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REINING IN AMNESTY: TEXAS v. UNITED STATES AND ITS IMPLICATIONS

HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED FOURTEENTH CONGRESS

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THURSDAY, MARCH 19, 2015

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION,
FEDERAL RIGHTS AND FEDERAL COURTS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:36 p.m., Room 226, Dirksen Senate Office Building, Hon. Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Lee, Tillis, Durbin, Coons and Blumenthal.

OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CRUZ. Good afternoon. This hearing will come to order. Welcome to each of the witnesses on this panel.

I will briefly give an opening statement. Then I will recognize the Ranking Member on the Subcommittee, Senator Coons, to give an opening statement, at which point we will begin to receive testimony from the members of the panel.

It is no secret that I and many Members of the Senate are frustrated with the President's continued disregard for the Constitution and the rule of law. The Administration has over and over again refused to follow Federal law, refused to follow the Constitution, whether with regard to Obamacare, whether with regard to the work requirements in our welfare programs, or whether with regard to amnesty.

Twenty-two times President Obama admitted to the American people he had no legal authority to grant amnesty to those who are here illegally. Indeed, one of those 22 times, he put it this way: "I am not an emperor." Then, sadly, after the last election, apparently things changed and the legal authority, the constitutional authority he lacked those preceding 22 times suddenly miraculously appeared and I guess, using the President's own formulations, he achieved the power of an emperor.

It is disappointing that Congress has not acted more effectively to defend the rule of law, to defend Federal immigration laws, which the President has decreed he will not follow and indeed he will openly defy.

Far too many Republicans campaigned across the country promising to lead; that if we were given a Republican Majority, that we would stand up and stop the President's unconstitutional amnesty. Yet Congress has failed to honor those commitments.

Senate Democrats filibustered the funding of the Department of Homeland Security in order to protect the President's illegal amnesty and, unfortunately, Republican leadership capitulated to their demands. Yet I am pleased to say when one branch of the government is not doing its job reining in the lawlessness of another branch of government, the third branch of government has stepped forward to perform its job; namely, the Federal Judiciary.

I am very proud that my home State of Texas is taking the lead litigating against the lawlessness of President Obama's executive amnesty.

Along with 25 other States, Texas has sued the Federal Government, challenging this illegal policy, and the Federal Court in Texas has enjoined the law as contrary to Federal law.

The ruling, a serious scholarly ruling, some 120 pages in length, goes through meticulously how the President's executive amnesty plan is directly contrary to Federal law. It enjoined it as being contrary to the Administrative Procedures Act, a major new policy promulgated without the notice and comment required by that Act.

The purpose of this hearing is to assess the impact of that litigation, to assess the impact of that Federal Court's rulings and to assess the impact of the President's illegal and unconstitutional executive amnesty, if it is allowed to go into effect, upon the rule of law, upon all 50 States, and upon the American people.

I appreciate the learned witnesses who have come to join us today and I look forward to this Committee hearing your testimony in this regard.

Chairman CRUZ. I will now recognize the Ranking Member, Senator Coons, for his opening statement.

**OPENING STATEMENT OF HON. CHRISTOPHER COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Mr. Chairman. I welcome and congratulate you as Chairman of this Subcommittee.

Although the name of the Subcommittee has changed over recent Congresses, the Subcommittee continues to have an important role in overseeing the courts and the Judiciary and overseeing agency action as governed by the Administrative Procedures Act.

I am sure, under your leadership, the Subcommittee will continue in its tradition of providing responsible oversight, while respecting the separation of powers and concerns, as well as the non-political nature of the third branch of our government.

Turning then to the subject of this hearing, the case of *Texas v. United States*, in which one U.S. district court judge has temporarily blocked a nationwide program that would allow millions to come out of the shadows, to contribute to and help grow our economy, by one estimate, up to \$250 billion.

I recognize there is a great deal of debate and division in this country over immigration. Such issues, however, are typically played out in the political branches, not in the Judicial. A key reason for this, of course, is the constitutional requirement that the Judiciary be empowered to decide cases and controversies rather than purely political disputes.

Political disagreements are first hashed out within the legislative branch and between the Legislative and executive branches, and those are then routinely subjected to review by the courts.

Our overburdened Judiciary would hardly have the resources to continue to decide the concrete legal disputes between litigants as charged by the Constitution rather than dealing with its core responsibilities.

The doorkeeper that prevents the Judiciary from wading in where it should not is the Article III standing doctrine that requires a plaintiff to show they have suffered a concrete and particularized injury traceable to the acts of the defendant that is capable of remedy by law.

In this case, it is worth noting that the Court rejected the plaintiff's theory that standing could be based on a flood of illegal migration that the Administration's executive action would purportedly, hypothetically, bring about in the future. Such damages would be speculative and traceable to the demonstrably illegal activities of third parties, not the government.

The Court's opinion on this point seems well supported and that should have been the end of the case, as it was when a D.C. District Court threw out a very similar lawsuit on the basis of standing.

It is not the end, however, because Texas argued that deferred action recipients would be eligible for a Texas driver's license under Texas law and because the State of Texas has set the fees for licenses below its own cost to make them, the Texas DMV potentially stands to lose about \$175 per DAPA recipient.

The Judge in this case found this injury confers standing on the State of Texas. I very much look forward to our witnesses considering that question.

It seems to me that this case does present a license problem, just not the specific one Texas complains of. The problem here is the license that the judge's opinion gives States to challenge any administrative policy or action with which they disagree.

It is a unique and novel end run around generalized grievances and the bar in the Article III standing doctrine. There are many other aspects of this case that I think deserve strong and close review. I do think that the judge here has set dangerous precedent that threatens to undermine a raft of practices, guideline and procedures that are critical for the functioning of our government, including Department of Justice charging decisions, clemency decisions, decisions to defer prosecutions.

I would note that this is an extraordinary hearing and that it concerns ongoing litigation in a Federal trial court that is subject to current and future appeal. There has been no trial and only limited discovery. Only a preliminary injunction has been granted so far.

The APA, the Administrative Procedures Act, may appear to some opponents of this President as a conservative cudgel with which to bludgeon the Administration, but this hearing strikes me as premature.

The government is confident that this decision will ultimately be reversed and if I were a betting man, I would wager they are right.

At the end of this case, both the APA and the judge's recent ruling may be viewed in sharply different focus.

With that, I look forward to our witnesses and thank the indulgence of the Chair.

Chairman CRUZ. I thank the Ranking Member and I look forward to serving together on this Committee for the next two years and to having hopefully a productive collaboration and vigorous oversight carrying out our constitutional responsibilities in that regard.

I now want to welcome the three distinguished witnesses who are here.

Mr. David Rivkin is a partner at BakerHostetler here in Washington, DC. He is a member of the firm's litigation, international and environmental groups, and he co-chairs the firm's appellate and major motions team.

He has extensive experience in constitutional, administrative and international law litigation. He has represented the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act and he was the lead outside counsel in the District Court and the Court of Appeals.

He has a bachelor's degree from Georgetown University, a master's degree from Georgetown University, and a law degree from Columbia School of Law.

Mr. Kris Kobach is the Secretary of State for the State of Kansas. He was sworn in on January 10, 2011. Prior to his election as Secretary of State, Secretary Kobach was a professor of constitutional law at the University of Missouri-Kansas City from 1996 to 2011.

In 2001, Secretary Kobach was awarded a White House fellowship, where he served as the chief advisor to Attorney General Ashcroft in immigration law and border security. Following his fellowship, he was appointed as counsel to the Attorney General.

