSENCES.—An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A).

"(C) ADMISSIBLE AS IMMIGRANT.—The alien must establish that he—

"(i) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2), and

"(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

"(D) BASIC CITIZENSHIP SKILLS.—

"(i) IN GENERAL.—The alien must demonstrate that he either—

8 USC 1423.

"(I) meets the requirements of section 312 (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or

"(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

"(ii) EXCEPTION FOR ELDERLY INDIVIDUALS.—The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years of age or older.

"(iii) RELATION TO NATURALIZATION EXAMINATION.—In accordance with regulations of the Attorney General, an alien who has demonstrated under clause (i)(I) that the alien meets the requirements of section 312 may be considered to have satisfied the requirements of that section for purposes of becoming naturalized as a citizen of the United States under title III.

8 USC 1401.

"(2) TERMINATION OF TEMPORARY RESIDENCE.—The Attorney General shall provide for termination of temporary resident status granted an alien under subsection (a)—

"(A) if it appears to the Attorney General that the alien was in fact not eligible for such status;

"(B) if the alien commits an act that (i) makes the alien inadmissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2), or (ii) is convicted of any felony or three or more misdemeanors committed in the United States; or

"(C) at the end of the thirty-first month beginning after the date the alien is granted such status, unless the alien has filed an application for adjustment of such status pursuant to paragraph (1) and such application has not been denied.

"(3) AUTHORIZED TRAVEL AND EMPLOYMENT DURING TEMPORARY RESIDENCE.—During the period an alien is in lawful temporary resident status granted under subsection (a)—

"(A) AUTHORIZATION OF TRAVEL ABROAD.—The Attorney General shall, in accordance with regulations, permit the alien to return to the United States after such brief and casual trips abroad as reflect an intention on the part of the

alien to adjust to lawful permanent resident status under paragraph (1) and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

"(B) AUTHORIZATION OF EMPLOYMENT.—The Attorney General shall grant the alien authorization to engage in employment in the United States and provide to that alien an 'employment authorized' endorsement or other appropriate work permit.

"(c) APPLICATIONS FOR ADJUSTMENT OF STATUS.—

"(1) TO WHOM MAY BE MADE.—The Attorney General shall provide that applications for adjustment of status under subsection (a) may be filed—

"(A) with the Attorney General, or

"(B) with a qualified designated entity, but only if the applicant consents to the forwarding of the application to the Attorney General.

As used in this section, the term "qualified designated entity" means an organization or person designated under paragraph (2).

"(2) DESIGNATION OF QUALIFIED ENTITIES TO RECEIVE APPLICATIONS.—For purposes of assisting in the program of legalization provided under this section, the Attorney General—

"(A) shall designate qualified voluntary organizations and other qualified State, local, and community organizations, and

"(B) may designate such other persons as the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 209 or 245, Public Law 89-732, or Public Law 95-145.

8 USC 1159, 1255.
8 USC 1255 note.

"(3) TREATMENT OF APPLICATIONS BY DESIGNATED ENTITIES.—Each qualified designated entity must agree to forward to the Attorney General applications filed with it in accordance with paragraph (1)(B) but not to forward to the Attorney General applications filed with it unless the applicant has consented to such forwarding. No such entity may make a determination required by this section to be made by the Attorney General.

"(4) LIMITATION ON ACCESS TO INFORMATION.—Files and records of qualified designated entities relating to an alien's seeking assistance or information with respect to filing an application under this section are confidential and the Attorney General and the Service shall not have access to such files or records relating to an alien without the consent of the alien.

"(5) CONFIDENTIALITY OF INFORMATION.—Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—

"(A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application or for enforcement of paragraph (6),

"(B) make any publication whereby the information furnished by any particular individual can be identified, or

"(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with

respect to applications filed with a designated entity, that designated entity, to examine individual applications.

Law enforcement and crime.

Anyone who uses, publishes, or permits information to be examined in violation of this paragraph shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

"(6) PENALTIES FOR FALSE STATEMENTS IN APPLICATIONS.—Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

"(7) APPLICATION FEES.—

"(A) FEE SCHEDULE.—The Attorney General shall provide for a schedule of fees to be charged for the filing of applications for adjustment under subsection (a) or (b)(1).

"(B) USE OF FEES.— The Attorney General shall deposit payments received under this paragraph in a separate account and amounts in such account shall be available, without fiscal year limitation, to cover administrative and other expenses incurred in connection with the review of applications filed under this section.

"(d) WAIVER OF NUMERICAL LIMITATIONS AND CERTAIN GROUNDS FOR EXCLUSION.—

"(1) NUMERICAL LIMITATIONS DO NOT APPLY.—The numerical limitations of sections 201 and 202 shall not apply to the adjustment of aliens to lawful permanent resident status under this section.

8 USC 1151, 1152.

"(2) WAIVER OF GROUNDS FOR EXCLUSION.—In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B)—

"(A) GROUNDS OF EXCLUSION NOT APPLICABLE.—The provisions of paragraphs (14), (20), (21), (25), and (32) of section 212(a) shall not apply.

8 USC 1182.

"(B) WAIVER OF OTHER GROUNDS.—

"(i) IN GENERAL.—Except as provided in clause (ii), the Attorney General may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

"(ii) GROUNDS THAT MAY NOT BE WAIVED.—The following provisions of section 212(a) may not be waived by the Attorney General under clause (i):

"(I) Paragraphs (9) and (10) (relating to criminals).

"(II) Paragraph (15) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence by an alien other than an alien who is eligible for benefits under title XVI of the Social Security Act or section 212 of Public Law 93-66 for the month in which such alien is granted lawful temporary residence status under subsection (a).

42 USC 1381.
42 USC 1382 note.

"(III) Paragraph (23) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.

"(IV) Paragraphs (27), (28), and (29) (relating to national security and members of certain organizations).

"(V) Paragraph (33) (relating to those who assisted in the Nazi persecutions).

"(iii) SPECIAL RULE FOR DETERMINATION OF PUBLIC CHARGE.—An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 212(a)(15) if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. 8 USC 1182.

"(C) MEDICAL EXAMINATION.—The alien shall be required, at the alien's expense, to undergo such a medical examination (including a determination of immunization status) as is appropriate and conforms to generally accepted professional standards of medical practice.

"(e) TEMPORARY STAY OF DEPORTATION AND WORK AUTHORIZATION FOR CERTAIN APPLICANTS.—

"(1) BEFORE APPLICATION PERIOD.—The Attorney General shall provide that in the case of an alien who is apprehended before the beginning of the application period described in subsection (a)(1)(A) and who can establish a prima facie case of eligibility to have his status adjusted under subsection (a) (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first 30 days of the application period to complete the filing of an application for adjustment, the alien—

"(A) may not be deported, and

"(B) shall be granted authorization to engage in employment in the United States and be provided an 'employment authorized' endorsement or other appropriate work permit.

"(2) DURING APPLICATION PERIOD.—The Attorney General shall provide that in the case of an alien who presents a prima facie application for adjustment of status under subsection (a) during the application period, and until a final determination on the application has been made in accordance with this section, the alien—

"(A) may not be deported, and

"(B) shall be granted authorization to engage in employment in the United States and be provided an 'employment authorized' endorsement or other appropriate work permit.

"(f) ADMINISTRATIVE AND JUDICIAL REVIEW.—

"(1) ADMINISTRATIVE AND JUDICIAL REVIEW.—There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

"(2) NO REVIEW FOR LATE FILINGS.—No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

"(3) ADMINISTRATIVE REVIEW.—

Ms. LOFGREN. I also wanted to question, I guess, an issue. In footnote 21 on your testimony, you mentioned the CRS report about granting relief. I think it is important—and I would ask unanimous consent to place into the record the Congressional Research Service report that is referenced, that that, according to the CRS, was the first time or at least the most notable time that the grant of blanket extended voluntary departure was made for domestic policy considerations rather than a crisis in a foreign national's homeland.

[The information referred to follows:]

MEMORANDUM July 13, 2012

To: Prepared for Distribution to Multiple Congressional Requesters

From: Andorra Bruno, Specialist in Immigration Policy, 7-7865
Todd Garvey, Legislative Attorney, 7-0174
Kate Manuel, Legislative Attorney, 7-4477
Ruth Ellen Wasem, Specialist in Immigration Policy, 7-7342

Subject: **Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children***

This Congressional Research Service (CRS) memorandum provides background and analysis related to the memorandum issued by the Department of Homeland Security (DHS) on June 15, 2012, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. Under the DHS directive, certain individuals who were brought to the United States as children and meet other criteria will be considered for relief from removal. Intended to respond to a variety of congressional requests on the policy set forth in the DHS memorandum, this CRS memorandum discusses the content of the June 15, 2012 memorandum, as well as the unauthorized alien student issue and related DREAM Act legislation, past administrative exercises of prosecutorial discretion to provide relief from removal, the legal authority for the actions contemplated in the DHS memorandum, and other related issues. For further information, please contact Andorra Bruno (unauthorized students and the DREAM Act), Todd Garvey (constitutional authority), Kate Manuel (other legal issues), or Ruth Wasem (antecedents of deferred departure and access to federal benefits).

Overview of Unauthorized Alien Students

The unauthorized alien (noncitizen) population includes minors and young adults who were brought, as children, to live in the United States by their parents or other adults. These individuals are sometimes referred to as "unauthorized alien students," or, more colloquially, as "DREAM Act kids" or "DREAMers."

While living in the United States, unauthorized alien children are able to receive free public education through high school.[1] Many unauthorized immigrants who graduate from high school and want to attend

[1] The legal authority for disallowing state discrimination against unauthorized aliens in elementary and secondary education is the 1982 Supreme Court decision in Plyler v. Doe. See also CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

college, however, find it difficult to do so. One reason for this is that they are ineligible for federal student financial aid.[2] Another reason relates to a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[3] that discourages states and localities from granting unauthorized aliens certain "postsecondary education benefits" (referred to here as the "1996 provision").[4] More broadly, as unauthorized aliens, they are typically unable to work legally and are subject to removal from the United States.[5]

According to DHS estimates, there were 1.4 million unauthorized alien children under age 18 living in the United States in January 2011. In addition, there were 1.6 million unanthorized individuals aged 18 to 24, and 3.7 million unauthorized individuals aged 25 to 34.[6] These data represent totals and include all individuals in the specified age groups regardless of length of presence in the United States, age at time of initial entry into the United States, or educational status. Numerical estimates of potential beneficiaries of the policy set forth in DHS's June 15, 2012 memorandum are provided below.

Legislation

Multiple bills have been introduced in recent Congresses to provide relief to unauthorized alien students. These bills have often been entitled the Development, Relief, and Education for Alien Minors Act, or the DREAM Act. A common element in these bills is that they would enable certain unauthorized alien students to obtain legal status through an immigration procedure known as *cancellation of removal*[7] and at some point in the process, to obtain legal permanent resident (LPR) status, provided they meet all the applicable requirements. Multiple DREAM Act bills have been introduced in the 112th Congress but none have seen any legislative action.[8]

Traditional DREAM Act bills

Since the 109th Congress, "standard" DREAM Act bills have included language to repeal the 1996 provision mentioned above and to enable certain unauthorized alien students to adjust status (that is, to obtain LPR status in the United States). These bills have proposed to grant LPR status on a conditional basis to an alien who, among other requirements, could demonstrate that he or she:

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[2] Higher Education Act (HEA) of 1965 (P.L. 89-329), as amended, November 8, 1965, 20 U.S.C. §1001 *et seq.*

[3] IIRIRA is Division C of P.L. 104-208, September 30, 1996.

[4] This provision, section 505, nominally bars states from conferring postsecondary education benefits (e.g., in-state tuition) to unauthorized aliens residing within their jurisdictions if similar benefits are not conferred to out-of-state U.S. citizens. Nevertheless, about a dozen states effectively do grant in-state tuition to resident unauthorized aliens without granting similar benefits to out-of-state citizens, and courts that have considered these provisions have upheld them.

[5] For additional information, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

[6] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker.

[7] Cancellation of removal is a discretionary form of relief that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien's status is adjusted to that of a legal permanent resident.

[8] For additional analysis of DREAM Act legislation, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*.

- was continuously physically present in the United States for at least five years preceding the date of enactment;
- was age 15 or younger at the time of initial entry;
- had been a person of good moral character since the time of initial entry;
- was at or below a specified age (age has varied by bill) on the date of enactment; and
- had been admitted to an institution of higher education in the United States or had earned a high school diploma or the equivalent in the United States.

The bills also include special requirements concerning inadmissibility,[9] and some would disqualify any alien convicted of certain state or federal crimes. After six years in conditional LPR status, an alien could have the condition on his or her status removed and become a full-fledged LPR if he or she meets additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the uniformed services[10] for at least two years. Two similar bills with these elements (S. 952, H.R. 1842)—both entitled the DREAM Act of 2011—have been introduced in the 112th Congress.

Other Versions of the DREAM Act

Revised versions of the DREAM Act have also been introduced in Congress in recent years. In the 111th Congress, the House approved one of these DREAM Act measures as part of an unrelated bill, the Removal Clarification Act of 2010 (H.R. 5281).[11] Unlike earlier DREAM Act bills, this measure[12] did not include a repeal of the 1996 provision and proposed to grant eligible individuals an interim legal status prior to enabling them to adjust to LPR status. Under this measure, an alien meeting an initial set of requirements like those included in traditional DREAM Act bills (enumerated in the previous section) would have been granted conditional *nonimmigrant*[13] status for five years. This status could have been extended for another five years if the alien met additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the Armed Forces for at least two years. The applications to obtain conditional status initially and to extend this status would have been subject to surcharges. At the end of the second conditional period, the conditional nonimmigrant could have applied to adjust to LPR status.

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[9] The Immigration and Nationality Act (INA) enumerates classes of inadmissible aliens. Under the INA, except as otherwise provided, aliens who are inadmissible under specified grounds, such as health-related grounds or criminal grounds, are ineligible to receive visas from the Department of State or to be admitted to the United States by the Department of Homeland Security.

[10] As defined in Section 101(a) of Title 10 of the U.S. Code, *uniformed services* means the Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard); the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service.

[11] The Senate failed, on a 55-41 vote, to invoke cloture on a motion to agree to the House-passed DREAM Act amendment, and H.R. 5281 died at the end of the Congress.

[12] The language is the same as that in H.R. 6497 in the 111th Congress.

[13] Nonimmigrants are legal temporary residents of the United States.

Two bills in the 112th Congress—the Adjusted Residency for Military Service Act, or ARMS Act (H.R. 3823) and the Studying Towards Adjusted Residency Status Act, or STARS Act (H.R. 5869)—follow the general outline of the House-approved measure described above, but include some different, more stringent requirements. These bills would provide separate pathways for unauthorized students to obtain LPR status through military service (ARMS Act) or higher education (STARS Act). Neither bill would repeal the 1996 provision and, thus, would not eliminate the statutory restriction on state provision of postsecondary educational benefits to unauthorized aliens.

The initial requirements for conditional nonimmigrant status under the ARMS Act are like those in the traditional DREAM Act bills discussed above. The STARS Act includes most of these requirements, as well as others that are not found in other DREAM Act bills introduced in the 112th Congress. Two new STARS Act requirements for initial conditional status are: (1) admission to an accredited four-year college, and (2) submission of the application for relief before age 19 or, in some cases, before age 21.

Under both the ARMS Act and the STARS Act, the conditional nonimmigrant status would be initially valid for five years and could be extended for an additional five years if applicants meet a set of requirements. In the case of the ARMS Act, these requirements would include service in the Armed Forces on active duty for at least two years or service in a reserve component of the Armed Forces in active status for at least four years. In the case of the STARS Act, the requirements for an extension of status would include graduation from an accredited four-year institution of higher education in the United States. After obtaining an extension of status, an alien could apply to adjust to LPR status, as specified in each bill.

DHS Memorandum of June 15, 2012

On June 15, 2012, the Obama Administration announced that certain individuals who were brought to the United States as children and meet other criteria would be considered for relief from removal. Under the memorandum, issued by Secretary of Homeland Security Janet Napolitano, these individuals would be eligible for deferred action[14] for two years, subject to renewal, and could apply for employment authorization.[15] The eligibility criteria for deferred action under the June 15, 2012 memorandum are:

- under age 16 at time of entry into the United States;
- continuous residence in the United States for at least five years preceding the date of the memorandum;

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[14] Deferred action is "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion." U.S. Department of Homeland Security, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities," http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm.

[15] U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, 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, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

- in school, graduated from high school or obtained general education development certificate, or honorably discharged from the Armed Forces;
- not convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and not otherwise a threat to national security or public safety; and
- age 30 or below.

These eligibility criteria are similar to those included in DREAM Act bills discussed above. The deferred action process set forth in the June 15, 2012 memorandum, however, would not grant eligible individuals a legal immigration status.[16]

Based on these eligibility criteria, the Pew Hispanic Center has estimated that the policy set forth in the June 15, 2012 memorandum could benefit up to 1.4 million unauthorized aliens in the United States. This potential beneficiary population total includes 0.7 million individuals under age 18 and 0.7 million individuals aged 18 to 30.[17]

Antecedents of the Policy

The Attorney General and, more recently, the Secretary of Homeland Security have had prosecutorial discretion in exercising the power to remove foreign nationals. In 1959, a major textbook of immigration law stated, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."[18] Specific guidance on how prosecutorial discretion was applied in individual cases was elusive in the early years.[19] Generally, prosecutorial discretion is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; deciding to detain an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to let the alien depart voluntarily; and executing a removal order. (The legal authority to exercise prosecutorial discretion is discussed separately below.)

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[16] The DHS memorandum states: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law." Ibid., p. 3.

[17] Pew Hispanic Center, "Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy," June 15, 2012, http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation-policy/.

[18] Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

[19] For example, in 1961, an official with the former Immigration and Naturalization Service (INS) offered his insights on circumstances in which discretionary relief from removal might be provided. The first factor he cited was age: "I have always felt that young people should be treated in our proceedings as are juveniles in the Courts who have violated criminal law.... My personal opinion is that certainly someone under eighteen is entitled to extra consideration." He added that persons over 60 or 65 years of age should be given special consideration. He also emphasized length of residence in the United States as a factor, noting that "five years is a significant mark in immigration law." Other factors he raised included good moral character, family ties in the United States, and exceptional and unusual hardship to the alien as well as family members. Aaron I. Maltin, Special Inquiry Officer, "Relief from Deportation," *Interpreter Releases*, vol. 38, no. 21 (June 9, 1961), pp. 150-155. He also discussed refugee and asylum cases.

Over the next few decades, an official guidance on discretionary relief from removal began to take shape. A 1985 Congressional Research Service "white paper" on discretionary relief from deportation described the policies of Immigration and Naturalization Service (INS)[20] at that time.

> Currently, three such discretionary procedures are relatively routinely used by INS to provide relief from deportation. One of the procedures – stay of deportation – is defined under INS regulations; another—deferred departure or deferred action – is described in INS operating instructions; and the third – extended voluntary departure—has not been formally defined and appears to be evolving.

The CRS "white paper" further noted that the executive branch uses these three forms of prosecutorial discretion "to provide relief the Administration feels is appropriate but which would not be available under the statute."[21]

In an October 24, 2005, memorandum, William Howard, then-Principal Legal Advisor of DHS's Immigration and Customs Enforcement (ICE), cited several policy factors relevant to the need to exercise prosecutorial discretion. One factor he identified was institutional change. He wrote:

> "Gone are the days when INS district counsels... could simply walk down the hall to an INS district director, immigrant agent, adjudicator, or border patrol officer to obtain the client's permission to proceed ... Now the NTA-issuing clients might be in different agencies, in different buildings, and in different cities from our own."

Another issue Howard raised was resources. He pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

> "Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000."[22]

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or someone for whom sympathetic humanitarian circumstances "cry for an exercise of prosecutorial discretion."[23]

In November 2007, then-DHS Assistant Secretary for ICE Julie L. Myers issued a memorandum in which she clarified that the replacement of the "catch and release" procedure with the "catch and return" policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not "diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to

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[20] Most of the immigration-related functions of the former INS were transferred to the U.S. Department of Homeland Security when it was created in 2002 by the Homeland Security Act (P.L. 107-296). Three agencies in DHS have important immigration functions in which prosecutorial discretion may come into play: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).

[21] Sharon Stephan, *Extended Voluntary Departure and Other Blanket Forms of Relief from Deportation*, Congressional Research Service, 85-599 EPW, February 23, 1985.

[22] William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all OPLA Chief Counsel, October 24, 2005.

[23] *Ibid.*

meritorious health-related cases and caregiver issues."[24] Assistant Secretary Myers referenced and attached a November 7, 2000, memorandum entitled "Exercising Prosecutorial Discretion," which was written by former INS Commissioner Doris Meissner. The 2000 memorandum stated, in part:

> "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals."[25]

Meissner further stated that prosecutorial discretion should not become "an invitation to violate or ignore the law."[26]

The Meissner, Howard, and Myers memoranda provide historical context for the March 2011 memorandum on prosecutorial discretion written by ICE Director John Morton.[27] Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to civil immigration enforcement.[28] Under these guidelines, ICE's top three civil immigration enforcement priorities are to: (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,[29] and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.[30]

In a June 17, 2011 memorandum, Morton spells out 18 factors that are among those that should be considered in weighing prosecutorial discretion. The factors include those that might halt removal

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[24] Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion*, memorandum, November 7, 2007. CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel. (Hereafter CRS R42057, *Interior Immigration Enforcement.*)

[25] Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

[26] *Ibid.*

[27] John Morton, Director, Immigration and Customs Enforcement, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens*, memorandum, March 2, 2011.

[28] ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," http://www.ice.gov/about/overview/. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

[29] The memorandum does not define "recent illegal entrants." DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; and DHS policy is to pursue expedited removal proceedings against aliens who are determined to be inadmissible because they lack proper documents, are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, are encountered by an immigration officer within 100 miles of the U.S. border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States for over 14 days. See CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[30] CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

proceedings, such as whether the person's immediate relative is serving in the military, whether the person is a caretaker of a person with physical or mental disabilities, or whether the person has strong ties to the community. The factors Morton lists also include those that might prioritize a removal proceeding, such as whether the person has a criminal history, whether the person poses a national security or public safety risk, whether the person recently arrived in the United States, and how the person entered. At the same time, the memorandum states:

> "This list is not exhaustive and no one factor is determinative. ICE officers, agents and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."

The Morton memorandum would halt removal proceedings on those foreign nationals that are not prioritized for removal. The foreign nationals whose removals are halted in keeping with the Morton memorandum might be given deferred action or some other relief from removal. [31]

Deferred Action

In 1975, INS issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The INS Operating Instructions said that consideration should be given to advanced or tender age, lengthy presence in the United States, physical or mental conditions requiring care or treatment in the United States, and the effect of deportation on the family members in the United States. On the other hand, those INS Operating Instructions made clear that criminal, immoral or subversive conduct or affiliations should also be weighed in denying deferred action.[32] Today within DHS, all three of the immigration-related agencies—ICE, U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP)—possess authority to grant deferred action. A foreign national might be considered for deferred action at any stage of the administrative process.[33]

Because of where the foreign national may be in the process, ICE issuances of deferred action are more likely to be aliens who are detained or in removal proceedings. It is especially important to note, as mentioned above, that not all prosecutorial discretion decisions to halt removal proceedings result in a grant of deferred action to the foreign national. Voluntary departure, for example, might be an alternative outcome of prosecutorial discretion.[34]

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[31] John Morton, Director of Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention and Removal of Aliens*, memorandum to field office directors, special agents in charge, and chief counsels, June 17, 2011.

[32] Shoba Sivaprasad Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal*, Spring 2010.

[33] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol. 6, §72.03.

[34] Voluntary departure typically means that the alien concedes removability and departs the United States on his or her own recognizance, rather than with a final order of removal.

Other Forms of Deferred Departure

In addition to deferred action, which is granted on a case-by-case basis, the Administration may use prosecutorial discretion, under certain conditions, to provide relief from deportation that is applied as blanket relief.[35] The statutory authority cited by the agency for these discretionary procedures is generally that portion of the INA that confers on the Attorney General the broad authority for general enforcement and the section of the law covering the authority for voluntary departure.[36]

The two most common uses of prosecutorial discretion to provide blanket relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure (EVD).[37] The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate. Foreign nationals who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.

The executive branch has provided blanket or categorical deferrals of deportation numerous times over the years. CRS has compiled a list of these administrative actions since 1976 in **Appendix A**.[38] As the table indicates, most of these discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters. In many of these instances, Congress was considering legislative remedies for the affected groups, but had not yet enacted immigration relief for them. The immigration status of those who benefited from these deferrals of deportation often—but not always—was resolved by legislation adjusting their status (**Appendix A**).

Two Illustrative Examples

Several of the categorical deferrals of deportation that were **not** country-specific bear some similarities to the June 15, 2012 policy directive. Two examples listed in **Appendix A** are summarized below: the "Silva letterholders" class and the "family fairness" relatives. Both of these groups receiving discretionary relief from deportation were unique in their circumstances. While each group included many foreign nationals who would otherwise be eligible for LPR visas, they were supposed to wait in numerically-limited visa categories. These wait times totaled decades for many of them. Congress had considered but not enacted legislation addressing their situations. Ultimately, their cases were resolved by provisions folded into comprehensive immigration legislation.[39]

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[35] In addition to relief offered through prosecutorial discretion, the INA provides for Temporary Protected Status (TPS). TPS may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[36] §240 of INA, 8 U.S.C. §1229a; §240B, 8 U.S.C. §1229c.

[37] As TPS is spelled out in statute, it is not considered a use of prosecutorial discretion, but it does provide blanket relief from removal temporarily.

[38] **Appendix A** only includes those administrative actions that could be confirmed by copies of official government guidance or multiple published accounts. For example, reports of deferred action after Hurricane Katrina or the September 11, 2001, terrorist attacks could not be verified, though it seems likely that the Administration did provide some type of temporary reprieve.

[39] These policies and legal provisions pre-date the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (referenced above), which added substantial new penalties and bars for illegal presence in the United States.

The "Silva letterholders" were foreign nationals from throughout the Western Hemisphere who were in the United States without legal authorization. In 1976, the Attorney General opined that the State Department had been incorrectly charging the visas for Cuban refugees against the Western Hemisphere numerical limits from 1966 to 1976. A class action case named for Mr. Refugio Silva was filed to recapture the 145,000 LPR visas given to Cubans for foreign nationals with approved petitions from other Western Hemisphere nations. Apparently many of the aliens involved in the case were already in the country, out-of-status, even though they had LPR petitions pending. In other words, they had jumped the line. In 1977, the Attorney General temporarily suspended the expulsion while the class action case moved forward. Class members were allowed to apply for work authorization. Meanwhile, Congress passed amendments to the INA in 1978 that put the Western Hemisphere nations under the per-country cap, which further complicated their situation, by making visa availability more difficult for some but not all of the Western Hemisphere countries. The courts ruled for the Silva class, but the 145,000 recaptured visas were inadequate to cover the estimated 250,000 people who had received letters staying their deportation and permitting them to work. When the dependents of the Silva letterholders were included, the estimated number grew to almost half a million. Most of those in the Silva class who did not get one of the recaptured visas were ultimately eligible to legalize through P.L. 99-603, the Immigration Reform and Control Act (IRCA) of 1986.

Another example are the unauthorized spouses and children of aliens who legalized through IRCA. As Congress was debating IRCA, it weighed and opted not to provide a legalization pathway for the immediate relatives of aliens who met the requirements of IRCA unless they too met those requirements. As IRCA's legalization programs were being implemented, the cases of unauthorized spouses and children who were not eligible to adjust with their family came to the fore. In 1987, Attorney General Edward Meese authorized the INS district directors to defer deportation proceedings where "compelling or humanitarian factors existed." Legislation addressing this population was introduced throughout the 1980s, but not enacted. In 1990, INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA, dropping the where "compelling or humanitarian factors existed" requirement. At the time, McNary stated that an estimated 1.5 million unauthorized aliens would benefit from the policy. The new policy also allowed the unauthorized spouses and children to apply for employment authorizations. Ultimately, the Immigration Act of 1990 (P.L. 101-649) provided relief from deportation and employment authorization to them so they could remain in the United States until a family-based immigration visa became available. P.L. 101-649 also provided additional visas for the family-based LPR preference category in which they were waiting.

Legal Authority Underlying the June 15, 2012 Memorandum

The Secretary of Homeland Security would appear to have the authority to grant both deferred action and work authorization, as contemplated by the June 15 memorandum, although the basis for such authority is different in the case of deferred action than in the case of work authorization. The determination as to whether to grant deferred action has traditionally been recognized as within the prosecutorial discretion of immigration officers[40] and, thus, has been considered an inherent power of the executive branch, to which

[40] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (characterizing a grant of deferred action as within the prosecutorial discretion of immigration officers); Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 2 (listing "granting deferred action or staying a final order of removal" among the determinations in which immigration officers may exercise prosecutorial discretion).

the Constitution entrusts decisions about whether to enforce particular cases.[41] While it could perhaps be argued that decisions to refrain from fully enforcing a law might, in some instances, run afoul of particular statutes that set substantive priorities for or otherwise circumscribe an agency's power to discriminate among the cases it will pursue, or run afoul of the President's constitutional obligation to "take care" that the law is faithfully executed, such claims may not lend themselves to judicial resolution.[42] In contrast, when it enacted the Immigration Reform and Control Act of 1986, Congress delegated to the Attorney General (currently, the Secretary of Homeland Security) the authority to grant work authorization to aliens who are unlawfully present.[43]

Authority to Exercise Prosecutorial Discretion

The established doctrine of "prosecutorial discretion" provides the federal government with "broad" latitude in determining when, whom, and whether to prosecute particular violations of federal law.[44] The decision to prosecute is one that lies "exclusively" with the prosecutor.[45] This doctrine, which is derived from the Constitution's requirement that the President "shall take Care that the Laws be faithfully executed,"[46] has traditionally been considered to be grounded in the constitutional separation of powers.[47] Indeed, both federal and state courts have ruled that the exercise of prosecutorial discretion is an executive function necessary to the proper administration of justice. Thus, prosecutorial discretion may be appropriately characterized as a constitutionally-based doctrine.

Prosecutorial Discretion Generally

In granting discretion to enforcement officials, courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors—such as the strength of evidence, deterrence value, and existing enforcement priorities—"not readily susceptible to the kind of analysis the courts are competent to undertake."[48] Moreover, the Executive Branch has asserted that "because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress."[49]

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[41] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that the Attorney General and the United States Attorneys have wide latitude in enforcing federal criminal law because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'").

[42] *See infra* notes 66-85 and accompanying text.

[43] P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

[44] United States v. Goodwin, 457 U.S. 368, 380 (1982). *See also* Exercising Prosecutorial Discretion, *supra* note 40, at 2 (defining prosecutorial discretion as "the authority of an agency charged with enforcing a law to decide whether to enforce, or not enforce, the law against someone").

[45] *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the *Confiscation Cases*, 7 Wall. 454 (1869) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case…")).

[46] U.S. Const. art. II, §3 ("[H]e shall take Care that the Laws be faithfully executed…").

[47] *See, e.g.*, *Armstrong*, 517 U.S. at 464.

[48] Wayte v. United States, 470 U.S. 598, 607 (1985).

[49] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 114 (1984). This traditional conception, however, may have been qualified in some respects following the Supreme Court's decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an "independent counsel" under the Ethics in Government Act.[49] In sustaining the validity of the statute's (continued...)

An agency decision to initiate an enforcement action in the *administrative* context "shares to some extent the characteristics of the decision of a prosecutor in the executive branch" to initiate a prosecution in the *criminal* context.[50] Thus, just as courts are hesitant to question a prosecutor's decisions with respect to whether to bring a criminal prosecution, so to are courts cautious in reviewing an agency's decision not to bring an enforcement action. In the seminal case of *Heckler v. Cheney*, the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[51] The Court noted that agency enforcement decisions, like prosecution decisions, involve a "complicated balancing" of agency interests and resources—a balancing that the agency is "better equipped" to evaluate than the courts.[52] The *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-enforcement decisions, holding that an "agency's decision not to take enforcement action should be presumed immune from judicial review."[53] That presumption however, may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"[54] as is discussed below.

Prosecutorial Discretion in the Immigration Context

In *Reno v. American-Arab Anti-Discrimination Committee*, a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"[55] which entails civil (rather than criminal) proceedings. While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,[56] the Court's language is broad and arguably can be construed to

(...continued)

appointment and removal conditions, the Court suggested that although the independent counsel's prosecutorial powers—including the "no small amount of discretion and judgment [exercised by the counsel] in deciding how to carry out his or her duties under the Act"—were executive in that they had "typically" been performed by Executive Branch officials, the court did not consider such an exercise of prosecutorial power to be "so central to the functioning of the Executive Branch" as to require Presidential control over the independent counsel. 487 U.S. 654 (1988). While the ultimate reach of *Morrison* may be narrow in that the independent counsel was granted only limited jurisdiction and was still subject to the supervision of the Attorney General, it does appear that Congress may vest certain prosecutorial powers, including the exercise of prosecutorial discretion, in an executive branch official who is independent of traditional presidential controls.

[50] Heckler v. Cheney, 470 U.S. 821, 832 (1985).

[51] *Id.* at 831. Accordingly, such decisions are generally precluded from judicial review under the Administrative Procedure Act (APA). 5 U.S.C. §701 (establishing an exception to the APA's presumption of reviewability where "agency action is committed to agency discretion by law.").

[52] *Heckler*, 470 U.S. at 831.

[53] *Id.* at 832.

[54] *Id.* at 833.

[55] 525 U.S. 471, 490 (1999). *See also* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (noting that immigration is a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").

[56] Specifically, the Court noted that any delays in criminal proceedings caused by judicial review of exercises of prosecutorial discretion would "merely … postpone the criminal's receipt of his just desserts," while delays in removal proceedings would "permit and prolong a continuing violation of United States law," and could potentially permit the alien to acquire a basis for changing his or her status. *Reno*, 525 U.S. at 490. The Court further noted that immigration proceedings are unique in that they can implicate foreign policy objectives and foreign-intelligence techniques that are generally not implicated in criminal (continued...)

encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning 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."[57] According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of … individual case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on … international relations."[58]

In addition to such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion afforded first to INS and, later, the immigration components of DHS. These decisions include:

- whether to parole an alien into the United States;[59]
- whether to commence removal proceedings and what charges to lodge against the respondent;[60]
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests in an immigration judge;[61]
- whether to grant deferred action or extended voluntary departure;[62]
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;[63] and
- whether to impose a fine for particular offenses.[64]

The recognition of immigration officers' prosecutorial discretion in granting deferred action is arguably particularly significant here, because the June 15 memorandum contemplates the grant of deferred action to aliens who meet certain criteria (e.g., came to the United States under the age of sixteen).

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proceedings. *Id.* at 491. It also found that the interest in avoiding selective or otherwise improper prosecution in immigration proceedings, discussed below, is "less compelling" than in criminal proceedings because deportation is not a punishment and may be "necessary to bring to an end *an ongoing violation* of United States law." *Id.* (emphasis in original).

[57] No. 11-182, Opinion of the Court, slip op. at 4-5 (June 25, 2011). Justice Scalia's dissenting opinion, in contrast, specifically cited the June 15 memorandum when asserting that "there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift." Opinion of Scalia, J., slip op., at 19 (June 25, 2011).

[58] No. 11-182, Opinion of the Court, slip op. at 4-5.

[59] *See, e.g.*, Matter of Artigas, 23 I. & N. Dec. 99 (2001).

[60] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012).

[61] *See, e.g.*, Matter of G-N-C, 22 I. & N. Dec. 281 (1998).

[62] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (deferred action); Hotel & Rest. Employees Union Local 25 v. Smith, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988), *aff'g*, 563 F. Supp. 157 (D.D.C. 1983) (extended voluntary departure).

[63] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012); Matter of York, 22 I. & N. Dec. 660 (1999).

[64] *See, e.g.*, Matter of M/V Saru Meru, 20 I. & N. Dec. 592 (1992).

Limitations on the Exercise of Prosecutorial Discretion

While the executive branch's prosecutorial discretion is broad, it is not "unfettered,"[65] and has traditionally been exercised pursuant to individualized determinations. Thus, an argument could potentially be made that the permissible scope of prosecutorial or enforcement discretion is exceeded where an agency utilizes its discretion to adopt a broad policy of non-enforcement as to particular populations in an effort to prioritize goals and maximize limited resources. It would appear, especially with respect to agency enforcement actions, that the invocation of prosecutorial discretion does not create an absolute shelter from judicial review, but rather is subject to both statutory and constitutional limitations.[66] As noted by the U.S. Court of Appeals for the District of Columbia Circuit: "the decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness."[67] While it is apparent, then, that the exercise of prosecutorial discretion is subject to certain restrictions, the precise boundaries beyond which the executive may not cross remain unclear. Moreover, even if existing statutory or constitutional restrictions were conceivably applicable to the June 15 memorandum, standing principles would likely prevent judicial resolution of any challenge to the memorandum on these grounds.[68]

Potential Statutory Limitations on the Exercise of Prosecutorial Discretion

With respect to statutory considerations, the presumption following the Supreme Court's decision in *Heckler v. Cheney* has been that agency decisions not to initiate an enforcement action are unreviewable. However, *Heckler* expressly held that this presumption against the reviewability of discretionary enforcement decisions can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[69] Consistent with *Heckler*, a court may be willing to review a broad agency non-enforcement policy where there is evidence that Congress intended to limit enforcement discretion by "setting substantive priorities, or by otherwise circumscribing the agency's power to discriminate among issues or cases it will pursue."[70] The *Heckler* opinion also suggested that scenarios in which an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" may be subject to a different standard of review.[71]

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[65] United States v. Batchelder, 442 U.S. 114, 125 (1979).

[66] Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) ("It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.")

[67] *Id.* at 679 (citing *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970)).