He has a bachelor's degree summa cum laude from Harvard, a PhD from Oxford, and a law degree from Yale. For the latter fact, we hope he can be forgiven. [Laughter.]

Ms. Jill Family, Professor of Law and Director of the Law and Government of the Law and Government Institute at the Widener University School of Law, is our third witness.

Professor Family teaches immigration law, introduction to immigration law practice, administrative law and civil procedure. Professor Family's research focuses on immigration law and administrative law.

She has an undergraduate degree from the University of Pennsylvania, a master's from Rutgers University, and a law degree from Rutgers School of Law.

I would now ask each of the witnesses to rise and be sworn in. [Witnesses are sworn in.]

Chairman CRUZ. Thank you very much. Mr. Rivkin, you may begin.

**STATEMENT OF DAVID B. RIVKIN, JR.,
PARTNER, BAKERHOSTETLER, WASHINGTON, DC**

Mr. RIVKIN. Thank you, Chairman Cruz, Ranking Member Coons, Members of the Subcommittee. I appreciate the opportunity to testify before you today.

I am going to focus briefly and solely on the legality of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents, DAPA, since DAPA's policy merits no matter how compelling they may be are not relevant to its legality.

My bottom line is that the President cannot suspend any validly enacted congressional statute or even dispense with its application to certain parties. The Supreme Court confronted this very question in the 19, excuse me, in the 1838 case called *Kendall v. United States*. In that case, the President's lawyers argued forthrightly not to try to claim that he was exercising enforcement discretion or harnessing his limited resources, but rather forthrightly argued that the Congress passed too many statutes, that the executive branch could not execute all of them well, and, therefore, the faithful execution really meant they were going to execute a portion of them well at the time and defer enforcing other statutes for a while.

The Supreme Court decisively rejected this argument, calling the suspension and dispensing powers utterly alien to our constitutional tradition.

This controversy, by the way, dates to a much earlier debate between King James II and the Parliament, which culminated in the Glorious Revolution. The framers, of course, being a professor in encyclopedic knowledge of history, we are aware of this and this is what led to the faithful execution language in Article III, excuse me, Article II, Section 3, which requires the President shall take care that the laws be faithfully executed.

This duty of faithful execution is a compelling constitutional obligation subject only to the proper constraints of enforcement discretion and resource limitations.

I would argue that DAPA is, in fact, a constitutionally prescribed exercise in dispensing power and is neither a legitimate exercise in enforcement discretion nor prioritization of government's limited resources.

It rewrites existing law. Illegal immigrants would not be deported if they are not a threat to national security, public safety or border security. Beyond those three categories, deportation may be pursued only if it serves an important Federal interest.

By contrast, the Immigration and Nationality Act, INA, indicates that whoever enters the country illegally is a deportable alien who shall, upon the order of the Attorney General, be removed.

The President's policy transforms deportable aliens in two different categories, some of which are deportable and some are not.

DAPA, very importantly, and this is the heart of this litigation, does not involve case-by-case scrutiny. This is the key, because an across-the-board categorical non-enforcement policy amounts to the very constitutionally proscribed dispensing power, as the Supreme Court held in the *Chaney* case and other cases.

The Administration argues that this is not the case, that there are really are no removable aliens because removal cannot be pur-

sued under any circumstances and, therefore, there is still an opportunity to exercise enforcement discretion in the context of processing individual applications.

The mere possibility that a small percentage of four-plus million applicants may be rejected does not a meaningful enforcement discretion make. Numbers aside, since the millions of applicants will be applying by mail, the very context for implementing DAPA is inherently unsusceptible to the use of case-by-case discretion.

The Administration also claims that Congress somehow acquiesced to what the President is doing because Congress has from time to time created exceptions by grant—to removal by granting deferred deportation opportunities. Congress has always done it with a specific narrow category of individuals, and I, frankly, find the argument that because statute creates certain narrow categories of exceptions, that the President can somehow create his own broader category to be somewhat unpersuasive.

Finally, DAPA creates entitlement to benefits, such as a work program, and, as Judge Hanen points out in his opinion and I think it is perfectly clear, benefit-bestowing is never a part of enforcement discretion.

All these problems aside, DAPA—and this goes to the standing, of course—profoundly harms the states by burdening them with costs, but there is another argument that is even dearer and nearer to me in that DAPA, which Judge Hanen's opinion comments briefly, he calls it abdication standing, because DAPA unconstitutionally injures state sovereignty.

All of the States, of course, exercise their sovereignty in the shadow of the Constitution supremacy clause. The framers who drafted the Constitution in Philadelphia and the citizens of the 13 States who ratified have agreed to these arrangement to be subject to be preempted by Federal legislation because they were given a formidable set of tools to shape this preemptive legislation primarily through the States' representation in the Senate.

That is why, by the way, this is the only—that the States' membership in the Senate is the only part of our Constitution—if you look at Article V, it cannot be amended.

All of those tools are entirely inapposite if statutes are drafted by the President as the sole lawmaker and not by Congress. We have INA in place today that preempts States, including the State of Texas, from doing anything about immigration, and yet the statute that is in place today is not the same statute Congress wrote.

I would close by saying that DAPA reflects a not only unconstitutional premise, the President as sole lawmaker, it is a dangerous precedent that warps the separation of powers and harms individual liberty. It cannot be allowed to stand and I am quite hopeful that the Fifth Circuit would uphold the PI and the Supreme Court would do likewise and this case would be resolved promptly on the merits.

Thank you.

[The prepared testimony of Mr. Rivkin appears as a submission for the record]

Chairman CRUZ. Thank you, Mr. Rivkin.

I now recognize Secretary Kobach.

**STATEMENT OF KRIS W. KOBACH,
SECRETARY OF STATE, STATE OF KANSAS**

Secretary KOBACH. Thank you, Mr. Chairman and Members of the Committee.

Although I come before you as Secretary of State, I am chiefly here in my private capacity as an attorney who has represented ICE agents and U.S. citizens in cases and litigation in Federal courts across the country.

At the outset, on that point, it is important for the Committee to note that the *Texas v. United States* decision is not the only decision in which a Federal district judge has held that the President DACA/DAPA actions are in violation of law. It is actually the second.

The first was in a case where I served as lead counsel. Right after the June 2012 DACA, 10 ICE agents sued the Department of Homeland Security; and, in April 2013, the Northern District of Texas—another district, same State—held that the—on a preliminary injunction motion that the statutes found at 8 USC Section 1225(b)(2) are violated by the President's order.

Specifically, the President's directives order ICE agents to break the law. The law requires ICE agents to put certain aliens into removal proceedings and the directives say no, do not follow the law, do not put them into removal proceedings.

That case is currently pending before the Fifth Circuit. It is now titled *Crane v. Johnson*. The reason that the Northern District of Texas did not issue a preliminary injunction is that the judge subsequently revisited his jurisdiction and concluded that the Civil Service Reform Act of 1976 precluded jurisdiction and forced the ICE agents to go through the MSPB, the administrative hearing, before they could get to a Federal court.

The case is on appeal in this Fifth Circuit both on the preclusion question and on the merits, which the Department of Justice cross-appealed. I would note that the judge did find that the 10 ICE agents do have standing.

Both cases, *Texas v. United States* and *Crane v. Johnson*, present three independent reasons why these administrative acts are unlawful. First, as has already been noted, they violate the Administrative Procedures Act's rule and comment requirements.

Second, even if they did not violate the APA, they violate substantive provisions of Federal law, which I just mentioned. Third, even if they did not violate Federal law, they would still violate the Constitution because they constitute an executive exercise of legislative power, which violates the separation of powers.