[68] In order to satisfy constitutional standing requirements, a prospective plaintiff must have suffered a personal and particularized injury that is "fairly traceable" to the defendant's conduct and is likely to be redressed by the relief requested from the court. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984). It is difficult to envision a potential plaintiff who has been adequately injured by the issuance of the June 15 memorandum such that the individual could satisfy the Court's standing requirements. Standing is a threshold justiciability requirement. Thus, unless a plaintiff can attain standing to challenge the DHS directive, it would not appear that a court would have the opportunity to evaluate the directive's validity.

[69] 470 U.S. 821, 833 (1985).

[70] *Id.*

[71] *Id.* at 833 n.4 ("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. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable (continued...)

Reviewability of the policy underlying the June 15 memorandum might, however, be limited even under a broad reading of *Heckler*, in part, because the INA does not generally address deferred action,[72] much less provide guidelines for immigration officers to follow in exercising it. Some commentators have recently asserted that amendments made to Section 235 of the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removed immigration officers' discretion as to whether to bring removal proceedings against aliens who unlawfully entered the United States.[73] Specifically, this argument holds that, pursuant to Section 235, as amended:

1) any alien present in the United States who has not been admitted (i.e., aliens who entered unlawfully) "shall be deemed … an applicant for admission;"

2) all aliens who are applicants for or otherwise seeking admission "shall be inspected by immigration officers;" and

3) in the case of an alien who is an applicant for admission, if the examining immigration officer determines that the alien is not clearly and beyond a doubt entitled to be admitted, the alien "shall be detained" for removal proceedings.[74]

It appears, however, that this argument may have been effectively foreclosed by the majority opinion in *Arizona*, where the Supreme Court expressly noted the "broad discretion exercised by immigration officials" in the removal process.[75] Moreover, the argument apparently relies upon a construction of the word "shall" that has generally been rejected in the context of prosecutions and immigration enforcement actions.[76] Rather than viewing "shall" as indicating mandatory agency actions, courts and the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration law in removal cases, have instead generally found that prosecutors and enforcement officers

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under §701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not `committed to agency discretion.'").

[72] The INA uses the phrase "deferred action" only three times, in very specific contexts, none of which correspond to the proposed grant of deferred action contemplated by the June 15 memorandum. *See* 8 U.S.C. §1151 note (addressing the extension of posthumous benefits to certain surviving spouses, children, and parents); 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("Any [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."); 8 U.S.C. §1227(d)(2) (providing that the denial of a request for an administrative stay of removal does not preclude the alien from applying for deferred action, among other things). However, INS and, later, DHS policies have long addressed the use of deferred action in other contexts on humanitarian grounds and as a means of prioritizing cases. *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 821 (2004) (discussing a 1970's INA Operations Instruction on deferred action). This Instruction was rescinded in 1997, but the policy remained in place. *See, e.g.*, Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 6-72 IMMIGR. L. & PROC. §72.03 (2012).

[73] *See, e.g.*, Kris W. Kobach, *The "DREAM" Order Isn't Legal*, NEW YORK POST, June 21, 2012, http://www.nypost.com/p/news/opinion/opedcolumnists/the_dream_order_isn_legal_4WAYaqJueaEK6MS0onMJCO.

[74] Arizona v. United States, No. 11-182, *Amicus Curiae* Brief of Secure States Initiative in Support of Petitioners, at 8-9 (quoting 8 U.S.C. §1225(a)(1), (a)(3), and (b)(2)(A)).

[75] No. 11-182, Opinion of the Court, slip op. at 4-5.

[76] *Cf.* Exercising Prosecutorial Discretion, *supra* note 40, at 3 ("[A] statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion.").

retain discretion to take particular actions even when a statute uses "shall" or "must" when discussing these actions.[77]

It is also unclear that the actions contemplated by the June 15 memorandum conflict with any substantive priorities set by Congress, or are "so extreme as to amount to an abdication" of DHS's responsibilities under the INA. For example, it appears that an argument could potentially be made to the contrary that the policy comports with the increased emphasis that Congress has placed upon the removal of "criminal aliens" with amendments made to the INA by IRCA, IIRIRA, and other statutes.[78] The June 15 memorandum expressly excludes from eligibility for deferred action persons who have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors,[79] thereby potentially allowing immigration officers to focus their enforcement activities upon the "criminal aliens" who were identified as higher priorities for removal in earlier Obama Administration guidance on prosecutorial discretion.[80] In addition, Congress has funded immigration enforcement activities at a level that immigration officials have indicated is insufficient for the removal of all persons who are present in the United States without authorization. This level of funding figures prominently in the Obama Administration's rationale for designating certain aliens as lower priorities for removal,[81] and could potentially be said to counter any assertion that the Obama Administration's policy amounts to an "abdication" of its statutory responsibilities.

Potential Constitutional Limitations on the Exercise of Prosecutorial Discretion

With respect to constitutional considerations, it is clear that executive branch officials may not exercise prosecutorial discretion in a manner that is inconsistent with established constitutional protections or other constitutional provisions. Selective prosecution cases commonly illustrate such an abuse of prosecutorial discretion. These cases typically arise where certain enforcement determinations, such as whether to prosecute a specific individual, are made based upon impermissible factors, such as race or religion.[82] A separate constitutional argument may be forwarded, however, in situations where the

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[77] *See, e.g.*, Matter of E-R-M & L-R-M, 25 I. & N. Dec. 520, 523 (2011) (finding that determinations as to whether to pursue expedited removal proceedings (as opposed to removal proceedings under Section 240 of the INA) are within ICE's discretion, even though the INA uses "shall" in describing who is subject to expedited removal). The Board here specifically noted that, "in the Federal criminal code, Congress has defined most crimes by providing that whoever engages in certain conduct 'shall' be imprisoned or otherwise punished. But this has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute." *Id.* at 522.

[78] *See, e.g.*, IRCA, P.L. 99-603, §701, 100 Stat. 3445 (codified, as amended, at 8 U.S.C. §1229(d)(1)) (making the deportation of aliens who have been convicted of certain crimes an enforcement priority by requiring immigration officers to "begin any deportation proceeding as expeditiously as possible after the date of … conviction"); IIRIRA, P.L. 104-208, div. C, 110 Stat. 3009-546 to 3009-724 (expanding the definition of "aggravated felony," convictions for which can constitute grounds for removal, and creating additional criminal grounds for removal).

[79] Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[80] *See, e.g.*, John Morton, Director, U.S. ICE, Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, at 1-2, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[81] *Id.*, at 1 (estimating that ICE has resources to remove annually less than four percent of the noncitizens who are in the United States without authorization).

[82] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding that a decision may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). *But see Reno*, 525 U.S. at 488 ("[A]s a general matter … an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his (continued...)

executive branch has, in effect, broadly refused to enforce a duly enacted statute by implementing a blanket ban on enforcement such that the agency has "expressly adopted a general policy which is in effect an abdication of its statutory duty."[83] By refusing to fully enforce certain aspects of a statutory provision, such an action may exceed the permissible scope of prosecutorial discretion and violate the President's duty that the "laws be faithfully executed."[84] However, CRS was unable to find a single case in which a court invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care clause. Moreover, it is unclear whether the June 15 memorandum would constitute an absolute non-enforcement policy so as to amount to an "abdication" of a statutory obligation, as discussed previously. Though establishing a department-wide policy regarding a group of individuals who meet certain criteria, the directive suggests that the listed criteria should be "considered" in each individual case. Thus, the directive could be interpreted as setting forth criteria for consideration in each individual exercise of prosecutorial discretion, rather than implementing a ban on deportation actions for qualified individuals.[85]

Authority to Grant Work Authorization

The INA grants the Secretary of Homeland Security arguably wide latitude to issue work authorization, including to aliens who are unlawfully present. Since the enactment of IRCA in 1986, federal law has generally prohibited the hiring or employment of "unauthorized aliens."[86] However, the definition of "unauthorized alien" established by IRCA effectively authorizes the Secretary to grant work authorization to aliens who are unlawfully present by defining an "unauthorized alien" as one who:

> with respect to the employment of an alien at a particular time, ... is not either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General [currently, Secretary of Homeland Security].[87]

Regulations promulgated by INS and DHS further provide that aliens who have been granted deferred action and can establish an "economic necessity for employment" may apply for work authorization.[88]

When first promulgated in 1987,[89] these regulations were challenged through the administrative process on the grounds that they exceeded INS's statutory authority.[90] Specifically, the challengers asserted that

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deportation.").

[83] *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

[84] U.S. Const. art. II, §3.

[85] As is discussed elsewhere in this memorandum, there have been other instances where deferred action or extended voluntary departure was granted to individuals who were part of a more broadly defined group (e.g., persons from Nicaragua, surviving spouses and children of deceased U.S. citizens, victims and witnesses of crimes).

[86] *See* 8 U.S.C. §§1324a-1324b.

[87] 8 U.S.C. §1324a(h)(3).

[88] 8 C.F.R. §274a.12(c)(14). Under these regulations, the "basic criteria" for establishing economic necessity are the federal poverty guidelines. *See* 8 C.F.R. §274a.12(e).

[89] *See* INS, Control of Employment of Aliens: Final Rule, 52 Fed. Reg. 16216 (May 1, 1987).

[90] INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (Dec. 4, 1987) (denying a petition for rulemaking submitted by the Federation for American Immigration Reform, which sought the rescission of certain regulations pertaining to employment authorization for aliens in the United States).

the statutory language referring to aliens "authorized to be … employed by this chapter or by the Attorney General" did not give the Attorney General authority to grant work authorization "except to those aliens who have already been granted specific authorization by the Act."[91] Had this argument prevailed, the authority of INS and, later, DHS to grant work authorization to persons granted deferred action would have been in doubt, because the INA does not expressly authorize the grant of employment documents to such persons. However, INS rejected this argument on the grounds that the:

> only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[92]

Subsequent case law has generally affirmed that immigration officials have broad discretion in determining whether to deny or revoke work authorizations to persons granted deferred action, or in other circumstances.[93] These cases would appear to suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria (e.g., economic necessity) are met.

Corollary Policy Implications: Access to Federal Benefits

Many observers characterize foreign nationals with relief from removal who obtain temporary work authorizations as "quasi-legal" unauthorized migrants.[94] They may be considered "lawfully present" for some very narrow purposes under the INA (such as whether the time in deferred status counts as illegal presence under the grounds of inadmissibility) but are otherwise unlawfully present. Foreign nationals to whom the government has issued temporary employment authorization documents (EADs) may legally obtain social security numbers (SSNs).[95] Possession of a valid EAD or SSN issued for temporary employment, however, does not trigger eligibility for federal programs and services. In other words, foreign nationals who are granted deferred action may be able to work but are not entitled to federally-funded public assistance, except for specified emergency services.[96]

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[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Perales v. Casillas, 903 F.2d 1043, 1045 (5th Cir. 1990) ("[T]he agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law."); Chan v. Lothridge, No. 94-16936, 1996 U.S. App. LEXIS 8491 (9th Cir. 1996) (finding that INS did not abuse its discretion in denying interim work authorization to the petitioner while his application for asylum was pending); Kaddoura v. Gonzales, No. C06-1402RSL, 2007 U.S. Dist. LEXIS 37211 (W.D. Wash. 2007) (finding that the court lacked jurisdiction to hear a suit seeking to compel U.S. Citizenship and Immigration Services to grant work authorization because such actions are discretionary acts).

[94] The "quasi-legal" unauthorized aliens fall in several categories. The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS). They have sought asylum in the United States and their cases have been pending for at least 180 days. They are immediate family or fiancées of LPRs who are waiting in the United States for their legal permanent residency cases to be processed. Or, they have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs. These are circumstances in which DHS issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States.

[95] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[96] CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the eligibility of all noncitizens for means-tested public assistance, with exceptions for LPRs with a substantial U.S. work history or military connection. Regarding unauthorized aliens, Section 401 of PRWORA barred them from any federal public benefit except the emergency services and programs expressly listed in Section 401(b) of PRWORA. This overarching bar to unauthorized aliens hinges on how broadly the phrase "federal public benefit" is implemented. The law defines this phrase to be

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[97]

So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation.

Thus, beneficiaries of the June 15, 2012 policy directive will be among those "quasi-legal" unauthorized migrants who have EADs and SSNs—but who are not otherwise authorized to reside in the United States.

[97] §401(c) of PRWORA, 8 U.S.C. §1611.

Appendix. Past Administrative Directives on Blanket or Categorical Deferrals of Deportation

Selected Major Directives, 1976-2011

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1976	Extended voluntary departure (EVD) for Lebanese on a case-by-case basis	Otherwise deportable Lebanese in the United States.	NA	Lebanese received TPS from 1991 to 1993.
1977	EVD for Ethiopians	Otherwise deportable Ethiopians in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by the Immigration Reform and Control Act (IRCA) of 1986 to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ethiopians.
1977	The Attorney General temporarily suspended the expulsion of certain natives of Western Hemisphere countries, known as the "Silva Letterholders." They were granted stays and permitted to apply for employment authorization.	A group of aliens with approved petitions filed a class action lawsuit to recapture about 145,000 visas assigned to Cubans.	250,000	Many of these cases were not resolved until the passage of IRCA.
1978	EVD for Ugandans	Otherwise deportable Ugandans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ugandans.
1979	EVD for Nicaraguans	Otherwise deportable Nicaraguans in the United States.	NA	EVD ended in September 1980.
1979	EVD for Iranians	Otherwise deportable Iranians in the United States.	NA	EVD ended in December 1979, and they were encouraged to apply for asylum.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1980	EVD for Afghans	Otherwise deportable Afghans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Afghans.
1984	EVD for Poles	Otherwise deportable Poles in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Poles.
1987	Memorandum from Attorney General Edward Meese directing the Immigration and Naturalization Service (INS) not to deport any Nicaraguans and to grant them work authorizations.	Nicaraguans who demonstrated a "well-founded fear of persecution," who had been denied asylum, or had been denied withholding of deportation.	150,000 to 200,000	Legislation to grant stays of deportation to Nicaraguans as well as Salvadorans had received action by committees in both chambers during the 1980s. Congress ultimately enacted legislation legalizing the Nicaraguans, the Nicaraguan Adjustment and Central American Relief Act (P.L. 105-100).
1987	Attorney General Edward Meese authorized INS district directors to defer deportation proceedings of certain family members of aliens legalized through IRCA.	This policy directive applied where "compelling or humanitarian factors existed" in the cases of families that included spouses and children ineligible to legalize under IRCA.	NA	Legislation to enable the immediate family of aliens legalized through IRCA to also adjust status had been introduced. (See 1990 "Family Fairness" directive below.)
1989	Attorney General Richard Thornburgh instructed INS to defer the enforced departure of any Chinese national in the United States through June 6, 1990.	Chinese nationals whose nonimmigrant visas expired during this time were to report to INS to benefit from this deferral and to apply, if they wished, for work authorizations.	80,000	Legislation that included provisions to establish Temporary Protected Status (TPS) was moving through Congress at that time.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1990	Executive Order 12711 of April 11, 1990, provided temporary protection for certain nationals of the People's Republic of China (PRC) and their dependents. It permitted temporary deferral of enforcement of the departure from the United States and conferred eligibility for certain other benefits through January 1, 1994.	Chinese nationals and dependents who were in the U.S. on or after June 5, 1989, up to and including the date of Executive Order 12711.	80,000	The Chinese Student Protection Act of 1992 (CSPA) (P.L. 102-404) enabled Chinese with deferred enforced departure to become lawful permanent residents.
1990	INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA. The policy dropped the where "compelling or humanitarian factors existed" requirement and allowed the family members to apply for employment authorizations.	Unauthorized spouses and children of aliens legalized under IRCA.	1.5 million	P.L. 101-649 provided relief from deportation and employment authorization to an eligible alien who was the spouse or unmarried child of a legalized alien holding temporary or permanent residence pursuant to IRCA.
1991	Presidential directive to Attorney General instructing him to grant deferred enforced departure to Persian Gulf evacuees who were airlifted to the United States after the invasion of Kuwait in 1990	Aliens who had U.S. citizen relatives or who harbored U.S. citizens during the invasion, largely persons originally from Palestine, India, and the Philippines.	2,227	It is not clear how these cases were handled.
1992	President George H.W. Bush instructed the Attorney General to grant deferred enforced departure (DED) to Salvadorans	Unauthorized Salvadorans who had fled the civil war in the 1980s.	190,000	Congress had passed a law in 1990 giving Salvadorans TPS for 18 months.
1997	President William J. Clinton instructed the Attorney General to grant DED to Haitians for one year.	Haitians who were paroled into the United States or who applied for asylum before December 1, 1995.	40,000	Haitians had been provided TPS from 1993-1997. Legislation enabling Haitians to adjust their status passed at the close of the 105th Congress (P.L. 105-277) in 1998.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1997	INS General Counsel Paul Virtue issues guidelines for deferred action for certain foreign nationals who might gain relief through the Violence Against Women Act.	Battered aliens with approved LPR self-petitions, and their derivative children listed on the self-petition.	NA	Regulations to implement the U visa portions of P.L. 106-386 were promulgated in 2007.
1998	Attorney General Janet Reno temporarily suspended the deportation of aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	Unauthorized aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	NA	This relief was provided in response to Hurricane Mitch. Guatemalans and Salvadorans had their stays of removal extended until March 8, 1999. TPS was given to Hondurans and Nicaraguans.
1999	President William J. Clinton instructed the Attorney General to grant DED to Liberians for one year.	Liberian nationals with TPS who were living in the United States.	10,000	Liberians had been provided TPS from 1991 through 1999; they were given TPS again in 2002.
2007	President George W. Bush directed that DED be provided to Liberians whose TPS expired.	Liberian nationals who had lived in the United States since October 1, 2002, and who had TPS on September 30, 2007.	3,600	
2011	President Barack Obama extended Liberian DED through March 2013.			

Source: CRS review of published accounts, archived CRS materials, and government policy documents.

Notes: Excludes aliens with criminal records or who "pose a danger to national security." *Estimated Number* refers to estimated number of beneficiaries at time of issuance of directive. *NA* means "not available." Other countries whose nationals had some form of deferred deportation prior to 1976 include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam.

Ms. LOFGREN. And I think that is an important issue because I think you, sir, and also Mr. Dupree have indicated that prior grants of relief were related to the President's inherent foreign policy position, and that is clearly—hasn't been the case for many decades.

Finally—well, I guess it is not finally because I don't want to be corrected by my colleague from California, but I am sorry that Mr. Rotunda has had to leave because I did want to comment on a couple of the points that he made. He mentioned that the—and I have lost my notes here. Now let me go to you, Mr. Dupree.

You mentioned in your written testimony a former head of the Office of Legal Counsel under President Clinton, and we researched who was that person, and it turns out, unless there were two individuals who made the exact same comment, that it was Walter Dellinger. And it occurred to me that, although you are quoting him, Mr. Dellinger is 1 of the 10 legal scholars who has written to us saying that although they differ on the merits of immigration reform, they do not disagree on the power of the President and that they have reached the opinion that the President's action most recently are completely lawful and consistent with governing law and with the policies that Congress has expressed in the statutes that it has enacted.

In fact, when he was making the Take Care Clause comment, it was in reference to a request or an opinion regarding whether the Constitution limits the authority of the Federal Government to submit to binding arbitration. And the OLC opinion concluded that there was no such constitutional prohibition. As the Supreme Court in *Heckler v. Chaney* had indicated, the faithful execution law does not necessarily entail acting against each technical violation of the statute, but the case cited really has nothing to do, in my judgment, with the points that you are making relative to the immigration matter.