The APA argument is laid out best by Judge Hanen in the *Texas* case. Judge O'Connor lays out the statutory violations very well in the *Crane* case. The APA arguments have already been touched upon. Let me jump straight to the violations of the substantive provisions of Federal law.

In 1996, Congress acted to drastically limit the discretion that then the INS had been exercising. The process of—the procedure of deferred action actually started in the 1990's and it was that procedure that Congress tried to limit and to tie down so that it could not be used.

Specifically, Congress passed three interlocking provisions, which are found in Section 1225 of Title 8 of the United States Code. One of the ones, Section 1225(b)(2)(a) says that if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under Section 1229(a). That is a removal proceeding.

In other words, shall Congress specifically said you have to place these aliens in removal proceedings. Shall has a very specific meaning, as I am sure the Members of the Committee know.

The DACA and DAPA directives order ICE agents to violate these laws. The First Circuit has already characterized these specific provisions as mandatory in nature. The District Court characterized them as mandatory in nature and rejected the Justice Department's rather absurd argument that shall means may. As a result, the DOJ has seen fit to cross-appeal in the Fifth Circuit.

The case is currently pending. Oral argument was on February 3 of this year.

The Obama administration's primary protest is that it would not make sense to interpret the law this way. We need discretion. We need to choose how to exercise our resources. The answer, which is found in the text of the law and found in Judge O'Connor's ruling, is Congress took away your discretion.

If you believe that you need to make better decisions about which aliens to deport, you must take your case to Congress or you must ask Congress for more money. The law is very clear.

Finally, consider the third document and that is the separation of powers argument. Even if there were not a Federal statute that says quite clearly you must remove these aliens, and Congress had a very clear intent, the legislative record supports that meaning, it is a violation of the separation of powers.

In the landmark case of *INS v. Chadha*, the Supreme Court said that if a—"if an action has the purpose or effect of altering the legal rights, duties and relations of persons," end quote, then that is a legislative act.

That is clearly what has happened here. The directives set criteria, they grant benefits, and they grant dispensation from removal. They alter the legal rights and responsibilities of those persons. They are legislation.

It is illegal on three levels. Indeed, it is also unconstitutional. I would be happy to answer your questions.

[The prepared testimony of Secretary Kobach appears as a submission for the record]

Chairman CRUZ. Thank you very much, Mr. Secretary.

I now recognize Professor Family.

**STATEMENT OF JILL E. FAMILY, PROFESSOR
OF LAW AND DIRECTOR OF THE LAW AND GOVERNMENT
INSTITUTE, WIDENER UNIVERSITY SCHOOL
OF LAW, HARRISBURG, PENNSYLVANIA**

Professor FAMILY. Thank you. Mr. Chairman and honorable Members of the Subcommittee, thank you so much for the opportunity to testify before you.

I have submitted written testimony and I would like to highlight a few points about that testimony.

With all due respect, Judge Hanen's opinion in *Texas v. United States* is deeply flawed. It misunderstands immigration law and misapplies well established administrative law principles.

Judge Hanen erred in concluding that the deferred action for parental accountability, or DAPA, policy is something other than prosecutorial discretion. Deferred action is, in fact, a well established form of prosecutorial discretion and it is a part of a long history of prosecutorial discretion in immigration law.

DAPA does not provide legal immigration status. Instead, it allows individuals to request deferred action, which simply is a signal that the individual is a low priority for deportation. Deferred action gives revokable permission for an individual to be present in the United States for a certain period of time. It does not provide the same security as a legal immigration status.

Further, any recipient of deferred action may request work authorization. Work authorization is a part of a separate, already established, legally binding framework. The Department of Homeland Security did not create work authorization especially for DAPA.

Additionally, the Department of Homeland Security continues to enforce the immigration laws. It is merely making priorities for how to spend its limited resources.

Because deferred action is prosecutorial discretion, it is not subject to judicial review under the Administrative Procedures Act, or APA. The APA prevents judicial review where agency action is committed to agency discretion by law.

The Supreme Court held that, quote, "An agency's decision not to take enforcement action should be presumed immune from judicial review."

Judge Hanen's decision hinges on his conclusion that the APA provides for judicial review. He reaches that conclusion by characterizing deferred action as something other than prosecutorial discretion.

I strongly disagree with that conclusion. Statutes give DHS discretion in enforcing the immigration laws and DHS is exercising its discretion through deferred action.

I strongly disagree with Judge Hanen's conclusion that the immigration statutes forbid DHS to grant deferred action without placing an individual into removal proceedings. That is never how the statutes have been interpreted and that interpretation goes against the meaning of the overall Immigration and Nationality Act and the legislative history.

That interpretation looks at certain statutory sections in a vacuum and would create absurd effects. As I stated, I do not believe that Judge Hanen should have exercised judicial review under the APA.

Since he did, I will address the question he resolved on the merits, whether DHS appropriately invoked an exception to notice and comment rulemaking.

I strongly disagree with Judge Hanen's conclusion that DHS was required to use notice and comment rulemaking. The Department of Homeland Security issued a memorandum from the Secretary of

Homeland Security to announce the new immigration policies. This type of memorandum is called a policy statement.

Under the APA, agencies are explicitly authorized to use policy statements. It is part of the legal administrative law framework.

The question then is whether the DAPA memo really is a policy statement or whether it does not fit into that category. The applicable test is whether the memorandum is binding on its face or as applied.

Contrary to Judge Hanen's conclusions, the DAPA memo is not binding on its face and it is too early to know how DHS will apply it.

Aside from addressing Judge Hanen's opinion, I want to emphasize that agency use of policy statements is not exclusive to immigration law or to the current Administration. As I explained, the APA explicitly authorizes agencies to use this procedural mechanism. Policy statements are very common in administrative law and have been for decades.

Finally, we should encourage the Department of Homeland Security's efforts to be transparent about requests for deferred action. The listing of criteria for consideration is preferable to no signals to either the public or to the department's own adjudicators about how the agency may approach these requests.

Agencies are authorized to use policy statements and we should encourage agencies to do so with transparency.

I welcome the opportunity to discuss these matters more thoroughly.

[The prepared testimony of Professor Family appears as a submission for the record]

Chairman CRUZ. Thank you very much, Professor Family.

We will now begin questioning. I would like to start.

Mr. Rivkin, the Federal court did not pull any punches in concluding that the Administration's executive amnesty was in direct violation of Federal law.

Indeed, the Federal court noted, quote, "The very statutes under which defendants claim discretionary authority actually compel the opposite result."

The Federal court further noted, quote, "The DHS Secretary is not just rewriting the laws, he is creating them from scratch." That is a direct conclusion of the Federal court in this litigation.

Mr. Rivkin, the question I want to ask you is two-fold. Number one, do you agree with that assessment? Number two, if you do, what are the consequences for the rule of law if the Executive has the authority, under the guise of prosecutorial discretion, to categorically refuse to enforce this Federal law and other Federal laws?

Mr. RIVKIN. Chairman Cruz, as to the first question, I have read very carefully Judge Hanen's decision. I think he is absolutely right. This is indeed rewriting of a law. To make one point, it was not done in a subterranean fashion. It was done in the daylight.

The President not only had the Secretary of DHS issue this—not a policy statement, but a pretty binding opinion. A number of statements issued by the Administration indicated clearly what is going to happen.

The notion that there is going to be a meaningful exercise at the field director office is—well, to put it gently, is risible.

We also have a little bit of experience with the predecessor of DAPA, called DACA, where, out of hundreds of thousands of applicants, less than three percent, Mr. Chairman, were rejected. To me, that pretty clearly demonstrates that this is a wholesale dispensation of the law relative to a particular category of individuals, which is, of course, utterly unconstitutional and violates the President's faithful execution duty.