I am wondering, since we only provide sufficient funds to deport about 4 percent of the undocumented population a year, and since the statute itself charges the Homeland Security secretary to establish national immigration enforcement policies and priorities, how would it lead you to a conclusion that establishing those priorities to fit within the funding made available would somehow be impermissible? Mr. Dupree.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent that the gentlelady be granted 2 additional minutes.

Ms. LOFGREN. Mr. Dupree.

Mr. MARINO. One minute.

Mr. DUPREE. Congresswoman, my view is that there is no question that the executive and Department of Homeland Security have the constitutional power to set enforcement priorities. In my view, the setting of enforcement priorities is inherent in the concept of discretion, and it is something that is committed by our Congress to the executive. Where I think that President Obama has gone awry is, number one, in indicating that he essentially is going to abandon enforcement as to a very significant percentage of the affected population, and number two is that this really goes beyond a mere statement of saying, We are not going to remove you. This amounts to a determination that will enable potentially 5 million

people to claim benefits under Federal law, so it is more than just——

Ms. LOFGREN. If I may. There are no benefits, and I would like to thank Mr. Sekulow. We don't agree on the constitutional question, but you do note that section 274A(h)(3) of the Immigration Nationality Act does apply——

Mr. MARINO. Congresswoman's time has expired.

Ms. LOFGREN. May I ask unanimous consent to put some things into the record, please?

Mr. MARINO. Yes, I was going to ask you that, if you wanted to put some documents in.

Ms. LOFGREN. I would ask unanimous consent to put the following statements into the record: Statements by the National Hispanic Christian Leadership Conference; the Lutheran Immigration Refugee Service; the Episcopal Church; the Church World Service; the AFL/CIO; the American Federation of State, County, and Municipal Employees; the American Federation of Teachers; the Asian Pacific American Labor Alliance; Bend the Arc; the Coalition of Black Trade Unionists; the Economic Policy Institute; the Communications Workers of America; Jobs With Justice; the Labor Council for Latin American Development; the Laborers International Union of North America; the National Education Association, the United Auto Workers; the United Food and Commercial Workers International Union; the United Steelworkers; Asian Americans Advancing Justice; the American Civil Liberties Union; the American Immigration Council; the American Immigration Lawyers Association; Appleseed; Common Cause; Farm Worker Justice; Fair Immigration Reform Movement; the Latino Victory Project; Latino American Working Group; the National Council of La Raza; One America; and We Belong Together; along with 10 stories compiled by United We Dream.

Mr. MARINO. Without objection, those documents will be entered for the record.***

Mr. MARINO. The Chair now recognizes the Congressman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Sekulow, you are familiar with the *Youngstown v. Ohio* case.

Mr. SEKULOW. Yes.

Mr. ISSA. Is there any question in anyone's mind whether or not the basic question of the President is relying on his constitutional authority and not on any statutory authority in this case?

Mr. SEKULOW. Well, he believes he is relying on his constitutional authority. Under *Youngstown Steel*, I don't think he meets that standard at all. It would be at the lowest ebb they said.

Mr. ISSA. But presuming that he does.

Mr. SEKULOW. Yeah.

Mr. ISSA. Presuming that he is relying, clearly not on the intent of Congress—clearly when he talks about work permits and so on, going well beyond any statutory visas that exist, he has only his constitutional authority. So let me ask a series of questions, and I will first ask it to you and then the other witnesses.

***The submissions referred to are not printed in this hearing record but are on file with the Committee. A list of this these submissions is also available in the Appendix on page 189.

Mr. SEKULOW. Okay.

Mr. ISSA. If the President decided to expand his current definition to include all persons with health issues, would there be any difference in that basis? If he decided—and I will go through a quick series. If he decided that any person who had a means of support, any person who had gainful employment, any person who had a life-threatening disease, any person who was unable to find a job in their home country, any person who in fact had been here more than 5 years, period, wouldn't all of those arbitrary categories be just as binding and just as legitimate as the one that he has created in order to create roughly 5 million or almost half of all illegals becoming legal?

Mr. SEKULOW. If the President's constitutional analysis was correct, that would be correct, Mr. Chairman.

Mr. ISSA. So if we allow this authority to be left unchecked, the President could at any time pick any category, any group of people, and allow them all to stay here, simply under the basis that he created a list of requirements that if they met them, they could stay.

Mr. SEKULOW. Yes. And under his theory, at any time, he could change his mind the next day and say, now you all have to leave. That is the problem.

Mr. ISSA. And let's go into that because I think for all of you, I want this question. Back in 2003, I authored the Alien Accountability Act. That allowed for a 6-year hiatus in deportation of any individuals who came forward, voluntarily submitted themselves, and stood up for a procedure in which they would only be guaranteed a temporary work permit if they could show that they were gainfully employed, and then they would be subject at the end of the 6 years, if were not renewed by some other work permit, to then leave.

The interesting thing about that was it looks a lot like the President's act. The difference, of course, is that it would have lasted for more than just the President's time, but in this case, when the President's term expires, the next President can be just as arbitrary, or even this President, as you said, could be just as arbitrary.

Mr. SEKULOW. Right

Mr. ISSA. So the reason I couldn't get a single Democratic cosponsor, including my good friend Howard Berman when he was here, was that the interest groups that were just named by my colleague from California all said they will never sign up for this because in fact they would come out of the shadows, expose themselves, and at any time could be deported.

From a practical standpoint, are there two truisms, which is, one, if you could name this category as broadly as you do, can't you name any category?

Mr. SEKULOW. Yes.

Mr. ISSA. And, two, if in fact you want people to come out and disclose themselves, on what basis would this lack of full force of binding agreement for more than the whim of the President's next morning coffee, why would this cause people to actually come out from the shadow?

Lastly, the gentlelady, I want to know if in fact, if people don't come from the shadows under this act, has the President still given

them complete immunity, or is this contingent in any way on whether or not they turn themselves in because that is something the President hasn't said? If somebody hasn't signed up within the period he specified, would they then be subject to deportation? I will get to you last.

But please, Mr. Sekulow, I know I gave you a lot of questions, but the questions I have are broader than the answers the President gave.

Mr. SEKULOW. Well, I would point to the Administration's justification under the OLC document where they say that ultimately that the only way that this is constitutional is that it is revokable at any time and your proposal, your legislation, which would have been based on law if passed, would have had a concrete, not only constitutional, but a statutory basis upon which to respond to a real situation.

What the President has done—that is why I said if I am the lawyer representing some of these clients, I would be very hesitant to say come out of the shadows under the whim of what could be changed literally the next day. There is no guarantee in this whatsoever. This does not solve the serious problem that we have in this country on immigration.

Mr. ISSA. Okay. And then probably the second question just because my time has expired.

Mr. MARINO. Quickly please, because the Congressman's times has expired, but go ahead and answer the question

Ms. HINCAPIÉ. Sure. So——

Mr. ISSA. But I do have 1,200 unanimous consent requests coming up, too. No, just kidding. Please.

Ms. HINCAPIÉ. So if people—if I understand the question, Congressman, if people don't come forward, will they still be subject to deportation; is that correct?

Mr. ISSA. If somebody is apprehended not having signed up under the President's plan, he is silent on the question of is Homeland Security simply going to ignore them, or is it contingent on signing up because the President implied that it was contingent on signing up, but I could find nothing in his order that actually convinced me that it was?

Ms. HINCAPIÉ. So assuming that if somebody doesn't come—let's say it is a parent of a U.S. citizen child and they for whatever reason don't come forward and they later——

Mr. ISSA. Like they are smart and know that it is arbitrary and could be gotten rid of at any time.

Ms. HINCAPIÉ. They are deemed 9 months from now to say—and they are potentially subject to deportation. They may be considered a lower level priority, so the immigration agents maybe in your district, for example, may decide, no, this is a parent of a U.S. child, I am not going to deport the because I have got somebody who is a national security threat. So those discretionary decisions will be made on a day-by-day basis individualized on an ongoing just as they were before——

Mr. ISSA. But in the case of DACA, the discretion never sent anyone out, right?

Mr. MARINO. The gentleman's time has expired.

The Chair now recognizes Congresswoman Jackson Lee from Texas.

Ms. JACKSON LEE. As I said earlier this morning, in another hearing on this topic, I thank in this instance the Chairman and Ranking Member for an important discussion that is the responsibility of the United States Congress. And, in that discussion, I think it is well clear that different opinions are to be presented.

I also think it is important for the record for many who are not members of this panel to understand that when a particular party is in the majority, it gives them the right to have the dominant opinion on the panel. The three persons arguing against the Executive order are only reflective of the opinion of the majority. They are not reflective of the broad base of legal thought across America.

I represent to you that there are now 135 law professors and others of prominent law schools from Harvard to Columbia to Washington University to individuals from various law firms, prominent who completely disagree with the remaining two members of the panel, which I hope gives us a basis for making an intelligent decision which really speaks to what all of us would like to do is to have legislation passing comprehensive immigration reform.

But my dear friends who are there who I thank for being here are not the final statement. They are a representative sample of the opposition. We have exactly one witness and those of us who have a different perspective. So I would like to quickly put into the record a statement from Dr. Sharon Stanley-Rae, Christian Church Disciples. I come from it from a humanitarian perspective. I think the executive order is narrowly drawn, but she says, I come with hands full of faith statements like my own from dozens of faith communities that repeatedly name our values for people over politics, community safety over partisan strategies, family unity and welcome over fears of foreigners and humanitarian compassion for children and families above rhetoric and rank.

I ask unanimous consent to put her entire statement in the record.

Mr. MARINO. Without objection.

[The information referred to follows:]

Equipping Disciples for Christ

Disciples Home Missions Responds to the President's "Immigration Accountability Executive Action"

As a faith movement deeply committed to fulfilling our biblical call to welcome the stranger and live out God's challenge that "the alien who resides with you shall be to you as the citizen among you" (Leviticus 19:34), the Christian Church (Disciples of Christ) commends the President's important step to grant relief to nearly 5 million immigrants who have lived in the United States for a significant period of time, invested in their local communities, and grown their families among us. By doing so, the President joined every U.S. President since 1956 in using his authority to offer temporary relief to vulnerable immigrants.

Born from a movement on the American frontier, and founded on the principles that all are welcome at the Table of Christ, Disciples throughout our history have had specific ministries of hospitality to immigrants coming to the United States and Canada, which have been carried out by congregations, regions, and general ministries. Family unity remains a core faith value, and we have seen for far too long how separations through detention and deportations cause wrenching pain, and diminish the ability for families to focus upon education, progress, and contributions to our society. With the President's announcement, we recognize how up to 5 million lives from suffering families will now find new hope.

Within our own Disciples family of congregations and communities, we celebrate how the President's executive actions will allow a young woman who was previously excluded from DACA because she'd arrived in 2008 to now be eligible to apply for the expanded program. The "Deferred Action for Parents" program will now allow a mother to find relief who has served behind the scenes in one of our churches for over 20 years, has single-handedly put her older daughter through college, and has a younger daughter in the Navy. We are thankful for protections given to undocumented parents of U.S. citizen children who have lived and paid taxes in the U.S. for so many years. And we are grateful for ways some of our immigrant church leaders are now able to obtain the stability they have sought throughout long seasons of service to God and their neighbors. We appreciate how individuals such as these are contributors, not threats, to our communities.

While we celebrate much in the President's announcement, we likewise grieve for those nearly 6 million immigrants left outside of relief. We have special concern for individuals who do not have U.S. citizen or lawful permanent resident children—including many parents of current DACA recipients, and others who entered the U.S. to be unified with their families here. Our historic partnerships with farm workers leave us seeking additional help for the remaining hundreds of thousands of agricultural workers who grow the food on our tables but are not covered by the President's announcement. Our commitment to peace within our border communities leaves us concerned that the emphasis on border enforcement could lead to unnecessary militarization.

We recognize that the President's action is only temporary, and will not lead to permanent status or citizenship. In line with our General Assemblies which have repeatedly called upon Disciples to

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reflect from a faith perspective and with intentionality on current immigration issues and to advocate immigration reform legislation that is just, humane and compassionate, we will continue to urge Congress to do what only they can do—enact legislative reform needed to provide permanent solutions that improve our nation's immigration system.

Our Disciples Office of Refugee & Immigration Ministries will continue to provide updated background and advocacy information, stories of Disciples anticipated to be impacted, and related worship resources on their website at: www.discipleshomemissions.org/dhm/dhm-ministries/refugee-immigration-ministries/rim-resources/administrative-action-information-responses/. Contact Director Rev. Sharon Stanley-Rea for additional assistance as further clarifications unfold, and to share your local stories of persons anticipated to be impacted or left out of the President's action. Our Disciples Immigration Legal Counsel, Tana Liu-Beers offers legal and other related information at www.disciplesimmigration.org/executive-action/. She reminds Disciples who may qualify for the new deferred action program to beware of notarios and scam artists who try to take advantage of immigrants during this time. As the program has not yet begun, applications are not yet being accepted. Individuals who hope to qualify can prepare by collecting documents to prove their continuous presence in the U.S. since January 1, 2010. Individuals should also continue paying their taxes, and should save money for application fees.

Ms. JACKSON LEE. I believe the *Arizona* case in 2012, Mr. Sekulow, completely disagree with your interpretation. Executive orders are narrowly drawn. The Executive order the President issued is clear on its face, and therefore, the example of my good friend from California about people who have different reasons for possibly coming out are clearly not in the executive order. It lists the priorities according to terrorism, felons, multiple misdemeanors. It is written out very clearly.

And, in this case, it clearly indicates that the Supreme Court has said that discretion in the enforcement of immigration law embraces immediate human concerns, unauthorized workers trying to support their families, for example, who are likely to pose less danger than aliens and 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, clearly what the President has enunciated.

So, in essence, although you are dynamic legal scholars, and those of us who have gone to law school relish your cerebral ability, but you are make a mountain out of a mole hill, and you are wrong. You are absolutely wrong. It is based on emotions. It is based on opposition to immigration, despite your constitutional prowess, and I say that globally. I am not pointing out any names here. Because we have a Supreme Court decision that says that this Executive order is within the confines of its discretion.

Let me ask Ms. Hincapié this question, and I have a question for Mr. Dupree, quickly if I can.

If you would, Ms. Hincapié, we have been hearing about stay under the covers, don't come out. That is frightening people and, again, just putting people in a box. What is your thought about continually telling people that, as a lawyer, I would advice my clients not to take advantage of this defining Executive order?

And then I just quickly want to ask Mr. Dupree that he quoted from one of the counsels from Bill Clinton. I want to ask him who that counsel was and what was the approach of his citing that person.

Yes, Ms. Hincapié.

Ms. HINCAPIÉ. Great. So thank you for the question, Congresswoman, and for your leadership on immigration for many years. The National Immigration Law Center has been very involved in the implementation of the Deferred Action for Childhood Arrivals program. The new program announced by the President, the Deferred Action for Parental Accountability, is very similar and premised on the same thing. As lawyers, as a legal organization, we do advise individuals of what the risks are, and the fact that this is an individualized adjudication that someone at USCIS is going to review the applications, look at all of the evidence, are you eligible for the criteria, do you meet the criteria, and only at that point will the Department of Homeland Security decide whether the person merits deferred action.

However, the reason we do advise that individuals come forward is because the status quo is unacceptable, as I shared in my testimony, and parents, the mother who was here earlier today, Isabel, prefers to come out of the shadows to make sure that she is there

for her daughter at the end of the day, so they will take that risk, even if a future Administration may terminate this program.

Ms. JACKSON LEE. Mr. Chairman, would you yield Mr. Dupree to answer the question that I did get on the record, please. I would ask for courtesy.

Mr. MARINO. You have 30 seconds, sir.

Mr. DUPREE. Absolutely.

Ms. JACKSON LEE. Who are you citing from?

Mr. DUPREE. It is Walter Dellinger's opinion. I believe Congresswoman Lofgren was correct. It was the opinion on the Federal Government's ability to switch the finding arbitration.

Ms. JACKSON LEE. Then you are aware that he has said that this Executive order is consistent with governing law with the policies that Congress has expressed in the statutes?

Mr. DUPREE. Yes, and if I could address that. Look, Congresswoman Jackson Lee, I like law professors. I have been known to associate with law professors, but the day that we choose to elevate the opinions of the law professoriat over the text of the Constitution is the day that I fear for the Republic.

Ms. JACKSON LEE. I doubt that that is the case, but he was in the Office of Legal Counsel, and I imagine he had to read the Constitution, but we will disagree but not be disagreeable.

Thank you so very much, Mr. Chairman. I yield back

Mr. MARINO. The Chair recognizes Congressman King.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony and your patience for us to come back to this hearing after our votes on the floor. I would first ask if each of you have read the 33-page OLC guiding document; is that true for each of the witnesses?

And let the record reference that they nodded or affirmed yes to that.

And so I would take you back to a time in my memory when then Secretary of Homeland Security Janet Napolitano sat at that very table and we had a discussion about the lack of constitutionality of the Morton memos and DACA, and I promised her that day that she would face litigation, and, of course they have; drug out, as we likely expected.

But I also recall in that foundational document that she referenced on an individual basis only seven times in a one-and-a-third page document, and so it came to my attention when I was reading through this 33-page OLC component of advice for the President that purports to rationalize how the President conduct himself and can conduct himself in a constitutional fashion, I put it through my Word processor, and I came up when I used these phrases—"case-by-case," "discretion," "individual"—those three searches, and I came up with 152 incidents of it in this 33-page document, which caused me to think that I know that they were preparing for the litigation in the Morton memos that had seven mentions of individual basis in it, but I didn't realize how paranoid they were about the litigation that is bound to come in the 33-page document here of the OLC, the Office of Legal Counsel.

I would also like to put into the record a few things that I picked out of here. I mean, I read not the full thing studiously like you all did, but I got through the first third of it pretty well, and I con-

cluded there is enough advice here that says no to the President that if I had been he, I would not have followed it any longer. I would have decided, Well, I guess maybe I was right the 22 times I told the public I didn't have the authority to do this.

And so here is one thing I think that is important out of the OLC opinion: Deferred action does not confer any lawful immigration status.

Let's put that one up in the record. Another one: DHS' decision not to seek alien removal—well, that is just an underlying component, but I continue—may apply for authorization to work in the United States under certain circumstances, that being a discretionary decision of the executive branch of government as I understand it.

I skipped to page 6 where this document says that "the executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences."

And continuing, "an agency's enforcement decision should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering."

And further, in the same paragraph, I might add, on page 6, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

There is more. In fact, I think I will continue. On page 7, it says, "Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, 'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."

There is more. This is the first third of this, at least, is a devastating article, if you are the President trying to defend your action. And so I would start first with Mr. Sekulow, and could you begin to explain to me what I am missing as I read this OLC document?

Mr. SEKULOW. You know, the President's lawyers clearly advised him that in order for his Executive order or Executive action, in their opinion, to meet constitutional scrutiny, there would have to be individual case-by-case determination which is revokable at any time at the agency's discretion, which is markedly different than the deal the President offered when he gave his speech.