As to what this would portend, let me also briefly link the APA arguments that I think are very important here. We have an Administration that has really done three things, and I point it out in my written statement.

It has, first, rewritten the law. It is then did not bestir itself to comply—let us call them structuring statutes, like APA, because the whole purpose of APA, for respect, and Article I delegates some authority to Article II, which the courts have upheld since the New Deal, it wants to cabin, to discipline that exercise by having statutes like APA that provide for a structured approach to decision-making—notice, comment, judicial review.

The third thing, they said nobody has judicial review. Where the Administration wants to rewrite the laws, not comply with any structuring statutes that cabin how the Executive does it, even if it is given authority, and then there is no judicial review, that decision stands.

It warps separation of powers, which is the primary means of protecting individual liberty. For those who care about policy results, which I have nothing to say since I do not think it is relevant to the law, let me tell you, if that—if that endures, if this is the new constitutional baseline, future Presidents would suspend on their own and rewrite tax laws, worker safety laws, pharmaceutical safety laws and various other things that are very, very important to the administrative State.

It is a horrible situation.

Chairman CRUZ. Thank you, Mr. Rivkin.

I would like to shift now to you, Secretary Kobach.

The Federal court in *Texas* heard evidence and that if the President's amnesty program went into effect, that just in the State of Texas, it would apply to at least 500,000 people who were here illegally and that as a consequence, when you add up the personnel costs, the facilities costs, the costs of driver's license production and all of the other costs, the two-year price tag to the taxpayers and the citizens of Texas for the President's illegal amnesty was in excess of \$103 million.

That was included in Exhibit No. 24 in the trial. Without objection, I would like to enter that into the record of this hearing.

[The information referred appears as a submission for the record]

Chairman CRUZ. My question to you, Secretary Kobach. Does your home State of Kansas and do other States face similar costs if some 4.5 million people here illegally are granted amnesty, issued work authorizations, issued driver's licenses, contrary to current law?

Mr. KOBACH. Yes. We do face similar costs and one of the reasons we cannot give you an exact number is because the Federal

Government, the Obama administration will not give us the exact names and dates of birth of the amnesty recipients. If we had those names we could then see if these individuals are receiving leave benefits, X number of people have received a driver's license.

Instead we have to estimate. If you do estimate, in Kansas, for example, the number of people who have received the DACA benefit is much smaller than in Texas. Of course, our State has fewer illegal aliens, but it is roughly 6,000 at this point, using the Federal Government's numbers of people in the State.

Assuming two-thirds of them get a driver's license, you are roughly talking about—and, again, assuming agency costs, it is conservatively about \$150 a driver's license, you are talking about \$600,000 on drivers' licenses alone. Then if you add all of the other services and benefits that the person can avail himself of once he has that deferred action. Then the price looks much later, I would say approximately \$38 million.

Again, you have to assume. We do not know the names of the DACA recipients. Then if you add to DACA another 35,000, approximately, Kansans who would be available for DAPA, then you increase all of those numbers roughly six-fold.

You are talking about a whopping increase over what was already an illegal and expensive amnesty.

Chairman CRUZ. Does that have a consequence for voting in the State of Kansas if people here illegally are given driver's licenses?

Secretary KOBACH. Interestingly, it does. The driver's license and the Social Security number are documents that the National Voter Registration Act specifies are documents you can use to register to vote.

For example, my fellow Secretary of State in Ohio wrote a letter to the President asking for what I just mentioned, a list of names and dates of birth so he could check the voter rolls and see if these individuals had not been registered when they go to get a driver's license, because many driver's license clerks will, after asking hundreds of people each day at the end of the interview, "Would you like to register to vote," they will ask the same question and people accidentally get on the voter rolls this way.

The Administration has refused to provide that information. In Kansas, we are more secure against that because we are one of four States that requires proof of citizenship at the time a person registers to vote. The other 46 States, however, I would wager that a significant percentage of these individuals, once they get the driver's license, are probably becoming registered, whether willfully or unintentionally.

Chairman CRUZ. Thank you, Mr. Secretary. Senator Coons.

Senator COONS. Thank you, Chairman Cruz.

Professor Family, if I would—you have published extensively on the intersection of immigration law and administrative law. Just review for us, if you would, what the key test is for determining whether DACA and DAPA are reviewable under the Administrative Procedures Act.

Professor FAMILY. Thank you, Senator. I think we cannot emphasize enough that policy statements are a part of the rule of law. They are part of the Administrative Procedures Act.

Senator COONS. Is your mic on, Professor Family?

Professor FAMILY. Sorry. I thought it was.

Senator COONS. Start again, if you would.

Professor FAMILY. I think it is important that we emphasize that policy statements are a part of the rule of law. They are part of the structure of the Administrative Procedures Act and the drafters of the Administrative Procedures Act put them in there for a reason.

The test is whether or not the memorandum is binding on its face or whether it is—how—we look at how it is applied, whether or not the agency applies the memorandum with some flexibility.

Just a couple of points on that. The first is that courts, including the Fifth Circuit, have upheld policy statements, saying that the agency correctly invoked an exception from notice and comment rulemaking and used policy statements where agencies have listed out criteria.

That is not—the DAPA amendment does not really do anything new in the fact that the agency lists out some criteria for the agency to take a look at, because what a policy statement does is the agency expressing to the public and to its own staff how the agency plans to use its enforcement power in the future. That is what a policy statement—that is what a policy statement does.

I just want to mention—since Mr. Rivkin mentioned the three percent rejection rate. I have seen different numbers for the DACA rejection rate. I also want to point out that that is a rate for a different program. We do not know how the Department of Homeland Security will implement DAPA yet.

It is extremely unusual in administrative law in these policy statement cases, which I have read a lot of, that—it is extremely unusual to look at how an agency implements a different program to make a guess at how the agency would implement this particular program.

I would also like to point out that I do not think the rejection rate alone really tells us anything. I think the memo itself gives discretion to the agency officers and we do not know yet how the agency will implement this particular program.

I think under the well settled principles of administrative law, as I said, I think Judge Hanen erred to find that notice and comment rulemaking was required.

Senator COONS. Let me just follow up, if I might, on that exact point about discretion and to whom discretion is granted, by whom it is exercised and whether or not the agency guidance here is exempted.

As I understand it, agency guidance is generally exempted from the Administrative Procedures Act notice and comment requirements.

DAPA appears to be guidance, but the Judge ruled that it was not because employees are required to follow it. Is that the right test? Even if the judge were right about that test, do the DACA program and the announced DAPA program allow Custom and Immigration Services, USCIS officers to exercise discretion or are they utterly without discretion?

Professor FAMILY. No. They have discretion. It is tricky because if you think just from an administrative law perspective of how you would want an agency to operate, we want to have these policy

statements because we want agencies to be able to give some direction to lower level agency officials. Otherwise, the alternative option would be, you know, sort of supervisory officials would say we will give you some sort of idea of what we would like to see happen, but we have no way of, you know, transmitting that or making sure that our lower level adjudicators understand and we will just totally leave it up to each individual adjudicator to decide what they maybe think is best.

A policy statement really is the better of two worlds in the sense that supervisory officials are able to give some direction, but still leave some discretion to lower level agency officials, and the DAPA memo does that.

Senator COONS. To the specific point about whether individuals operating at the front line are able to exercise discretion and whether the discretion that is legally at issue here is by those agents or by the agency as a whole, what is your answer to the latter?

Professor FAMILY. Yes. That is an administrative law question in terms of—that is unsettled and it may be enough just that the agency itself does not consider itself bound. In other words, if the higher level agency officials who are writing the memos, if they are free to change their mind, which they are, then that may be enough in order to say that it is a valid policy statement.

Senator COONS. What is the legal significance—this will be my last question. What is the legal significance of the fact that an applicant who, upon review, is denied in the exercise of discretion by a USCIS officer? They cannot appeal, to the best of my understanding. What is the legal significance of that?

Professor FAMILY. I think, you know, the fact that this policy was implemented through a policy statement I think shows that the Department Of Homeland Security wanted to access the flexibility that policy statements provide and, in fact, why they were included in the Administrative Procedures Act, because it gives the agency an opportunity to change its mind.

The agency could look at how the policy is being implemented and decide—you know, they might decide to change the way that they are enforcing the law. I think that a policy statement leaves the agency with a lot of flexibility. Again, if we sort of take this discussion out of immigration law and just look it at sort of good governance generally, policy statements serve a very important and useful purpose.

Senator COONS. Thank you, Professor Family. Thank you, Chairman.

Chairman CRUZ. Thank you. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. I would like to note that this *Texas* case was brought by Governors from several States, I believe all Republican Governors. I may be mistaken. That it did not include governors, pardon me, attorneys general of States like my own, and some 14 States are now asking that the injunction that was issued by this court not apply to those States.

The arguments they are making is there is no damage. They believe that the President's executive orders, in fact, will enhance the collection of revenue. One of the requirements of President Obama's executive order is that people come forward, register, sub-

mit themselves to a criminal background check, which, of course, would make them subject to deportation if there is a finding of wrongdoing of a serious nature and then be given a temporary work permit.

No matter how many times you use the word amnesty, we are talking about deferred action and a temporary renewable permit to stay or work in the United States and during that period pay taxes.

In my State, it is estimated there are 560,000 undocumented immigrants living in Illinois; 214,000 of them are potentially eligible—potentially eligible. If these immigrants receive this temporary work permit, it would lead to a \$347,000,000 increase in tax revenues for Illinois over 5 years.

That may be the reason Illinois did not join this lawsuit, because we disagree with the premise. We happen to believe that it is good for our economy and good for our State.

Ms. Family, I look at some of the comments that are made by legal scholars here and they draw analogies to what previous Presidents have done by executive order.

In 1987, Ronald Reagan, executive action to stop the deportation of 200,000 Nicaraguans. In 1990, President George HW Bush stopped the deportation of Chinese students. He kept hundreds of Kuwaiti citizens here who were otherwise illegal and saved them from being deported.

In 2001, President George W. Bush limited deportation of Salvadorean citizens at the request of that country's president and ordered that deportation decisions include consideration of specific factors.

It seems that each and every one of these fall into the basic argument that was made by Justice Anthony Kennedy when he, in fact, struck down the controversial Arizona immigration law, which was authored by one of our witnesses today.

This what Justice Kennedy said: "A principal feature of the removal system is the broad discretion exercised by immigration officials. 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."

If we only appropriate enough money, Ms. Family, to our agencies to, at least theoretically, deport four percent of the undocumented from the United States each year, does it not stand to reason that they must use discretion in choosing those who are most likely to be a harm to the United States or a threat to the United States?

Professor FAMILY. Yes. I think that prosecutorial discretion is inevitable in immigration law. I think we also have to remember here that we are talking about the regulation of people. That is something that drew me to the field of immigration law. I actually practiced immigration law before I became a law professor.

I think we need to remember that we are talking about the regulation of people here and prosecutorial discretion is always going to be necessary and humane. I think we do not want to lose aspect—lose sight of that, as well. I think we also need to remember that if you are talking about prosecutorial discretion in terms of the regulation of people and where they can be, an intrinsic part

of that is always going to be sanctioning someone's presence; not giving them a legal status, but sanctioning their presence.

I think if we look at sort of the reality and the practical nature of the situation, you know, especially given the limited congressional appropriations, I think the Department of Homeland Security is doing what the statute has mandated that it do.

Senator DURBIN. Not only limited resources, but limited action by Congress, having passed a bipartisan comprehensive immigration bill in the Senate with 68 votes, sent to the House where it languished for a 1 year and a half with no action at all. The President's response by executive order was only after the House of Representatives and Congress had been given ample opportunity to exercise their own power under our Constitution.

What the President is clearly attempting to do is to bring in those people, no threat to the United States, who will register, subject themselves to a criminal background check, pay taxes, and for that receive a temporary work permit. That, to me, is not even close to amnesty.

Thank you.

Chairman CRUZ. Thank you, Senator Durbin. Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

Mr. Rivkin, I am very concerned that this Administration may have created a new beast and that would involve establishing regulations by calculated inaction.

Many years ago, of course, the Supreme Court in *Heckler v. Chaney* concluded that agency inaction is normally not subject to review in court under the APA.

In the case of executive amnesty, of course, the Administration has gone beyond that, beyond *Heckler*, but it does cause me to worry about whether the *Heckler* rule has come to serve as sort of a shield, a shield behind which in any Presidential administration from here forward could shield, could hide unconstitutional or illegal executive policies and hope that those policies could never be reviewed in the same way that they could otherwise if they involved not inaction, but action.

My question for you is should we, should Congress consider changing the law to make an agency's non-enforcement, its calculated inaction decisions, subject to judicial review?

Mr. RIVKIN. Let me say first, Senator Lee, that I do not think the rule of *Heckler v. Chaney* is that porous. I think actually if you look at the OLC memo that provided justification for DAPA, it parsed the law perfectly fine. It applied it incorrectly to the facts by arguing, in fact, because the holding of *Chaney* is—there is a fundamental difference, the case states very clearly, between a wholesale suspension of enforcement, because that is what dispensing power is, and doing it on a case-by-case basis.

If DAPA was truly a case-by-case enforcement decision with an opportunity for ICE officers to look at each individual applicant and reach some decision would not have a problem. That is not what it is.

The reason it is not what it is—and if I may briefly comment on the question of discretion here, because Judge Hanen walks through it very carefully, particularly on pages 75 and 76 of his opinion.

Look, it cannot be a sham. We have a decision by the Secretary of Homeland Security that is written in pretty mandatory terms, from an agency that staffed itself up to implement the flood of applications, where the President of the United States who says that four million-plus people are going to come out of the shadows.

We have four million-plus applications, Senator, who are going to come in to be processed by roughly 50-plus field officers. In this situation, unlike granting of consular visas where you can look at the applicant, a very discretionary decision, you can satisfy all the criteria. You can have a return ticket, you have ties to the country you come from, the consular officer does not like the fact that you look shifty, you are sweating, or he may just think you are not trustworthy.

How is it possible to exercise meaningful discretion when 50-plus people are going to get four million-plus applications, knowing full well that their political masters expect virtually all of those applications to be granted?

The problem is not with *Heckler v. Chaney*. The problem is the Administration using it incorrectly. I have every confidence that Article III courts would look for it.

There are ways to tighten it. Yes, you can certainly change APA to clarify Section 702 because we have—obviously, Professor Family and I disagree about what it means. Let me just say also one thing. The fact that the agency can change its mind never means that it is truly a policy statement. The agency can always change its mind. If it is operating on its own discretion you, Article I, gave it, it can change its mind and issue a new rule. Under that logic, nothing would ever be judicially reviewable.

To me, again, the notion that this is not something that requires meaningful input under APA or judicial review just underscores the extent, frankly, of the arrogance of this Administration.

Look, I served in two administrations. Nothing is—nobody is more appreciative of prosecutorial discretion or all the prerogatives of Article II—I am an Article II person by my professional experience, but I have never seen any administration that would make such enormously imperious claims that would, frankly, make Nixon blush about the extent to which he could write domestic law without any warrant in statute or the Constitution.