Mr. KING. And so, on an individual basis only, would that be a class or a group of 5 million people, perhaps?

Mr. SEKULOW. Well, the reality is an individual determination on a case-by-case basis with 5 million people cannot happen.

Mr. KING. Mr. Dupree, would you care to comment?

Mr. DUPREE. Congressman King, I shared your reading of that memo, and that is the thing that struck me as remarkable is that the memo lays out certain legal premises correctly, in my view. Many of them are correct, but then the conclusion it draws from those legal premises is profoundly flawed. The people at OLC are very smart, and I think they understand what the law is, and I think, as I said, in portions of the memo, they accurately state the law. But I think they completely misfired in advising the President that what he was proposing was constitutional. It plainly is not.

Mr. KING. And I thank you. And I did read the concluding paragraph, and I will just put that into the record. It says, in sum, for the reasons set forth above, we conclude that the DHS' proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible—I would say that is inconsistent with at least the first 7 or 8 pages—but that the proposed deferred action program for parents of DACA recipients would not be permissible.

When I read that, I think could it be that they have said that the DACA recipients came here due to no fault of their own so it has to be somebody else's fault, would that be the parents of the DACA recipients, Ms.——

Mr. MARINO. The gentleman's time is expired. You can answer the question.

Mr. KING. Could I ask the witness to answer the question, please, Mr. Chairman?

Ms. HINCAPIÉ. Sure. Really quickly. I think the—of course, I respectfully disagree with my colleagues here to the right, which is that the OLC memo is very carefully written. And it lays out what the President's limitations are and clearly states that the program that the President has announced falls within those legal limits. And the way that the current DACA program exists is individualized adjudications. I tell you that because I personally have assisted individually young immigrants who qualify for DACA and put their applications together so that they can be adjudicated.

Mr. KING. But could it be that the parents were the ones at fault?

Mr. MARINO. Okay. The gentleman's time is expired. His documents will be entered into the record.****

The Chair now recognizes Mr. Cohen.

Ms. LOFGREN. Mr. Chairman, could I ask unanimous consent to put two things in the record?

Mr. MARINO. Go ahead.

Ms. LOFGREN. There has been a lot of discussion about——

Mr. MARINO. Quickly, please.

Ms. LOFGREN [continuing]. Authorized employment, so I would like to put Section 274A(h)(3) of the Immigration Nationality Act along with the regulation providing that those aliens who have deferred action may receive work authorization in the code.

Mr. MARINO. Without objection.

[The information referred to follows:]

****See *supra* text accompanying note *.

INA 274A - UNLAWFUL EMPLOYMENT OF ALIENS – 8 U.S.C. 1324a

(h) Miscellaneous Provisions.-

> (3) Definition of unauthorized alien.-As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

8 CFR 274a.12 – CLASSES OF ALIENS AUTHORIZED TO ACCEPT EMPLOYMENT

(c) ***Aliens who must apply for employment authorization.*** An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.

> (14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

Mr. MARINO. Mr. Cohen, you are up.

Mr. COLLINS. Mr. Chairman, could I just ask unanimous consent that—to instead of citing it, that we just admit the entire Immigration Naturalization Code into the record so that we don't have to continue to go through piece by piece.*****

Mr. MARINO. I have no objection to that.

Mr. COLLINS. This law is being ignored now, but it is law.

Mr. MARINO. Mr. Cohen.

Mr. COHEN. Thank you.

Ms. Hincapié, let me ask you a question. I believe you have said that you believe the President's actions are lawful; is that correct?

Ms. HINCAPIÉ. That is correct.

Mr. COHEN. And it is because he has discretion, prosecutorial discretion. Some people have asked that he had said in the past about some set of facts or laws that he didn't have this authority, and he changed his opinion, and you gave a reason for that, but let me—what is the—and I don't recall. I don't know if anybody here does. What were the facts upon which when the President said he didn't have the authority? Were they the same limited situation as he has got going now where he is just doing deferred prosecution? Was the other responses to people that wanted to get a fast track to citizenship and some other things that are not part of this program?

Ms. HINCAPIÉ. Sir, that is a very good question, Congressman. What the President was responding to was basically demands from the immigrant rights community, from grassroots organizations, and from immigrants themselves to stop all deportations. And that was a consistent demand, which he often said, no, I cannot do that.

And then the second piece which I tried to explain in my testimony earlier, the context, the timing of when the President was making those comments was always because he was specifically focused on getting comprehensive immigration reform done through legislation.

Now I should share, on March 14th of earlier this year, I sat across from the President and specifically talked to him about the need for him to exercise his legal authority, and even there, he said, I agree, but I am focused on immigration reform, and all of you immigrant advocates also need to be focused on immigration reform. And he disagreed with the extent of authority that we believe he has, and one of those examples is the parents of DACA or workers. We believe at the National Immigration Law Center that workers who have been here for over 5 years who meet certain criteria should potentially be eligible.

So this Administration has decided, by consulting the Office of Legal Counsel, to take a much more conservative approach about what kind of discretion they are willing to take on and also have set forth the specific enforcement priorities.

Mr. COHEN. And Mr. Sekulow, you agree that—well, first, let me finish up with Ms. Hincapié. The foundation upon which the President acted that you believe is constitutional is the same foundation

*****The information referred to is not reprinted in this hearing record but can be accessed at http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html.

that President Reagan and President George Herbert Walker Bush acted upon; is that correct?

Ms. HINCAPIÉ. Absolutely. They have all—every Administration, Republican and Democrat, including Presidents Reagan and President Bush, Sr., used prosecutorial discretion to provide—at the time, it was voluntary departure. And here it is the same thing. It is deferred action. It is simply a different type of prosecutorial discretion, a different type of deferred action.

Mr. COHEN. Thank you.

Mr. Sekulow, you said you agreed that—and maybe differed a little bit in degree, but that President Bush and Reagan, and you threw in Clinton and maybe Bush, II, that they also were wrong and that four wrongs don't make a right.

Mr. SEKULOW. I basically what I said was constitutional violations don't get better with time, and I don't see an underlying—this is my view. I don't see an underlying statutory base. I am sympathetic with what they are trying to do, as I am with the President, but that doesn't mean there is a constitutional base on which to do it, so——

Mr. COHEN. Well, let me ask you this, and I know you are not a politician. But why is it that in all those other four instances, nobody came out and questioned the President's authority from either side——

Mr. SEKULOW. Yeah.

Mr. COHEN [continuing]. And and nobody came out and filed a lawsuit and nobody even suggested the possibility of impeaching Presidents Bush, Reagan, Clinton—they did get to Clinton for whatever else, but—and then Bush. What is the difference? Why is this President—why do they say it pass over different from all other Presidents?

Mr. SEKULOW. Oh, sorry.

Mr. COHEN. Yeah.

Mr. SEKULOW. I think, Congressman, you answered it. There is a political element it to, and it is the sheer numbers and scope of what we are dealing with. You are dealing with 5 million people. And, you know, when you ask about the question, which I think was a good one, about was the President talking about deportation or was he talking about something else, that is a good question, but let me read you the exact quote.

He was at a speech. He was giving a speech. He had hecklers, much like we saw today, that were concerned about this. And they were saying, Stop the deportations. And the President said, Now, you are absolutely right that there have been significant numbers of deportation—that is true—but what you are not paying attention to is the fact that I just took an action to change the law.

So the President views what he did, even though the OLC doesn't say that, but the President viewed it as stopping deportations. And he said he took action to change the law. So I don't think what any of these Presidents have done is more than constitutional framework. That is in my view.

Mr. COHEN. Ms. Hincapié, do you believe—and you are not a politician either.

Ms. HINCAPIÉ. I am not.

Mr. COHEN. That the reason why the response to this has been so different under this President, do you believe it is just because of the number, or do you believe that there is some other reason that makes this President different from all other Presidents?

Ms. HINCAPIÉ. I would have to say that I do believe this is different. He is the first African American president. He is being attacked for a number of issues, and historically, every single President, Republican and Democrat since Eisenhower, have used their prosecutorial discretion and used their executive authority.

I would also add that when Bush, Sr., exercised that prosecutorial discretion, they, too, believed that they were going to be covering about 40 percent of the undocumented population at the time. And it was after Congress expressly said that they were not going to cover the children and spouses of immigrants who were legalized under IRCA. There was late Senator Chafee had an amendment that was expressly denied and defeated that would have done what President Bush decided to do anyway.

Mr. COHEN. I thank each of you.

Thank you, Mr. Chair.

Mr. MARINO. The Chair recognizes Congressman Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And I thank all of you as witnesses for being here today.

Mr. Chairman, of all of the relevant premises I think we could consider, perhaps the most foundational would be to simply read the oath that President Barack Obama made when he laid his hand upon the Lincoln Bible almost 6 years ago: I do solemnly swear that I will faithfully execute the Office of President of the United States and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.

Mr. Chairman, I believe the recent Executive action by the President on illegal immigration is categorically incompatible with that oath. I am also convinced that there are very few things a President can do more dangerous to a republic such as ours. If American Presidents in the future should consider these days precedents and consider themselves unconstrained to the Constitution as a matter of routine, the rule of law in America will be no more, and so much of what so many men and women have died on dark battlefields to protect will be undone.

These are not light issues, Mr. Chairman.

And so, Mr. Sekulow, my first question is to you, sir. Justice of the Supreme Court James Wilson once explained that the Take Care Clause meant that the President has the "authority not to make or alter or dispense with the laws but to execute and act the laws which are established." So, sir, do you believe that the President's recent actions comport with Mr. Wilson's conclusions, and is the President refusing to adhere to the Take Care Clause in an attempt to evade the will of Congress?

Mr. SEKULOW. I think that is the fundamental question, and it is not the policy issue of whether it is good or bad as far as immigration reform goes. It is, is the President's action moored in constitutional authority? In my view, it is not.

Mr. FRANKS. Mr. Dupree, let me ask you. You state in your testimony that when President Bush was unable to get comprehensive immigration reform through Congress, "that we did not attempt to

achieve through executive fiat what we could not achieve through the legislative process. We respected the system the Framers established." That is your testimony. Do you believe that this Administration is respecting the Constitution when it grants deferred action to a class of millions of unlawful immigrants?

Mr. DUPREE. I do not, Congressman. I do not think that the President's actions are consistent with the system that our Framers established, and I would point out that one of the ironies is that the Bush administration, and particularly the Justice Department in which I served, was often criticized for excessive assertions of executive power. And yet when it came to immigration, we held back. We did not act through executive fiat. We did not act through executive order, but rather, we deferred to the Congress, we respected the congressional role under Article I, Section 1—Article I, Section 8, which confers the power to grant—make immigration laws on this Congress, and we held back.

Mr. FRANKS. Mr. Sekulow, let me ask you, if a President holds himself unconstrained to the Constitution, what are the implications to a republic like ours?

Mr. SEKULOW. It could end up with lawlessness. I mean, the real problem here, and I said this in my testimony earlier, and we said in our written submission, is that under the President's lawyers interpretation of this executive action, the President could wake up tomorrow morning and say, you know what, that executive action I took 2 days ago, I don't want to do that anymore, and you now have these people apply for something that doesn't exist, and I think that is part of the problem here. If you are not moored in the Constitution, the danger to the republic is the separation of powers becomes meaningless, which was a major—it is our entire constitutional framework.

Mr. FRANKS. Yeah. Well, Mr. Chairman, I guess I would just suggest to you that the issue that we are dealing with here in the central consideration is one of profound significance, and if we allow the rule of law to be jettisoned, which it appears that we may be on that road, then I am afraid we would all owe Great Britain a pretty profound apology for that little unpleasantness we had with them a few centuries back.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. FRANKS. I would yield back.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. FRANKS. I would yield.

Ms. JACKSON LEE. I thank the gentleman.

I started by acknowledging that there are differences of opinion, but I really think we can work through this, and I would only say to the gentleman, an Executive order—and both to the gentlemen here—is limited by the President's tenure. It is temporary. The President knows that. I think that is a bogus argument, but what we can do is we can pass, Mr. Franks, with you, immigration law by this Congress, and I hope we will do that.

With that, I yield back, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. MARINO. The Chair now recognizes Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. It should serve as no surprise to anybody in this room that the first hearing of this Com-

mittee that we would have after our return from our August break, or excuse me, after our return from Thanksgiving. We have had so many breaks; I am getting confused about it. But you know, our very first hearing, we only have two more weeks to go, and this is a messaging hearing, as opposed to a substantive oversight hearing of presidential action. This is just another example of the strategy that Republicans have employed since the very moment that President Obama was sworn into office, and that is to obstruct everything that the President set out to do.

Now, they won't give the President credit for being the deporter in chief. I mean, he has deported, under his Administration, more people than any President in history. Do you think you would ever hear a Republican give him praise for that? No. They will find something to obstruct that process, so it doesn't matter what it is. It is just we are going to say no to it, and so, then you get a group of lawyers together. My wife is lawyer, by the way. I mean, we have been married for 34 years, and we have been lawyers the whole time. And man, we sit down, whatever I say, she is going to take issue with from a legal perspective. Any legal issue that we start discussing, she is automatically going to take the opposite side, and she is going to argue it earnestly and convincingly, and you three, along with the fourth gentleman was here, have done the same thing, and I believe that you feel earnest about the topic here today.

But I also know that you are lawyers, and lawyers can argue either side of an issue and do so compellingly. And so my hat is off to you because all three of you all are topnotch lawyers, litigators, and that is what lawyers do, and lawyers also take abstract principles of law, apply them to the facts that a client will present to you, and then you will give the client the options. You won't select the option for the client. You won't direct the client to do this, but you will give the client a range of options, and the client will decide for him or herself which option to take, and then if you want to retain that client because that client pays well, you are going to go to court and you are going to argue for whatever position that client decided upon, and you are going to do so very earnestly, and you are going to do it convincingly, and you may be fortunate enough to win the case, and that is what lawyers do and that is what you all are doing.

And that is what I used to do. I still do it when I argue with my wife, but this, ladies and gentlemen, is not a courtroom. This is a legislative chamber, and our power as a legislature comes out of Article I of our Constitution, and so we are sitting here talking about Article II, and there is not one thing that us legislators here with Article I power can do about Article II power, other than to sue the President, and we don't have to have this hearing to do that.

We don't even have to have a hearing for the Republicans to decide that they are going to impeach the President or that we are going to file a lawsuit on him, or we are going to prosecute him. We don't need that. So what this body is doing is actually wasting time when we could be passing comprehensive immigration reform, just like the Senate did almost 2 years ago, and then we are refusing to do our obligation to the people that they elected us to do.

This is the most do nothingness Congress in the history of mankind, and we are doing nothing today other thank what we have always done in this Congress under Republican leadership, and that is to say no, obstruct the President, and so I don't have any questions.

I think each one of you all have argued your positions admirably, and if I were the judge, I would be deciding this case, my ruling would go in favor of the minority, the underdog.

Mr. MARINO. The gentleman's time is expired.

The Chair now recognizes Congressman Gowdy.

Mr. GOWDY. I thank the gentleman.

I thank Mr. Chairman.

Ms. Hincapié, among many limitations in life is my inability to glean other people's motives or be able to read their minds. I could have sworn in response to a question you received from Mr. Cohen, you suggested race was the basis for why we may have this constitutional perspective. Did I understand you correctly?

Ms. HINCAPIÉ. I believe I was responding to the question about is there an explanation about why, despite the fact——

Mr. GOWDY. Well, let me offer another explanation to you, okay. Not a single Republican who is here right now ever served under a Republican President, not one, so I hope I do live long enough to hold a Republican President to the exact same standard that I am holding this one, but for you to run to race as the explanation for why we hold the position that we do—Harry Reid had a very different perspective on recess appointments when there was a Texan in the White House. And none of us accused him of geographic discrimination. In fact, hell, for that matter, Senator Obama had a different perspective on executive overreach than President Obama. And nobody runs to race as an explanation for that. So I would just caution you to be careful when you try to import motives to people.

With that, what are the limits of prosecutorial discretion?

Ms. HINCAPIÉ. So among the limits of prosecutorial discretion is that the President must comply with existing statutes, such as the appropriations. So the President can't simply stop deporting everybody, and in fact, what they have done here is they have listed new priorities, so——

Mr. GOWDY. So he can't stop deporting everybody. Well, I mean, what are the limits? So as long as he deports one person, then that is a proper exercise of prosecutorial discretion?

Ms. HINCAPIÉ. No, under the current appropriations, the current——

Mr. GOWDY. I am not talking about appropriations. I am talking about the constitutional doctrine of prosecutorial discretion, which if you marry up with the pardon clause means you don't have to enforce it, and if they do break it, you can pardon them for it.

Ms. HINCAPIÉ. Right. Under the constitutional doctrine, we should take two pieces. One is you have got the Take Care Clause, which says that the President must take care to enforce the laws that exist.

Mr. GOWDY. Ms. Hincapié, your answer is much more complex than my question. What are the limits of the doctrine of a prosecutorial discretion?

Ms. HINCAPIÉ. The limits are that the President must enforce the laws based on statute, so one is——

Mr. GOWDY. I thought he just announced he wasn't going to do that, that he was carving out categories and exceptions.

Ms. HINCAPIÉ. In addition to——

Mr. GOWDY. And not on a case-by-case basis, too. For entire categories.

Ms. HINCAPIÉ. No, he is not stopping, he is not saying that he is not going to enforce the law whatsoever vis-a-vis those individuals. He is saying he is creating a program by which individuals can come forward if they meet certain criteria, and they will be held accountable to apply, pay a fee, pass a criminal background check, and——

Mr. GOWDY. But that is not the current law, right?

Ms. HINCAPIÉ. That is what is possible under deferred action, and that is what he has developed, correct.

Mr. GOWDY. Well, I want to talk to you for a second about that background check, and I want to get into the policy a little bit. Can you tell me what a nonserious criminal is? Because when I look at the White House talking points, they are interested in serious criminals, so tell me what a nonserious criminal is.

Ms. HINCAPIÉ. It could include somebody, for example, who has been detained for shoplifting, let's say a, I don't know, a 22-year-old who takes lipstick, and that is a misdemeanor and she gets——

Mr. GOWDY. So just misdemeanors. Nonserious criminal refers to misdemeanors convictions?

Ms. HINCAPIÉ. Right. And, in fact, there are certain misdemeanors that are considered serious criminals under the recent memos from the Department of Homeland Security as well.

Mr. GOWDY. How about domestic violence? How many domestic violence convictions can you have and still remain?

Ms. HINCAPIÉ. I believe domestic violence is considered a serious crime under the new——

Mr. GOWDY. It wasn't under the comprehensive Senate immigration bill, which I have heard lots and lots of my colleagues embrace. I think you can have up to three domestic violence convictions and still remain on a path to something under the Senate version. How about recidivist DUI?

Ms. HINCAPIÉ. I believe DUI completely disqualifies you as well.

Mr. GOWDY. A single DUI conviction——

Ms. HINCAPIÉ. Conviction, correct.

Mr. GOWDY [continuing]. Is considered a serious criminal.

Ms. HINCAPIÉ. That is my understanding.

Mr. GOWDY. Even though it is a misdemeanor?

Ms. HINCAPIÉ. That is my understanding, yes.