Senator LEE: So this, in your opinion, moves far outside of calculated discretionary inaction contemplated under *Heckler v. Chaney*. This is calculated action in the opposite direction of the statute.

Mr. RIVKIN. That is exactly right, masquerading as inaction.

Professor FAMILY: May I add something real quick?

Senator LEE: Sure.

Professor FAMILY: I just want to make sure we do not lose sight of the fact of the reason why the Supreme Court held in *Heckler* that they did not think there should be judicial review over non-enforcement decisions, and that is because they were trying to protect against judges who essentially want to say to the executive I disagree with how you have chosen to enforce, the choices that you have made about enforcement.

I think, you know, if we look at this situation, I think we have got some of that going on here. We have got disagreements about

how the Department of Homeland Security should be enforcing the immigration laws and that is exactly what Heckler wanted to protect against.

Senator LEE. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Lee. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chairman. I was largely planning on being here to learn amongst the lawyers on this panel. I am the only non-lawyer you will be dealing with.

I do have a question. It really goes back to the point that Senator Durbin made. He cited several examples where he thinks prior administrative actions are on par with the actions taken by President Obama.

Can any of you, from Ms. Family down the line, talk about either why you agree with that or what the differences were in the context within which the decisions were made?

Ms. Family, you can start.

Professor FAMILY. Sure. Thank you. Yes. I think deferred action is a longstanding type of prosecutorial discretion in immigration law. Prosecutorial discretion in immigration law goes back a long, long time.

Many people do not know this, but John Lennon actually was granted prosecutorial discretion. I think that it is—deferred action to an immigration attorney is nothing newsworthy. I think actually what—to an immigration attorney, what would be newsworthy here is that the agency is being more transparent about how it intends to consider requests for deferred action and I think, as I said earlier, we should be encouraging that.

Senator TILLIS. Mr. Secretary.

Mr. KOBACH. Yes, thank you. I can speak directly to this. First of all, the cases before 1996 are largely irrelevant because in 1996 Congress very specifically said that ICE agents shall place these people into removal proceedings.

In 1996, there was a sea change in immigration law. What happened was what previously would have been called catch and release occurred, where the ICE agent just let the person go, no recording of anything, now the law requires the ICE agent to take the person into custody. They actually requires him to detain the individual if he is unlawfully present and put them into one box or another. You either go into the normal removal box, you go into the expedited removal box, or you going into an asylum box.

At that point, there is discretion, but is only the discretion that Congress chose to allow and it is defined by law.

To use Senator Durbin's example of 2001, that was temporary protected status. There is a specific statute that says you can give discretion on a temporary protected status basis to all of the people of a nation because of the hardships in that nation, usually natural disaster or war.

Senator TILLIS. Kuwait being another example.

Secretary KOBACH. Exactly. Exactly. There is another statutorily defined area of discretion. That is called cancellation or withholding of removal in Section 1229(b) of Title 8. From that point onward, Congress said discretion is confined by law.

One other point about discretion. It has been falsely—well, I should not say falsely. Ms. Family said that there is still discretion

being exercised and I do not know which agency she was talking about, but the ICE agents I represent have told a very different story in testimony before the courts.

There is no discretion. All the alien has to do is assert that he or she is eligible for the amnesty, for DACA, and that is it. The ICE agent is forbidden from actually inquiring and saying prove it, prove you came in at this date, prove you came in that date.

Word has gotten around—according to one of our ICE agents in El Paso, word has gotten around into the jails that all you have to do is say you are eligible for Obama's amnesty. That is the way they refer to it. ICE has to let you go, zero discretion.

In the discretion that has been exercised by CIS, the agency that hands out the benefits, the only case that we know of an individual being denied an application for DACA was because he did not fill out the form entirely, did not sign his name, or did not provide the fee.

I know of no example and in the discovery in these cases so far, we have seen no example produced by the government showing any individual who met the criteria, but was denied the benefit, not one example.

Senator TILLIS. Mr. Rivkin.

Mr. RIVKIN. Thank you, Senator Tillis. I actually would be happy to provide a written answer for the record. I have analyzed very carefully when the opinion came out, because it is a long opinion—I can go with erudite—it is a long opinion. It walked carefully through each instance of prior use, Article II, of some authorities to prevent a person from being deported immediately.

I would say a couple of things. First of all, I agree with Secretary Kobach about the fact that discretion got ratcheted down in 1996. Quite aside from that, nomenclature is very important. Congress has never—no executive in the past has ever engaged precisely in that kind of deferred action.

It engaged in actions that were specifically authorized by Congress, the most notable which is the extended voluntary departure. There is a fundamental difference between extended voluntary departure, which basically said you are being deported, but we are not going to do it forcefully, you have a certain period of time to do that, and saying you can stay here and you can work.

Every single thing they cite, this thing was—we are talking about the law. Details matter. An even more fundamental problem here is this. We are not just talking about resource limitations. A lot of people who are now in deportation proceedings, who have already been captured, Senator, whose administrative process almost run out, are now being led out, their indications, binding orders to release them.

That is difficult for me to justify. It is one thing to say we do not have resources. There are a lot of illegal aliens out there. We cannot go capture them all. But you have people in custody. That is not prosecutorial discretion. That is not any kind of discretion.

Senator TILLIS. Mr. Chair, just a comment, if I may. I know I am over my time. I know it was said that those who are being considered for deferred action and let us say under DACA that they pose no threat to us.

As the Senator from North Carolina and 25 minutes from my home, I think the families of the victims of three people who were murdered recently by somebody who was granted deferred action, that there is some risk and we need to be sensible to that.

Thank you.

Chairman CRUZ. Thank you, Senator Tillis. Senator Blumenthal. Senator BLUMENTHAL. Thanks, Mr. Chairman.

Let me ask Professor Family, if I may, and anyone else who wants to respond, as well.

One of the aspects of Judge Hanen's opinion that worries me because it has implications beyond this case concerns her saying—she seems to be saying that whenever the head of an agency provides guidance to agency officials, he or she has to go through notice and comment, even if she explicitly says that the officials should use discretion, even if she says 10 times that that the official should use discretion and even if there is no evidence that officials are not using their discretion.

As you probably know, it can be very difficult to predict how long it will take to promulgate a rule through notice and comment. The average rule around here these days takes about 18 months. A quarter can take longer than 3.5 years and some can take decades. It is difficult to provide guidance to agency, meaning that the public does not know what the agencies—public agencies are pursuing and agency action is likely to be arbitrary and maybe even unfair.

More importantly, it makes it nearly impossible to change rules as you get more information. If you provide guidance and then discover a better way to do things, it could take another decade to fix the problem.

Americans are forced to live with this system and even the creators of the system know it is not working because of the delay, because of the obstacles to effective rulemaking.

Can you please talk about this opinion beyond the immediate case, the DACA/DAPA case that is involved here, why it is important for government to be flexible and to make changes, as experience dictates that there be changes and that there be discretion and flexibility in these rules?

Professor FAMILY. Sure. Thank you, Senator. I think the Administrative Procedure Act gives agencies some flexibility and the choice to choose between notice and comment rulemaking and to use a policy statement, as long as the policy statement truly is a policy statement.

We could have a discussion, as a matter of good governance, whether agencies should pick, you know, at certain times or whether they should use more notice and comment rulemaking or less.

I think we cannot lose sight of the fact that a policy statement is an authorized procedural mechanism for an agency and quite necessary, as well. Agencies need policy statement in order to move more nimbly and more flexibly.