Mr. GOWDY. Where could I go to find out whether or not that understanding is correct or not? It wasn't on the White House talking points. They talked about gang members, but I am not aware of a Federal crime for being a member of a gang. Is there one? I know it is a sentencing enhancement. Is there a crime for being a member of a gang?

Ms. HINCAPIÉ. Well, in fact, that is some of the concerns that some advocates have that if it is simply—if you are being consid-

ered a gang member because you live in a certain ZIP code and you are being associated or is it really based on——

Mr. GOWDY. Well, I understand your concern is that it might catch too many people. My concern is the opposite, that it won't catch the right people, so it is not a crime to be a member of a gang. You have to commit another underlying offense, and then it is a sentence enhancement, so how are you going to determine who the gang members are?

Ms. HINCAPIÉ. Well, there are gang databases that exist. We assume, again——

Mr. GOWDY. So if you are in a gang database, will you be deported?

Ms. HINCAPIÉ. We don't have enough information from the Administration yet, right. Remember, this was just announced.

Mr. GOWDY. Well, I have got the talking points that gang members are going to be deported.

Ms. HINCAPIÉ. But the talking points are not sufficient. They will be issuing guidelines with respect to how they will implement this program.

Mr. GOWDY. Who is "they"?

Ms. HINCAPIÉ. The Administration, the White House and the Department of Homeland Security.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. MARINO. The Chair recognizes Ms. Chu.

Ms. CHU. Ms. Hincapié, I want to address this claim that President Reagan and Bush only did a deferred action as a cleanup measure for laws that were already agreed upon by Congress, and that is IRCA, of course. However, isn't it true that Congress actually considered whether the spouses and children of persons who obtain legal status through IRCA should be granted special protection under the law and explicitly chose not to do so, and that both President Reagan and Bush chose to expand this law anyway with deferred action and work authorization?

Ms. HINCAPIÉ. Yes, Congresswoman, and thank you for your leadership, particularly on the Power Act. Yes, absolutely. The big difference between what Presidents Reagan and Bush, Sr., did versus what President Obama has done—they exercised prosecutorial discretion; they are using existing statute to provide deferred action and allow people to get work authorization—however, both under IRCA, the Congress considered and rejected the fact that children and spouses who didn't meet certain criteria would not be eligible, and then after IRCA was passed, the quote-unquote cleanup, there were a number of amendments that were introduced at different points, the Family Fairness Act, that also, that failed. One was with cloture—the cloture vote failed, and then, secondly, on October 7, 1987, the late Senator Chafee introduced an amendment specifically to amend the Immigration Nationality Act, to waive the continuous residence requirement under the legalization program for spouses and children of qualified legal aliens, and that also was defeated.

Despite the fact that those different attempts by Congress, and this was a Republican Senator, to address this issue, Presidents Reagan and Bush, Sr., decided this was unfair to deport the children and spouses of people who were legalized under IRCA, and

secondly, they recognized they had the legal authority to exercise that discretion and provide voluntary departure for those individuals and eventually work authorization as well.

Ms. CHU. So both Presidents Bush and Reagan acted in contrast to Congress, not in conjunction with Congress.

Ms. HINCAPIÉ. Correct. They acted against congressional will and exercised their legal authority, which was well established and continues to be well established today.

Ms. CHU. Okay. It has also been said repeatedly today that this deferred action is unfair because the beneficiaries will jump in line before millions of others who are waiting in line.

Why is this incorrect, Ms. Hincapié?

Ms. HINCAPIÉ. So, unfortunately, again, this is incorrect because there is a lot of misinformation about what the deferred action program is. People are not getting onto any path to citizenship. They are not becoming lawful permanent residents. They are simply getting a temporary reprieve from deportation and will be able to work because the regulations allow them to get work authorization if they get deferred action.

So we still have a need, and as Congressman Johnson was just saying a few minutes ago, there is a need for comprehensive immigration reform to address the needs of the individuals who are waiting in line. Nothing that the President has done changes in any way that need for immigration reform. And my understanding is H.R. 15 is still pending in Congress. There's still a few weeks left in this session, and I have been very comforted by the number of comments many people made today about the support for comprehensive immigration reform, and I would urge every single one of you to use the remaining days in this session to pass H.R. 15.

Ms. CHU. Ms. Hincapié, it's been also said repeatedly today that this deferred action creates a class of individuals who are considered for deferral of deportation a blanket, that this is a blanket nonenforcement program. Is this a blanket nonenforcement program? And, for instance, with DACA, have there been denials of the applications? Can you tell me how many of them there have been because I've read that it's 1,377 requests that have been denied.

Ms. HINCAPIÉ. Right. So, yes, this is not a blanket amnesty or a blanket program whatsoever. DACA, the program that's been in existence for the last 2 years as well as the new program are, based on individual adjudications, and so, again, individuals have to put forth the evidence that they meet all of the criteria, and I must say to you, Representative Chu, I mean, we have held large clinics through DACA where young immigrants have come with reams, volumes and volumes of evidence documenting all of their continuing residence, everything from report cards to immunization records, the student-of-the-month record, the certificates, letters, et cetera, from the school. They have come forward with a lot of evidence, and that is why it has been a successful program, because the majority of them have been able to meet the criteria required.

That said, there are many who have also been denied, and in fact, most recently, with the DACA renewal program, we have seen an increase in rejections of DACA applications, which we contin-

ually raise to the Administration to understand the reasons for those rejections.

Ms. LOFGREN. Would the gentlelady yield?

Ms. CHU. Yes.

Ms. LOFGREN. I would like——

Mr. MARINO. The gentlewoman's time is expired.

Ms. LOFGREN. I want to make a unanimous consent request.

Mr. MARINO. Should we just do a blanket unanimous consent?

Ms. LOFGREN. No, this is specifically——

Mr. MARINO. Please, go ahead

Ms. LOFGREN. My good friend, the Chairman of the Subcommittee had a number of questions about eligibility for the deferred action program, which is specified in the memorandum dated November 20. Those who are priorities for removal, which includes the misdemeanors and the like, are specified in that memo. And I would like to, since there were questions about that, put this memo in the record so people will understand who is eligible and who is not eligible.

Mr. MARINO. Without objection.

[The information referred to follows:]

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies for the Apprehension, Detention and Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,* March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens,* June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases,* November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,* December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations,* December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, 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.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;[1] sexual abuse or exploitation; burglary; unlawful possession or use of a firearm, drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal[2] on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

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[1] In evaluating whether the offense is a significant misdemeanor involving "domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. *See generally*, John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011.

[2] For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should 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. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, 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. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. 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.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Mr. MARINO. The Chair now recognizes Congressman Labrador.

Mr. LABRADOR. Thank you very much.

Ms. Hincapié, I would like to join my good friend from South Carolina and advise you and all the other Members of this Committee. I actually have a question for you. When the Congress went after President Clinton, were they racist when they were against his policies?

Ms. HINCAPIÉ. I don't recall what you are—I am not sure what you are referring to, Congressman.

Mr. LABRADOR. Just any time that the Congress objected to President Clinton's policies, were they being racist?

Ms. HINCAPIÉ. It is out of context, but your point is well taken, both of your points.

Mr. LABRADOR. When President Clinton was impeached, was it because the Members of Congress were being racist?

Ms. HINCAPIÉ. No.

Mr. LABRADOR. When the Democrats filed articles of impeachment against President Bush, was it because they were being racist?

Ms. HINCAPIÉ. No, Congressman.

Mr. LABRADOR. It was because they disagreed with his policies, wasn't it, and they thought that he had exceeded his authority as President of the United States and they thought that he had committed impeachable offenses.

I disagreed with them, and that is why no one on this side has filed articles of impeachment against this President but I——

Mr. CONYERS. Yet.

Mr. LABRADOR. I think you guys might, but I don't think any Republican wants to do that. I think you might try to do it under Republican hands, but no one is talking about impeachment here. No one is talking about anything like that, and we disagree with his policies. We disagree with everything he has done on immigration, but to assert here in a hearing, in an open hearing under oath that it might be racism is why we are disagreeing with the President's policies, I think is beyond the pale.

Now, let's talk about some of these facts that are happening here. You did not answer the question about what the limit to the President's authority might be under deferred adjudication. Are there any limits to his authority?

Ms. HINCAPIÉ. The limits to his authority have to do with the statutory limitations, and so, again, those——

Mr. LABRADOR. But you said he created a program. There is no statutory program that allows him to do this program. You said it in your own testimony that he created a program that now we're using and, according to you, in individualized adjudication, but he created that program, right?

Ms. HINCAPIÉ. Right. The creation of the program is. So, under the Homeland Security Act, Congress has charged the executive branch, and specifically the Secretary of the Department of Homeland Security.

Mr. LABRADOR. I understand that, and then you're going to argue that it's because we don't have enough appropriations. If the Homeland Security Department started deporting more people than they

have funds for, can't they just come to Congress and ask for more money to start deporting people?

Ms. HINCAPIÉ. Yes, they could definitely do that, but that was actually not the argument I was going to make. The argument I was going to make was simply that under the Homeland Security Act, the Department of Homeland Security has identified priorities for who is considered a high level priority, who is a low level priority.

Mr. LABRADOR. But they don't get to set those priorities.

Ms. HINCAPIÉ. Excuse me?

Mr. LABRADOR. They don't get to set those priorities. The Congress has set those priorities for them. They have said that there is a certain class of people that are here unlawfully and without document, and they should be deported. It is not that the Department of Homeland Security that gets to set that, those premises.

Ms. HINCAPIÉ. So it is a combination of the two, Congressman. So under 6 U.S.C., section 202, subsection 5, the statute is very clear that the Secretary of Homeland Security shall be responsible for the following: Subsection 5, "Establishing national immigration enforcement policies and priorities."

Mr. LABRADOR. But those priorities are in memos, not in statutes, isn't that correct?

Ms. HINCAPIÉ. Well, the statute says the Department gets to decide what those priorities are. And then secondly, as any administrative agency, any executive agency, then gets to decide, based on resources, based on policy priorities, based on what is considered good public policy, et cetera, they determine a combination of. It's the same way that——

Mr. LABRADOR. So if I run for President, and I decide that I don't like any EPA regulations, I don't like the EPA and I don't want to enforce any of the regulations, can I under prosecutorial discretion decide not to enforce any of the EPA rules?

Ms. HINCAPIÉ. You could, except the legal limitation again would be if there is a statute that requires the EPA to specifically enforce certain parts of it.

Mr. LABRADOR. Well, there is a statute that requires them to specifically enforce immigration laws. Now, if I decide that I don't like tax laws, can I decide as President that I don't want to enforce the tax laws?

Ms. HINCAPIÉ. But, again, that is not, Congressman, with all due respect, that is not what this Administration is doing.

Mr. LABRADOR. That is exactly what this Administration is doing. I was an immigration lawyer. You can do an individualized adjudication and I had many of my clients who I asked for deferred adjudication for. And I said, they have a set of facts that makes them eligible for deferred adjudication and usually it was because there was nothing in the law that allowed them to stay in the United States legally, correct, and I think you have done that as an immigration lawyer as well.

Ms. HINCAPIÉ. Uh-huh.

Mr. LABRADOR. But in the end, you ask for an individualized adjudication.

Ms. HINCAPIÉ. Right.

Mr. LABRADOR. Not for a whole class of people. You didn't just say, I want every one of my clients who has lived in the United States for 5 years to have deferred adjudication.

Ms. HINCAPIÉ. With all due respect, that again is not what the Administration is saying. The Administration is saying there is going to be accountability. Individuals who meet certain criteria can come forward.

Mr. LABRADOR. There is no accountability.

Mr. MARINO. The gentleman's time has expired.

The Chair now recognizes Congressman Deutch.

Mr. DEUTCH. Thanks.

Ms. Hincapié, would you like to finish your answer?

Ms. HINCAPIÉ. Thank you, Congressman. I was just saying that, again, what the Administration is doing is simply saying, here is a low-level priority. This is a criteria. Individuals still need to come forward, individually and affirmatively, and only at that point are they considered for deferred action. There is no blanket, every mother and father come today and get a work authorization document.

Mr. DEUTCH. Thank you. Thanks.

So I just wanted to take a moment. We're discussing President Obama's so-called executive overreach, but I fear that the characterization makes light of what is a very sad reality that law enforcement agencies face every day, which is there are limited resources. Officials must pick and choose which crimes and which charges to pursue. Every law enforcement agency, from the FBI to your local police department, chooses where to focus their resources. A state prosecutor makes choices. Perhaps they direct their staff to focus more on prosecuting domestic violence and less on marijuana possession. DOJ makes choices. The Administration has to determine where to focus its resources. Officials ask themselves questions, do we spend more on prosecuting corruption of the banking sector or do we focus more on Medicare fraud?

In fact, right on down to the most basic level of law enforcement, everyday police officers exercise discretion when enforcing our laws. They let some speeding drivers go with a warning. They charge others with reckless driving. Likewise, when it comes to immigration enforcement, there is no way for the Department of Homeland Security to deport more than 11 million undocumented immigrants in the United States, even if that's the goal of some in Congress.

Mr. Rotunda, when he was here earlier, made it clear, democracies just don't have mass deportations. So in an era of limited resources, DHS has to prioritize. The Administration is merely articulating something that law enforcement officers do every day, the FBI, the CIA, DOJ, the State prosecutors, all the way down to city cops. How else can immigration enforcement officials exercise their discretion and prioritize which of the approximately 11 million undocumented immigrants should be searched for, rounded up, detained, and deported?

The President's Executive orders on immigration made clear that DHS should direct their limited resources toward deporting those undocumented immigrants who commit serious felonies or significant misdemeanors. This enforcement prioritization based on available funding sources will ensure that undocumented immigrants

who pose a serious risk to the safety of our communities will be deported, while those who have been residing in the U.S. for many years and who have worked and who have contributed to our communities can remain.

I want to give you a practical example. Beatriz Perez has lived in the United States for 22 years. She and her four children live in my home State of Florida. A trained teacher in Mexico, she avoided going into her field here out of fear of deportation, instead making a living for her four children by selling fishing nets. Lourdes, 24, and Jassiel, 22, both qualified for delayed deportation status under the President's DACA policy. Mariel, 16, and Karen, 15, are both American citizens. The question is, should Beatrice Perez be deported and separated from her children? Should the Department of Homeland Security make this hard-working mother of four children, including two American children, a priority for deportation? I ask for unanimous consent to submit a summary of the Perez family into the record.

Mr. MARINO. Without objection.

[The information referred to follows:]

The Perez Family

Number of years residing in the U.S.:
Since 1992, 22 years

State of Residence:
Florida

Names of siblings, their ages, and immigration status:
Lourdes Perez, 24, DACA
Jassiel Perez, 22, DACA
Mariel Perez, 16, U.S. Citizen
Karen Perez, 15, U.S. Citizen

Full name of parent(s):
Beatriz Perez

Date of entry when parent(s) arrived:
Aug. 1992

Short description of their story:
Beatriz Perez was Kindergarten teacher in Mexico, she came to the U.S. in 1992 looking to provide a better future to her two children (Jassiel & Lourdes) as well as to continue practicing her profession here in the U.S. She has made the U.S. her home for the past 22years

Short description of family ties/roots in U.S.:
In Mexico she attained a degree in teaching and was a kindergarten teacher. She has been unable to practice her profession here in the U.S. and hopes that the President's executive order will put her back in the classroom. Bilingual teachers are needed in Lakeland, where 12,000 people identify as Hispanic. For now, she works at her son-in-law's fish nursery making fishing nets. She has been preparing for the President's announcement and has taken & passed English as a Second Language courses and is working to get a GED. As a devoted Catholic, she is heavily involved with St. Clements Catholic Church in Plant City, FL for the past 15 years. At St. Clements she participates in the church's chorus along with her two daughters, Mariel & Karen. She is also actively involved with United We Dream Tampa Bay, a local affiliate of the national United We Dream Network fighting for immigrant rights.

What does it mean to your family to potentially benefit from the Executive Action?
For me it means finally being able to live without the fear of being separated from my children. Being able to drive them to school, go to the grocery store, and knowing I am coming home to see them. It gives me a glimmer of hope to get one step closer to my dream and once again step foot in a classroom and continue practicing my profession.

Mr. DEUTCH. Thank you.

Exercising prosecutorial discretion for our Nation's immigration laws should ensure that law enforcement resources are used in a fiscally prudent manner and prevents us from unnecessarily taking people away from their families and stowing them in extremely expensive detention centers, which is the last point I would like to touch on.

Here is the problem. For more than a decade this Congress has required in the Department of Homeland Security appropriations bill that Immigration and Customs Enforcement maintain an average daily detention population. This required daily detention population, the detention bed mandate, has increased over the years to 34,000 people. It is an unprecedented restriction in law enforcement. It is costly financially. It takes a significant toll on families living in our communities.

Congress requires that 34,000 people be kept in detention facilities and provides more than $2 billion a year to hold undocumented immigrants in detention facilities. That's $5.5 million a day. It costs $159 to hold a person in detention. Less costly alternatives to detention cost between $0.70, and $17 per day. Decreasing our Nation's costly detention population could free up the funds that ICE could direct toward other critical responsibilities.

The detention bed mandate is unprecedented. No other law enforcement agency has a quota on the number of people they must keep in jail. None of them. Nowhere in this country. Providing ICE with discretion to fill detention beds based on need and not a number imposed by Congress would be consistent with the best practices of law enforcement. To satisfy the daily bed quota ICE officials are forced to find and remove undocumented immigrants from their families, even if they have committed no serious crime, even if they pose no flight risk to appear for immigration proceedings, and many undocumented immigrants have been living in the U.S. for years and are productive members of our communities. Removing them from their families to satisfy the bed mandate creates an enormous toll on our families.

Now, Mr. Chairman, as we go through the rest of this discussion, let's bear in mind that this Congress has some things that we can do. We can pass immigration reform and, I'm heartened to hear so many of my Republican colleagues talk about the need to do so, or seemingly their willingness to do so, and it has been so hard to have a vote. But let's also remember that we should stop taking away the discretion of law enforcement——

Mr. MARINO. The gentleman's time has expired. The gentleman's time has expired.

The Chair recognizes Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman.

We have already seen what happens when the Administration telegraphs what they are and aren't going to do with respect to enforcing our immigration laws, and that is a crisis on the Southwest border. And I'm a South Texas representative. Last summer I was down there and witnessed firsthand the problems caused by a bunch of children, in some cases completely unaccompanied, in some cases with their parents, crossing the border based on a mistaken belief that if they got here, they are going to get to stay. The

President's policy has a date certain in there, but these dates tend to slip. And we are telegraphing that we really do not have a serious intent to enforce our immigration laws. Not only is this damaging to the balance of power between Congress and the White House, they are also going to damage border security and open us up to a similar crisis in the future.

And I want to ask Ms. Hincapié if you think this action is going to cause more people to try to cross the border illegally.

Ms. HINCAPIÉ. No, Congressman, and for two reasons. One is, the deferred action program that the Administration has announced specifically says that it only covers individuals who have continuously resided in the United States since January 1 of 2010, so that's the last 5 years. So for any individual who comes tomorrow or today, they're not——

Mr. FARENTHOLD. All right, but didn't we under Reagan say that we were only going to grant legal status to those folks that were here on a certain date, and here we are doing something similar again? It seems like we're wasting our time doing anything before the border is secure.

Mr. Dupree, do you think we're going to see more people coming and attempting to cross the border illegally as a result of this policy.

Mr. DUPREE. I think we absolutely will. I think that the Administration's policies are followed very closely outside the United States, and I think we saw that with the episode that you referred to a minute ago. And I think there also, as you have alluded to, there really has been kind of a session of mission creep. I mean, it's been one of a one-way ratchet in which the Administrations, and Republican as well as Democrat administrations, say we'll provide limited relief. And guess which way that relief gradually goes? It expands and it expands.

Mr. FARENTHOLD. It also frustrates me that the President's action is going to make it more difficult for Congress to find a path forward on both securing the border and dealing with immigration reform. We have got issues with high-tech workers. We have got issues with agriculture workers. We have got a ton of issues that we need to deal with, with immigration. And it seems like the President is driving a wedge between the White House and Congress in doing this.

My understanding, you worked with the Bush administration on immigration reform. From your work trying to pass immigration reform, do you think this is going to damage the prospects of Congress acting?

Mr. DUPREE. Well, to say the least, if the President asserts the power, in my view unconstitutionally, to act unilaterally, it's basically saying to Congress good riddance. I don't need you, regardless of whether you pass a law, regardless of whether you don't pass a law, I'm going to make immigration law myself. So you all are the ultimate judges of this, but from my perspective it is very hard for me to see how this would enhance the likelihood of cooperation from Congress.

Mr. FARENTHOLD. And Ms. Hincapié has argued for very broad interpretation of prosecutorial discretion. Mr. Sekulow, do you believe that this broad of interpretation, I mean, does that leave us

anything with the Take Care Clause or has this just become an orphan clause in the Constitution that has no meaning if we take this broad of a definition?

Mr. SEKULOW. I think it is what the court in Chaney said, that when you have nonenforcement on such a broad-based scale, that you are, in essence, not enforcing the existing law. I mean, I don't know what is so confusing about prosecutorial discretion. A lot of you all have been prosecutors. I was a government lawyer.

Mr. FARENTHOLD. I learned it in law school. You don't arrest somebody for speeding to the hospital.

Mr. SEKULOW. Yeah. I was a tax lawyer for Treasury, and we had cases and sometimes would say, you know what, just based on our resources, we are not going to do that particular case. But we didn't say every case involving that particular industry we are not going to prosecute. That would not be prosecutorial discretion. That would be suspending the enforcement of the law.

Mr. FARENTHOLD. And my friend Mr. Labrador said he had one other question. I will yield the remainder of my time to him.

Mr. LABRADOR. Thank you.

Mr. Dupree, were you working with the White House on June 6 of 2007?

Mr. DUPREE. Yes, I was.

Mr. LABRADOR. Do you remember what happened in the Senate, because I'm tired of hearing that President Obama has been working so long for immigration reform, do you remember what happened in the Senate when then-Senator Obama decided to vote for poison pill amendments that killed the entire immigration bill that you guys were working on.

Mr. DUPREE. It was immensely frustrating. The way that that played out was immensely frustrating for many of us who had labored for months, and in some cases years, to effect immigration reforms.

Mr. LABRADOR. And in fact, President Obama, who at the time was a Senator, had gone to the White House, looked at George W. Bush in the eye, and said that he would work for immigration reform, and then he went to the Senate floor and he killed immigration reform. And then he promised the American people the first thing he was going to do as President was going to do immigration reform, had a Congress, a House, and a Senate in Democratic hands, and did absolutely nothing.

I think Ms. Hincapié said it right. This has always been a political issue for this President. It has never been a policy issue.

Thank you very much.

Mr. MARINO. Congressman Gutierrez is recognized.

Mr. GUTIERREZ. Thank you, Mr. Chairman.

As a segue to prosecutorial discretion, I'm just going to sit up here. Thank you so much. I didn't have the good fortune of being able to go to law school. I never met Thomas Jefferson or James Madison or Ben Franklin or George Washington. I read about them. And sometimes the lawyers kind of take us down memory lane like they're your first cousins once removed.

But not having met any of them, I admit to that, and not having gone to law school, so I'm a little not as prepared as the gentlemen might be on the questions of law, but I supported and I have

worked harder than anyone here, at least as hard as or harder than anyone here in working with Republicans. And you know what? They keep inviting me. They say, it will be next week, Luis, and here's our principles. And then they go, just kidding, I really didn't mean it.

You know, they keep testing us and teasing us about immigration reform—we're going to do it, we're just not ready right now. The fact is that the Speaker called the President of the United States in June of this year and he said, despite all of your great efforts, Mr. President, and mine, we're not going to call a vote on immigration reform.

So let's just put aside the fallacy that somehow this is disruptive to a system. It's almost as though you are coming here to tell us, oh, we were on the pinnacle of success and had the President not acted we'd all be convened here to do comprehensive immigration reform.

The fact is it's just not reality. So let's deal with reality. The fact is that when you and I and others were working in the Senate to pass the bill, we passed a bill here, the Sensenbrenner bill, that was immigration reform in the House of Representatives when they controlled it, that criminalized every priest, every teacher, every doctor. That was the response to the Senate bill.

So let's get it very, very clear here. Every time we have sat at the table and we have said, look, tell us what it's going to take, they refuse to act. It is now 23 months into the Congress, and we have not seen any legislation taken from this Committee to the House floor that isn't taking 800,000 young people and making them illegals once again, in the words of my colleagues.

So not having met any of them, I just want to say that I did meet a few other people that I have had the privilege and the honor of meeting and working with, so I can't go back 200, 300 years, or 400 years, when you guys suggest that prosecutorial discretion was well-established in the law. I can go back to November 4 of 1999. And here it is. And I'm just going to try to read a little bit of it. It says, "There has been widespread agreement that some deportations were unfair and resulted 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. We write to you because we believe people, you know, that discretion to alleviate some of the hardships." It says, "The principle of prosecutorial discretion is well established. Indeed INS general counsel and regional counsel have taken the position, apparently well grounded in case law, that INS has prosecutorial discretion in the initiation and determination of removal proceedings. Furthermore, a number of principles indicate INS has already employed this discretion in some cases. Two 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 prosecutorial discretion." Guidelines for the use of prosecutorial discretion.

Let me just suggest to you, I never met George Washington, Benjamin Franklin. I know you guys like taking us down memory lane, right, with the Founders. But I'll tell you what. I did meet Henry Hyde. I did meet Lamar Smith. I did meet Mr. McCollum. I did

meet all of these gentlemen that have signed this. And let me just say that Henry Hyde, Lamar Smith, McCollum, and others that have signed this aren't some open borders kind of friendly to immigrant policy kind of Members of Congress. I think we could suggest that. And yet, what did they say? They wrote the Attorney General and the INS Commissioner and said prepare guidelines.

Let me just suggest to you that Idaho has 1.6 million people. We deport 400,000 a year. It would take us, if we just spent all of our life in Idaho, it would take us the next 4 years. We are not going to deport ourselves out of the issue of immigration reform. We are going to have to find a solution. And instead of here arguing as though we're the Supreme Court and you guys are some, I don't know, some solicitor generals telling us what is constitutional or not constitutional, I think we should roll up our sleeves and begin to do the work of fixing the immigration problem because we have not put one more person on the border to secure our borders, nor will we help one more family.

And I would just end with this. Mr. Chairman, you know, I didn't go to law school, but it just seems to me that justice is about compassion too. It's about fairness. It's about looking and weighing the equities that people have. And I think 4 million American citizen children we should take into consideration. Because guess what. Tonight my grandson, he is going to be taken, and my daughter is going to go to his school and go check out his report card. She is going to be able to take him to the library, she is going to be able to help him with his homework. She is going to be able to do a lot of things, take him to soccer. There's millions of undocumented immigrants that can't do that for their American citizen children. So let's stop. Nothing has been resolved here.

Mr. MARINO. The gentleman's time has expired.

Mr. GUTIERREZ. Thank you so much, Mr. Chairman. Thank you for your indulgence and generosity.

Mr. MARINO. Congress Collins, you're next.

Mr. COLLINS. Thank you, Mr. Chairman. And probably the one part I would disagree with my friend just now is the fact that, you know, amazingly enough, after a wonderful speech, carried by many, that everything was supposed to be solved a couple of weeks ago because the President acted. Undoubtedly we're far from that.

This is concerning on many levels, and the problem that I have with the biggest part here is the fact that this has gotten mixed up into immigration and we are using immigration and we are using the stories of hardships, and I can understand that. But the problem is here, is a fundamental take the issue away. Remove the issue. Remove immigration, remove drug enforcement, and just go back to the simple idea of what the structure of government is. And that's the problem that I'm having here.

And also, as a reminder, one, and I heard it mentioned from across the aisle that if we had passed bills, in which we had, they have never moved out of this Committee, I'm not sure why my friends across the aisle were concerned. They didn't vote for any of them in this Committee. So they wouldn't have worried about them on the floor of the House, so I'm not sure why that.

And also, as my friend from Idaho mentioned just a few moments ago, the reason that most of us believe that this is a really political

issue for this President is because when he chose to overhaul the healthcare system, when he chose to go after the big banks, the Too Big to Fail, when he chose a lot of other priorities, do you know what he didn't choose as a priority? He did not choose illegal immigrants. He did not choose the immigrant community. He did not.

So we can complain all we want about differences of opinion and what did and did not move. So the issue comes is, now I can do it, I'm in my last term, and I don't like what Congress has or has not done.

My question also is this, and I'm just sitting here pondering this, because I did sit through law school and I'm proud that I did sit through law school, and I haven't met George Washington either. But the books and stories have told me a lot about how this history was founded and the folks who strived to come here, and rule of law matters. And if you come from a country in which rule of law does not matter, and the reason you are coming is you want to find rule of law, what does it say when we're going to avoid the rule of law in this country? Take immigration off of it and just look at the balance of power.

Ms. Hincapié, let me just ask a question. You used the term. Define for me policy change.

Ms. HINCAPIÉ. Policy change?

Mr. COLLINS. Yes. You use it quite regularly in your brief.

Ms. HINCAPIÉ. Sure. Under the, again, what the Department of Homeland Security has done, it has said in the past we were deporting parents of U.S. citizen children.

Mr. COLLINS. Is an Executive order policy change or is it prosecutorial discretion?

Ms. HINCAPIÉ. It's prosecutorial discretion.

Mr. COLLINS. So you are saying policy change to not do something would be captured under prosecutorial discretion?

Ms. HINCAPIÉ. Right. So just technically, the President has not issued an Executive order. He has issued Executive actions. All these are directives by the Department of Homeland Security identifying what their policies and priorities are—again, completely consistent with the Homeland Security Act.

Mr. COLLINS. In looking at this, take it away, and I know you can't because it's a cause for you, and I get that. Take immigration out of this.

Ms. HINCAPIÉ. Uh-huh.

Mr. COLLINS. What is the limit here? And you sort of blew off my colleagues who said about tax law and about other things. You came across that way. So you just say, well, no, it can't happen. Tell me why it can't. Because many people who would have said in this body 40, 50 years ago on different issues, or even 20 years ago, would have sat here and said, well, there's no way a President would just blanketly take a group and just do away with it, in a sense, and hide it under here is an outline. Why is it now not conspiracy theory to think that any President, Republican or Democrat, can use this as precedent?

Ms. HINCAPIÉ. So again, I believe that the President is actually following the law, the Constitution statutory, regulatory framework. And what the President has done here is the same that previous Administrations have done. In the future, taking the immi-

gration issue out of this, if it were tax law, if it were environmental, if it were labor employment laws——

Mr. COLLINS. Then why didn't he do it before the election? Why didn't he do it before the election? Why didn't he do it 6 years ago? Because broadly he knew it's a political issue. He knew it would cost his party politically. He chose to go after the election. It's political.

Standing, Mr. Sekulow, States. Would you say at least in a short answer States have at least a good argument for standing on this?

Mr. SEKULOW. I would say of the potential plaintiffs, they probably have the best argument. But standing is always a difficult task.

Mr. COLLINS. Very quickly. Also, those who are currently legally in line and it is taking forever to process their legal applications and now the same officers are going to have to deal with the deferred action program, would they have standing?

Mr. SEKULOW. Possibly.

Mr. COLLINS. So they are being hurt. There are damages. That is another legal term. Damages have to be found.

Also, in reference to the gentleman from Illinois, the letter that he stated, minor detail here, wasn't dealing with illegals. It was dealing with legal permanent residents and developing a process for them. He was not dealing with illegals. It was legal permanent residents.

With that, Mr. Chairman, I yield back.

Mr. MARINO. The Chair recognizes Congressman Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair. And I thank the witnesses for their presence here today. Let me just start with Mr. Sekulow.

There are approximately 11 million undocumented immigrants in the country right now, correct?

Mr. SEKULOW. That's the number I understand, yes.

Mr. JEFFRIES. Okay. And Congress appropriates resources to the Department of Homeland Security, correct?

Mr. SEKULOW. Yes, sir.

Mr. JEFFRIES. And those resources are used in part to undertake the deportation of undocumented immigrants, true?

Mr. SEKULOW. That's correct.

Mr. JEFFRIES. Okay. Now, the Department of Homeland Security does not have the resources, based on what Congress has allocated to it, to deport those 11 million undocumented immigrants, correct?

Mr. SEKULOW. Absolutely correct.

Mr. JEFFRIES. Okay. So since we've established factually there's no way that DHS can deport 11 million undocumented immigrants because it does not have the resources to do so, it's got to establish priorities as it relates to deportation, true?

Mr. SEKULOW. Absolutely correct.

Mr. JEFFRIES. Okay. Now, who actually has the authority to establish those priorities? Isn't it the Secretary of Homeland Security and therefore the President who appoints him?

Mr. SEKULOW. The Secretary of Homeland Security is authorized on a case-by-case basis. Prosecutors are authorized on a case-by-case basis. That's markedly different from a group exemption.

Mr. JEFFRIES. Right. First of all, this is not a group exemption. And I think that has just been a blanket misrepresentation. I think

many of my colleagues have actually corrected it, but there are at least five factors that individuals will have to prove, right? Present since 2010.

Mr. SEKULOW. Right.

Mr. JEFFRIES. Documentation will be required to demonstrate that.

Mr. SEKULOW. Right.

Mr. JEFFRIES. You can't just show up and make that representation.

Mr. SEKULOW. That puts you in the class.

Mr. JEFFRIES. Reclaiming my time. I'm not finished.

Mr. SEKULOW. I'm sorry.

Mr. JEFFRIES. Qualifying child. You have got to demonstrate that.

Mr. SEKULOW. Correct.

Mr. JEFFRIES. Birth certificate, perhaps, passport, whatever the case might be.

Mr. SEKULOW. Right.

Mr. JEFFRIES. Documentation.

Continuing presence. Again, it's going to require documentation.

Four, not an enforcement priority.

And then five, of course you have to pass a criminal background check.

Mr. SEKULOW. Right.

Mr. JEFFRIES. Those are all individual factors that will be assessed by the Department of Homeland Security to determine eligibility, correct?

Mr. SEKULOW. To determine if you're eligible for the class that does not constitute an individual determination.

Mr. JEFFRIES. Okay. Well, we disagree on that.

Now, in terms of—sir.

Mr. SEKULOW. Yes, sir.

Mr. JEFFRIES. I'm on the dais. You are answering questions.

Mr. SEKULOW. Yep.

Mr. JEFFRIES. We appreciate whatever authority you are bringing to this discussion.

Mr. SEKULOW. I appreciate that.

Mr. JEFFRIES. But you are not the definitive authority. In fact, what the Supreme Court has said, and let's touch on that, the *Arizona v. United States* case has been brought up. Are you familiar with that case?

Mr. SEKULOW. Yes, sir.

Mr. JEFFRIES. And do you believe that this case in any way contributes to the debate as to whether the President has discretion to defer deportation?

Mr. SEKULOW. No. SB 10, the conclusion of the Supreme Court was of course that the Federal Government has the authority and the States cannot override immigration authority that's Federally enunciated. The Supremacy Clause.

Mr. JEFFRIES. Right, okay. Justice Kennedy stated in the majority opinion, 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. Correct?

Mr. SEKULOW. Yes.

Mr. JEFFRIES. That's what Justice Kennedy said.

Mr. SEKULOW. Federal officials.

Mr. JEFFRIES. Okay, now, we have already established that the resources don't exist for the Department of Homeland Security to remove all 11 million undocumented immigrants, true?

Mr. SEKULOW. Yes.

Mr. JEFFRIES. So immigration officials, it seems to me, consistent with the Supreme Court decision which was written in 2012 on immigration, not on FDA matters, not on other collateral matters, on immigration, establishes clearly that the Department of Homeland Security and this President have the ability to make priority determinations related to deportation. Isn't that clear?

Mr. SEKULOW. Over a State determination. It involved the constitutionality of SB 10. This is a very different situation, with due respect, Congressman, to a situation where there is going to be a blanket creation of a class that is now protected outside of congressional authority. The answer to your question is pass a law.

Mr. JEFFRIES. I agree with that. The President agrees with that. Since President Eisenhower in 1956, 39 occasions there has been executive action related to deferred enforcement in connection with immigration, correct?

Mr. SEKULOW. Yes.

Mr. JEFFRIES. Thirty-nine occasions, right?

Mr. SEKULOW. Yes.

Mr. JEFFRIES. It happened under Eisenhower and Kennedy related to approximately 900,000 Cubans.

Mr. SEKULOW. Right.

Mr. JEFFRIES. It happened under Ford with approximately 200,000 Vietnamese. It happened under President Reagan, I think as it relates to approximately 200,000 Nicaraguans. It happened under George Bush 43 as it relates to Liberians. And of course it happened under the first President Bush with respect to 1.5 million undocumented immigrants, correct?

Mr. SEKULOW. Yes.

Mr. JEFFRIES. But you don't believe this President has the authority?

Mr. SEKULOW. I'm not sure—I have stated it very clearly, I thought, that I'm not convinced in all of those cases. Some of those cases were involving foreign policy issues where the President does have authority. But I have stated consistently in my testimony that I believe that, especially as it related to the situation with President Bush 41, as well as with President Reagan, that I think it is constitutionally suspect, as I think this is as well.

Mr. JEFFRIES. All right, my time is expired. I yield back.

Mr. MARINO. The Chair recognizes Congressman Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank you for being here in this filibuster-style proceeding.

You have heard the President, his proclamation, and he said that, in essence, since Congress didn't do anything that he had to act. And I just want to set the record straight. In July we had a bill to deal with border issues that was viscously fought within our party and there were massive changes and corrections that were made, and if we didn't have everybody, we had close to everybody

in the Republican Party vote for the bill, about 10 or 10:30 p.m. on Friday night, at the end of July.

So we did pass a border bill, and I'm hoping whoever advises the President will be able to tell him that. But they have got these pesky fences between us and getting to the President. I have advised the head of our CIS—and Secret Service was here testifying recently—that since we are told fences don't work on our southern border, we really need to remove the fences at the White House. If they don't work, they don't work, take down the fences at the White House.