If something comes up and an agency needs to move quickly to protect public health or to respond to something more quickly, a policy statement is helpful and I think they are a necessary and important part of the administrative process.

Like anything, they may have drawbacks and there may be things about them that people do not like as much as something

else, but I think that they very important and a very necessary part of the administrative process. I think we need to think very carefully about how—how we are treating them.

The whole idea of a guidance document is that it is not supposed to be binding. From an immigration attorney's perspective, USCIS denies applications all the time. I think that—I do not necessarily agree with the assertion that just because a guidance document says one thing, that definitely means that all adjudicators will walk in lockstep with what the policy memo said.

In fact, I spend a lot of time explaining to immigration attorneys that they cannot expect USCIS adjudicators to follow everything that is in a policy statement because it is a policy statement and that is what it is supposed to do.

Senator BLUMENTHAL. Thank you. I know the judge may have been very well meaning with his order, but I think it was based on an unrealistic and simply non-factual view of the way the process operates. I would be glad to have comments from anyone else.

Secretary KOBACH. Thank you, Senator. I would point out that by its own terms, DACA is not a guidance document. It is termed by the agency a directive and it is framed as a directive to the employees, you shall apply these criteria and you shall not do certain things and you shall do certain things.

The practice of the agency has been when an ICE agent initiates removal proceedings contrary to agency policy, he is punished. He faces adverse employment action. Indeed, one of our 10 plaintiffs in the *Crane* case has faced such punishment just before DACA was initiated, under the Morton memorandum, which has now been rescinded.

Second, the other reason you should not—I do not think it is correct to describe this as a guidance document because it sets up entirely new criteria. When the document—when the directive creates a criteria that you must be here for 5 years, these are arbitrary numbers, not necessarily bad numbers, but creating a number out of whole cloth that is not found in statute, 5 years, you have to have arrived before the age of 16. Your maximum age has to be no higher than 30. That is a policymaking document that is a directive to these people.

The third point I would mention is right before DACA was initiated, in April 2012, this Administration had been doing what previous administrations did and had formal notice and rulemaking and in April of that year they had formal notice and rulemaking on the provisional unlawful presence waivers of inadmissibility for certain immediate relatives, published in the Federal Reg, and that was far less expansive and policy-oriented than the DACA directive and suddenly the Administration decided, well, we were going by the old rules, we were going with notice and comment according to the APA, now suddenly we have changed.

I think the reason they changed is there were so many legal problems, all those problems would have come out in the notice and comment period.

Mr. RIVKIN. If I may briefly comment. Long ago when I practiced administrative law for a living, although not an immigration lawyer, I can assure you that there are other venues for an agency like

ICE to proceed with dispatch. They could have done an emergency final rule which would have been subject to judicial review.

The real reason, in my opinion, they proceeded the way they did is they precisely wanted to evade judicial review. As important as it is to move with speed and dispatch, it is important to have some accountability.

The problem with a policy statement, pretending to be a policy statement, but really being a final agency action is it evades review, because it would never be then subject to review. Nobody would have standing to challenge any individual decision.

Section 702 of APA would not apply, and here we are. Consider for a second—let us forget about immigration law, as important as it is. If you look at the case law in the D.C. Circuit—because of venue selection provision, most of those cases—not all are litigated in the D.C. Circuit, not in the case of INA.

Invariably, these are very progressive groups, environmental groups, labor groups, who take issue 99 percent of the time with an agency not wanting to do something by notice and comment. Often they succeed, because as I said in my brief statement, this is the structuring statute that you gave to the executive to comply with executive exercises, broad delegated power, because you wanted people, citizens, to have their voice.

You wanted the agency to reflect in the final rule how they respond to the questions that are being raised, and you want Article III to preside and review of the final decision. These are very important virtues that you all wanted to be in place.

Thank you.

Senator BLUMENTHAL. Is there—my time has expired but if I can ask just one more question. What is the experience—I presume there is experience with the November 20 memo showing how it would be implemented. Does not the policy, by its own terms, include discretion?

Secretary KOBACH. The policy does not allow for—does not give guidance as to how you deviate from these factors that must be considered in each alien's case. We do not have implementation of the DAPA memo of November 2014, although it subsequently came out that in one portion of it where it expanded DACA, the 2012 memo, they did—the agency apparently did implement it with respect to, I believe, 100,000 people.

That information is very new information. We have not seen much about it. Much of the statements we have made—the statements we have been making about implementation have been based on the two years-plus of implementation of DACA.

Senator BLUMENTHAL. But by its own terms, it permits discretion. In fact, it virtually mandates discretion.

Secretary KOBACH. It mandates deferred action and if you think deferred action is, by definition, discretionary, then I suppose you could reach that conclusion. It does not tell the ICE officer here are some things you can look at and you decide whether they apply. It says if these things apply, the person shall not be deported. It is not—it does not mandate discretion.

Mr. RIVKIN. If I can just weigh in for 10 seconds, Senator. If we had a situation where the agency was mandated to do something,

very specific criteria, and Secretary Kobach mentions, then there is completely undetermined basis for discretion.

Then you add to that 50-plus people doing that by mail from millions of applications and you put it all together and you say how are we going to do that, how are we going to exercise discretion, flip a coin and say out of 100 applicants that I get to process in an hour, I am going to throw a couple back. There is not a discretion.

I said in my remarks, unlike—there is no interview, there is no back-and-forth. It is not like cross-examining witness. It is a faux discretion. It is a pseudo discretion. It is not a real discretion.

Senator BLUMENTHAL. Thank you very much. Thank you.

Chairman CRUZ. Mr. Kobach, you just had a back-and-forth with Senator Blumenthal and previously you and Professor Family had a disagreement on the degree of individual discretion that is exercised in these cases.

I will note that the Federal Court in *Texas* assessed that question and indeed in footnote 101 of the Federal Court's opinion, the Federal Court observed that the claim of individualized discretion—what the Court said is evidence of DACA's approval rate, however, persuades the Court that this, quote, "factor" is merely pretext.

Indeed the Court goes on to say in that same footnote no DACA application that has met the criteria has been denied based on an exercise of individualized discretion.

The Federal Court heard this argument and concluded, to put it colloquially, it ain't never happened. There is no discretion.

Indeed I would note that, as you described the experience of your clients, the ICE agents, it brought to mind what President Obama said on February 25 when he was doing an interview with MSNBC and Telemundo, and the President said, quote, "There may be individual officers or border patrol who aren't paying attention to our new directives, but they're going to be answerable to the head of the Department of Homeland Security because he has been very clear about what our priorities should be. If somebody is working for ICE and there is a policy and they don't follow the policy, there are going to be consequences for it."

Secretary Kobach, does that sound like granting discretion or does that sound like a not very veiled threat that you will grant amnesty or risk serious employment sanctions?

Secretary KOBACH. It is a threat that is not veiled at all that you will face employment consequences and significant ones, if the President of the United States is actually delivering them.

Let me give you an example of the perfect case where you might say if they had discretion, they would have exercised it. One of our ICE agents in this plaintiff group of 10 is based in El Paso.

Just to quickly tell the story, the El Paso—this was in DACA. It was the late summer of 2012. The El Paso sheriff's office called, said we have in our jail someone who has been arrested for assault and he has admitted that he is illegally in the country, would you please, ICE, come over and pick him up and remove him, deport him.

ICE went over to pick him up. When they took custody of him, he had a scuffle. He injured one of the shoulders—one of the offi-

cer's shoulders and ran away. They had another fight, again, fighting a Federal law enforcement officer, ran away. They finally got him under control and got him into the vehicle.