But I've been perplexed. The President also said that, in essence, if you have been violating our laws for 5 years or more, you're our kind of people, we want you here. If you're new at violating the law, you haven't been violating it for a full 5 years, you're not our kind of people. We want longstanding law breakers.

Can anybody explain to me why we should have a preference for people that violated the law more than 5 years as opposed to maybe new lawbreakers?

Ms. HINCAPIÉ. I'll take a crack at that.

Mr. GOHMERT. What's the advantage of having longstanding law breakers?

Ms. HINCAPIÉ. I think the rationale behind it is that individuals who have been here for a long time have deep ties to our community, have U.S. citizen children, are paying taxes, property taxes. Many of them are small business owners, et cetera. They're contributing to the economy in our country in many ways and have U.S. citizen children. They're invested in our country. They want to be Americans, but there aren't any legal channels to do so. And because of the conversation we have been having so far about the lack of—there are 11 million people. This Administration has been deporting more people than any others, any previous Administrations; 2 million people have been deported under the Obama administration.

Mr. GOHMERT. Okay, so you're saying that those things don't apply to people that have been here less than 5 years? If you haven't been violating immigration laws for 5 years then you really don't want to be a citizen and you don't want to have the advantages here?

Ms. HINCAPIÉ. No, the Administration is simply saying that they are going to consider recent entrants a higher level priority. Whether I agree with that or not, that's what the Administration has decided on.

Mr. GOHMERT. Okay.

Ms. HINCAPIÉ. Their discretion as the executive branch, again, under the Homeland Security Act and the appropriations that Congress has provided, it needs to balance a number of factors. So, unequovically, the Administration——

Mr. GOHMERT. My time is short. And I am just still looking for the rationale for saying people who violated the law more than 5 years or more are our kind of people. But the 5-year figure triggered a remembrance as well. My friend Steve King and I had gone to meet with immigration officials in England in recent years. And we were told they have a firm standing law in the U.K. That until you have paid into their British system for 5 years, you are not en-

titled to any British benefits at all. Would there be a constitutional issue that any of you can think of if we were to pass such a law?

Mr. SEKULOW. No. I think that Congress has the authority—the Supreme Court has recognized—the comprehensive authority to set standards both for naturalization, the Constitution says that, and the Supreme Court has said with regard to immigration, that it vests exclusively with Congress. I think you could set standards. We have in the past. The country has done that.

Mr. DUPREE. I completely agree. That is Congress' job, its prerogative.

Ms. HINCAPIÉ. Yep, Congress can change the law at any point.

Mr. GOHMERT. And you wouldn't see a problem if we passed a law like that, you have got to pay into the system for 5 years before you can participate?

Ms. HINCAPIÉ. And I would add that actually the majority of people who are here have been paying into the system. They pay approximately $8 billion, $9 billion into our Social Security system every year.

Mr. GOHMERT. That begs the question, though. There is plenty of evidence here lately, like the child tax credit, where people are getting much more back than they paid in. But since my time has just expired, I would urge lawyers that are in the room, a potential area for litigation, since the President thinks he has the constitutional right to do this and he was a constitutional professor in Chicago, it seems like maybe his students have a legitimate class action for their money back.

I yield back.

Mr. MARINO. The Chair recognizes Congressman Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

I want to first say the witnesses have described this action by the President as unilateral, and also claim that the fact that it could be removed at any moment somehow undermines its legitimacy. Of course, every Executive order by a President is unilateral. That is the definition of an Executive order. So the notion that this is somehow not legitimate because it is unilateral, it seems to me a completely specious argument. Similarly, the fact that it could be repealed by another President or by this President is also the exact same thing when that happens in every single Executive order.

So I think those arguments that have been advanced by members of this panel are completely specious. I think you would agree, Mr. Sekulow, that the President's executive authority is neither enlarged nor limited by the words of the President. It is actually dictated by the Constitution and by the decisions of the Supreme Court of the United States. Correct?

Mr. SEKULOW. Yeah, but Executive action, though, incorporates what the President said, for in this particular case——

Mr. CICILLINE. But the constitutionality of the action is not determined by the description by any President. It is by what the Constitution permits and by the decisions of the Supreme Court. Correct?

Mr. SEKULOW. Yes.

Mr. CICILLINE. Okay. So the Supreme Court actually spoke to this question in *Arizona v. the United States*. And they said, A

principle 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.

They go on to say, 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.

So the United States Supreme Court in the most recent decision about the use of discretion in the context of immigration set forth both the right of the Federal Government to exercise prosecutorial discretion and even suggested some factors to consider in the exercise of that discretion.

You have said in your testimony, you keep using the term "blanket approval." But, in fact, what the President did in his Executive order is articulate a series of factors which, if satisfied, would entitle that person to deferral of deportation action. And that means an individualized determination as to each of those factors. The fact that in fact those are a common set of characteristics doesn't make it a blanket. It makes it they still require an individual case-by-case determination, which is all that is required in the exercise of discretion.

Now, Mr. Dupree, you said in both your written testimony and in your testimony today, that what disturbs you is the scale of this and also that it is different from past uses by other Presidents because it is not consistent with the will of Congress. Even Mr. Sekulow agrees the scale is irrelevant. It is either constitutional or not. And, in fact, when you look at scale, it is actually less in scale than President Bush's, which covered 42 percent of undocumented people. This covers 35. So the scale argument doesn't work.

Secondly, you say that it is inconsistent with the will of Congress, when in fact in President's Bush's use of Executive order it was in the face of clear express congressional disapproval of what Executive order did. And, in this case, President Obama's acting in the absence of an expression of congressional action. So the two bases for your argument have been completely undermined. Correct?

No, this is to Mr. Dupree this is to you. This is your testimony. You say here the scale of President Obama's directive significantly exceeds what past Presidents have done. Untrue. You then go on, moreover, in prior instances, the executive was acting to implement a new statute consistent with the will of Congress. Also not true.

Mr. DUPREE. I disagree. Let me take scale on first. My view as to scale is that if you had an instance in which a President said, or the Secretary of Homeland Security said, I am exercising my discretion not to remove this one individual, clearly a permissible exercise of discretion.

Mr. CICILLINE. That is not what scale means. You are not talking about whether it is done individually. You talk about the scale of what is being done here in terms of the quantity or number of individuals followed. The point of it is the scale of this is considerably less than even the most recent action by President Bush. And the

reality is this hearing is not about the authority of the President to do this. What we are really doing is delaying action by this Congress in trying to persuade the American people not to pay attention to the fact that this Congress has failed to pass comprehensive immigration reform. And rather than having a hearing where we are talking about what to do about that, we have a bipartisan bill that passed the Senate, that, if it came to the House floor, would pass. Instead, we have spent 4 or 5 hours where legal experts can pontificate about their own opinion about whether this is permissible, when it is very clear from every legal scholar I have read that this is permissible, that there is precedent for it. And I would ask unanimous consent to enter into the record a letter from the two general counsels of the United States Citizenship and Immigration Service, as well as general counsel for the Immigration and Naturalization Service, which conclude that they have studied the relevant legal parameters and wish to express their collective view that the President's actions are well within his legal authority.

And with that, I yield back.

Mr. MARINO. Without objection.

The Chair recognizes Congressman DeSantis.

Mr. DESANTIS. You know, we hear that, well, Congress hasn't acted, so then the President needs to act. But let me ask you, Mr. Dupree, because were you in the Bush White House, if Congress declines to enact a bill that the President wants, is there anything in the text, history, or structure of the Constitution that says that because Congress refused to act, that the President's Article II power is somehow augmented where he can go around Congress.

Mr. DUPREE. No, sir.

Mr. DESANTIS. That is totally foreign to our system of separated powers. Correct?

Mr. DUPREE. That is correct. Completely antithetical to it.

Mr. DESANTIS. And Bush would have never said, Well, Congress voted down my bill, I am going to go ahead and legalize people on my own or grant work permits. Correct?

Mr. DUPREE. That's correct. We were faced with virtually the same situation as President Obama was faced with, and we acted very differently.

Mr. DESANTIS. And the thing is the House, we actually considered, we did a hearing on this Gang of Eight bill, and it didn't have a lot of support on our side because the Congressional Budget Office said you would have millions of more illegal immigrants under that bill. One estimate was 7.5 million more. So that problem was not solved at all. The ICE union said it actually made it worse. And the Congressional Budget Office actually said that it would lower wages and increase unemployment for U.S. citizens. So there was a lot of reasons why that was something. And the Senators who voted for that, most of them lost this past election year.

Let me ask you this, Mr. Sekulow, prosecutorial discretion. So I am a Federal prosecutor. I may go after the heroin dealer. I am probably not going to go after the pot smoker. But what I don't do is issue the pot smoker a permit to where he can then keep smoking pot. And how does this idea of conferring positive benefits on somebody fit into the idea of prosecutorial discretion? Yeah, you may not have resources. You may have to set priorities about who

you actually enforce the law against. But where in that doctrine does it now come from where you are going to issue a work permit and a Social Security number without statutory authority?

Mr. SEKULOW. Well, the grant of substantive benefit takes it out of what is classical prosecutorial discretion. I mean, you are absolutely correct on that. And in the context here, it is one thing to do prosecutorial discretion, as you said, on a particular offense in a particular case. It is quite another, as you just said, to then award a particular benefit. In this particular case, the granting of work authorization is a substantive benefit, which is allowed in certain circumstances, but this is not one of the categories upon which these work permits, if you will, are authorized. That would take an act of the United States Congress, because despite everybody's protestations on both sides of this, the reality is there has been a creation of a class here. And I would just like to say for the record those five criteria are the criteria for determining class, not the individual discretion as to whether in fact some would be admitted, because that discretion, according to the OLC memo, rests completely with the agency, not with the President in that sense.

Mr. DESANTIS. And I was struck by footnote 8 of the OLC opinion, where OLC, when the DACA program was going to be instituted, Obama a year before said he couldn't do it; they advised him orally. They didn't actually put it in writing, which I thought was interesting. And then in the footnote, they say, hey, it's got to be case by case. But the statistics on that is the approval rate is 95-plus percent.So how is that case by case if it's 95-plus percent? I think the way it's been implemented actually conflicts with the OLC footnote even on the mini amnesty that was done in 2012.

Mr. SEKULOW. The structure of our Constitution does not allow for government by Executive action only. It requires statutory action from the legislative branch period. Especially on an issue like this, where it is in the purview of Congress.

Mr. DESANTIS. Ms. Hincapié, is it your understanding that under the President's new policy, that people who qualify for deferred adjudication will be eligible for Social Security and Medicare benefits? Because the White House had said if they pay in, then they will receive Social Security.

Ms. HINCAPIÉ. So under the existing regulations, and I just need—because this is related to what one of my colleagues has just said—the class that has been created is under the regulations. It is a class of aliens who are eligible for work authorization. The regulations, not the Obama administration, have determined, the regulations say individuals who have deferred actions that is 274A.12 subsection (C)(14), specifically say individuals who have deferred action. So that is the class. There is no new class being created.

Mr. DESANTIS. But Social Security, so they will receive Social Security and Medicare?

Ms. HINCAPIÉ. So, once they get a work authorization, employment authorization document, they will be eligible——

Mr. DESANTIS. And that, obviously, they would not have been eligible for that but for the President's action. So he is——

Ms. HINCAPIÉ. No, but for the immigration regulations and the statute.

Mr. DESANTIS. Right. But that may be the background regulation, but his action to put them into that situation is now. It is my understanding that they are not eligible for Obamacare subsidies. Is that your understanding?

Ms. HINCAPIÉ. Right. They are not eligible for Obamacare, nor are they eligible for——

Mr. DESANTIS. The problem, though, with the Obamacare thing is that, yeah, there is not going to be subsidies, but they are actually exempt under is the statute from Obamacare's employer mandate, which means that they don't count to that 50 employee limit. And so if you have, say, a naturalized U.S. citizen applying for a job versus somebody who is illegally in the country, qualifies under the President's Executive order, that business actually, it is about a $3,000 discount to hire the person who is here illegally over the person who is a U.S. citizen, even if they are naturalized.

And so, you know, you said that you are an immigrants' rights activist, but it seems what the President's doing is he is driving a wedge between illegal immigrants and legal immigrants. Legal immigrants and naturalized citizens are going to be made worse off as a result of this.

And I yield back.

Mr. MARINO. Thank you.

I have not asked my questions. I am going to ask you if you care to respond to my question in writing. It doesn't have to be that long. Any of you. I am going to switch gears here. I want to know what Congress can do to have the United States Supreme Court hear argument on and give parameters or a ruling on Executive orders, executive privilege. I know that we can sue the President, no matter who it is, on a case-by-case basis. But my research tells me that the Supreme Court has been punting that back to us, saying it is a political issue; it is a procedural issue. And I am just hoping that sometime perhaps the Supreme Court will take that Executive order or executive authority with regard to what we have been seeing with Republican and Democrat Presidents. So if you care to answer that, I would love to read it.

This concludes today's hearing. We thank all of our witnesses for joining us. I thank you for being so patient.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is adjourned. Thank you.

[Whereupon, at 6:14 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

List of Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary

Statement of Dr. Samuel Rodriguez, President, National Hispanic Christian Leadership Conference (NHCLC)
Statement of the Lutheran Immigration and Refugee Service
Statement on behalf of the Most Reverend Katharine Jefferts Schori, Presiding Bishop and Primate of the Episcopal Church
Statement of the Church World Service (CWS)
Statement of the AFL-CIO
News Release from Lee Saunders, President, the American Federation of State, County, and Municipal Employees (AFSCME)
News Release from Randi Weingarten, President, the American Federation of Teachers (AFT)
News Release from the Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Statement of Stosh Cotler, Chief Executive Office, Bend the Arc: A Jewish Partnership for Justice
News Release from Rev. Terry Melvin, President, Coalition of Black Trade Unionists (CBTU)
Statement of Daniel Costa, the Economic Policy Institute (EPI)
News Release from the Communications Workers of America (CWA)
News Release from Jobs With Justice
News Release from the Labor Council for Latin American Advancement (LCLAA)
News Release from the Laborers' International Union of North America (LiUNA!)
Statement of the National Education Association (NEA)
News Release from the United Auto Workers (UAW)
News Release from Joe Hansen, International President, the United Food and Commercial Workers International Union (UFCW)
News Release from Leo W. Gerard, International President, the United Steelworkers (USW)
Statement of Mee Moua, President and Executive Director, Asian Americans Advancing Justice (AAJC)
Statement of the American Civil Liberties Union (ACLU)
Statement of the American Immigration Council (AIC)
Statement of the American Immigration Lawyers Association (AILA)
Statement of Appleseed
Statement of Miles Rapoport, President, Common Cause
Statement of Farmworker Justice
Statement of the Fair Immigration Reform Movement (FIRM)
Statement of the Latino Victory Project
Statement of the Latin America Working Group (LAWG)
Statement of Charles Kamasaki, the National Council of La Raza (NCLR)
Statement of One America
Statement of Andrea Cristina Mercado and Miriam Yeung, Co-Chairs, We Belong Together
Stories compiled by United We Dream

Testimony of
The National Council of Asian Pacific Americans

Before the
U.S. House of Representatives
Committee on the Judiciary

Hearing on: President Obama's Executive Overreach on Immigration

December 2, 2014

Dear Chairman Goodlatte, Ranking Member Conyers, and members of the Committee:

It is a privilege to submit the following testimony for the record in this hearing on the President's Immigration Accountability Executive Action. The National Council of Asian Pacific Americans (NCAPA) is a coalition of thirty-three national Asian Pacific American organizations, representing the interests of the greater Asian American and Native Hawaiian Pacific Islander communities.

We agree with numerous legal experts around the country that as part of the executive branch's authority to enforce the law, the president has broad authority to shape how immigration laws are implemented. In recent decades, both Republican and Democratic presidents have acted to keep families together and to permit certain immigrants to enter and/or remain in the United States. President Obama's recent actions simply follow earlier precedent.

We commend the President on his leadership to provide nearly 5 million immigrants and their families – including more than 400,000 Asian American Pacific Islanders (AAPIs) – with temporary relief from deportation. Many of these AAPIs immigrated to the United States to escape war and economic turmoil, find better opportunities, and reunite with their families. Now, with the expansion of Deferred Action of Childhood Arrivals and the creation of Deferred Action for Parental Accountability, hundreds of thousands AAPIs who lack status will not be sent back to countries where they have little or no family connection. Young people and their parents may now stay together without the fear of being separated.

We also look forward to working with the White House Task Force on New Americans by providing input on modernizing our country's current visa system. The current system has led to tremendous family visa backlogs. Asian Americans are disproportionately impacted by family visa backlogs. Over 1.8 million people in Asian countries have been waiting decades for a family sponsored visa. We hope that by modernizing the current system, millions of Asian immigrants will reunite with family members more quickly.

We are committed to working with the administration on the critical next steps of outreach and implementation, and we expect that efforts to improve border and interior enforcement will be handled with strong oversight and accountability to protect civil and human rights. It is now up to Congress to pass legislation that will permanently protect immigrants, reunite families, and return fairness and due process to our immigration system.

Texas Organizing Project
Tuesday, December 1, 2014
United States House Judiciary Committee
Hearing on the "President Obama's Executive Overreach on Immigration"----------
Submitted written testimony

The following is a statement from Dorotea Mendez, a Texas Organizing Project community leader. She lives in Dallas, TX and is an immigrant mother who will benefit from President Obama's executive action:

"I have lived in the shadows as an undocumented immigrant for the past 15 years. It has been a journey of struggle, but I have never let hardships derail me from providing a better life for my three children, the oldest of whom is documented under DACA (Deferred Action for Childhood Arrivals) and two others who are U.S. citizens.

"My undocumented status has left me vulnerable to exploitation and not being compensated fairly for my work. I've also lived with the constant fear of being discovered and deported, separated from my children. This will hopefully be a thing of the past thanks for the President's executive action.

"This executive action gives me tremendous peace of mind knowing that I will have more economic stability, which will in turn help me and my husband raise our three children, two of which require special attention due to a blood condition. I want the very best for them, just as any mother does. I and millions of others who will benefit from the president's actions will now be able to contribute even more to this great nation without the haunting unease of possibly being deported and torn from the families we love.

"For the first time in our lives, we will have the opportunity to lay a more solid financial foundation for ourselves and have more reason to put our faith in living the American Dream. With more opportunity comes greater chance for success for families like mine. President Obama's executive action was a much-needed, humane first step to fixing our nation's broken immigration system, and we must build on it by fighting to protect all immigrant families.

"More than two decades have passed since a major reform was enacted to the country's immigration laws. In the absence of reform, our immigration system has become increasingly broken and is failing our families, businesses and communities. I applaud President Obama for recognizing a major issue affecting the livelihoods of millions across the country, and stepping up and putting forth policy that will hopefully blossom into comprehensive immigration reform that our country can support, regardless of one's political leanings. I remain faithful that we can obtain this.

"Immigrant families like mine are ready to play by the rules and help advance this great country we live in. When it was needed most, President Obama showed leadership by taking executive action that will help millions of hardworking immigrant families like mine live more freely."

The Texas Organizing Project (TOP), a membership-based organization, works to build power through community organizing and civic engagement. For more information, visit organizetexas.org.

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