At this point, one of the officers had been severely injured, the other office minor injuries. They get him to the ICE headquarters and they are ordered by the supervisor, as soon as he asserts that he is eligible for the amnesty, turn him, go.

The ICE officers were in shock, disbelief. This guy had just assaulted two Federal law enforcement officers, in addition to his prior assault that he had been arrested by the El Paso authorities for.

You would think if discretion existed, well, maybe we would exercise discretion in this case. The guy is beating up Federal law enforcement officers, but no.

No discretion was allowed. There is no discretion certainly at the ICE level and as the statistics and as Judge Hanen reflected, at the CIS level, that agency does not appear to have real discretion either.

Chairman CRUZ. Am I understanding you correctly that the President's executive amnesty program is so inflexible that a violent criminal who has committed three acts of assault, two of which are against Federal law enforcement officers, has fled law enforcement, is nonetheless forced to remain free and potentially commit more assaults?

Secretary KOBACH. He was ordered, let him—they were ordered to let him go and they were absolutely shocked.

Chairman CRUZ. I think that speaks for itself.

Let me shift, Professor Family, to a different component, which is the legal justification. Much of the legal justification has been discussed in the context of prosecutorial discretion. This is far more than simply saying we are not going to prosecute cases, because part of this illegal amnesty is printing up millions of work authorizations and Social Security cards for people that Federal law explicitly prohibits working in this country.

It is not obviously an exercise of limited resources, because printing up millions of work authorizations cost additional money and additional resources. When you print a document labeled a work authorization that is prohibited by Federal law, that is known as counterfeiting an immigration document.

Work authorizations can be printed only pursuant to Federal law and when Federal law prohibits someone here illegally from working, the President's order directs that work authorizations be printed nonetheless. All of this is hinged on this wonderfully flexible theory of prosecutorial discretion.

What I would like to ask you, because you have also in this hearing defended prosecutorial discretion, do you understand the limits—the theory of prosecutorial discretion to have any limits whatsoever? Is there anything that constrains the authority of this President or a subsequent President to pick and choose which laws he or she will enforce and which laws he or she will ignore?

Professor FAMILY. Thank you, Senator. I think we will just have to respectfully disagree on our interpretations of what the law allows in this circumstance.

Work authorization for anyone who is granted deferred action is authorized by a Federal regulation. That is legally binding on the Department of Homeland Security. They have to follow that—

Chairman CRUZ. Federal regulation, of course, cannot authorize conduct that is prohibited by Federal statute.

Professor FAMILY. That is where I think we have to respectfully disagree about what the statute says. I—the statute gives the Department of Homeland Security some delegated authority to decide who will get work authorization and then the Department of Homeland Security is utilizing that delegation through a regulation to say people who get deferred action can get work authorization.

I think we just disagree on what the Immigration and Nationality Act says.

Chairman CRUZ. If you would shift to the question I asked, which is the theory of prosecutorial discretion. Are there any limits you would recognize on that theory? For example, the President has claimed he has the authority to grant amnesty to some 4.5 million people here illegally.

Under your understanding of prosecutorial discretion, would anything prevent him tomorrow from granting amnesty to all 12 million people here illegally?

Is there any principal distinction between 4.5 million and 12 million or does this mean the President has the authority to grant amnesty to everybody?

Professor FAMILY. Let me tell you what I would think about. I would think about—you know, I would look to the statute to see what the statute says in terms of what Congress has delegated to the executive branch.

Of course, actions need to be rational. Right? They cannot be arbitrary and capricious. They have to be principled and they have to be thought through. We cannot just flip a coin to decide what the policy is going to be.

I would look at those things and then I would also point out that the Office of Legal Counsel memo actually stopped short of saying what I think you are suggesting is just authorizing—prosecutorial discretion being authorized for the whole undocumented population.

I really do want to emphasize this point, as well, that, you know, sort of what is at stake here is not a green card. Right? We are just talking about revokable permission to be present for a certain period of time.

As a matter of fact, because the Department of Homeland Security did this by policy memorandum, you know, that means that a new administration has great flexibility in deciding whether to continue the program or not.

Chairman CRUZ. Since my time has expired, I am going to recognize Senator Coons and then I am going to loop back at the end of these questions to finish this chain of questions.

Professor FAMILY. Sure.

Chairman CRUZ. Because there is more I would like to discuss.

Professor FAMILY. Sure.

Chairman CRUZ. Senator Coons.

Senator COONS. Thank you, Mr. Chairman. I have another commitment, so I will be fairly brief and just thank the panel of wit-

nesses and suggest that we have had a persistent disagreement about some of the critical facts, whether there is discretion being exercised in DACA cases.

I would be happy to share with Mr. Kobach a declaration of David Newfeld from the case that goes into some detail about a specific instance where there is discretion being exercised. There is a denial of the application based on actions by the applicant that are outside the three categories that you described.

I think it is just emblematic of the broader disagreement we are having.

Is this amnesty, as some strongly suggest, or is this deferred action that provides not an entitlement to a benefit, but simply a temporary work permit? Does it fit within the history of prosecutorial discretion and within the existing legal boundaries of the Administrative Procedures Act and immigration law or is it well outside of it?

I choose the former and, in my view, a thorough and detailed review of this by the Circuit Court, by the Supreme Court, by those of us in Congress will ultimately uphold the President's executive action.

Thank you to the Members of the panel and thank you, Chairman, for the opportunity.

Chairman CRUZ. Thank you, Senator Coons. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Thank you for giving us the opportunity to question again.

I am not an expert in this area of law, so forgive me if I am hitting in an area or focusing on an area where there is a difficulty in understanding or parsing the language here. I feel like we are in alternate or different universes almost because I look at this document, November 20th policy document, and I see again and again and again—I think it is nine times—a reference to the exercise of discretion.

In fact, in Section B, there is a specific direction, “I hereby direct, in effect, case-by-case, quoting “case-by-case” analysis of individual situations. And the last of these factors is present no other factors in the exercise of discretion makes a grant of deferred action inappropriate, which is kind of an open-ended mandate, use discretion.

I am having trouble understanding how that policy guidance from the Secretary of Homeland Security, the cabinet secretary responsible for this policy for the exercise of prosecutorial discretion, is not, in effect, a mandate for discretion.

I recognize that this policy guidance has never been implemented because it was stayed, but to say there has been no experience, and I think the judge concludes there has been no experience implementing the policy guidance, when it is, in fact, stayed by the order, is a sort of Alice in Wonderland thinking that is beyond the bounds of a proper judicial order and certainly difficult for me to understand.

Maybe you can address that issue. Mr. Kobach.

Secretary KOBACH. Two thoughts. I appreciate your question, Senator. I think that the DAPA directive is artfully worded and it is artfully worded in the wake of the DACA litigation.

By the point DACA/DAPA was issued in November 2014, we already had the case up to the Fifth Circuit in *Crane* and the District Court judge had already ruled that these were the—this would fall within the APA rulemaking and notice provisions and comment provisions, and, therefore—and it was a final order. It was binding upon the officers.

I think the use of the word discretion repeatedly in the DAPA memo was an attempt to force the word in there, but for—meaning—Senator Blumenthal. The way that they forced the word in there artfully, that is often the way we obey the law.

Secretary KOBACH. Right. But if I say—

Senator BLUMENTHAL. As Attorney General of the State of Connecticut, I tried to follow the law and artfully interpret it so as to—

Secretary KOBACH. Let me give you an example. If I say to you I have a memorandum ordering you to exercise discretion and not remove anyone who meets these five criteria. I am asking you to exercise discretion, but I am directing you that your discretion shall always result in this final outcome.

I would note that with respect to ICE agents, there is zero discretion. Again, there are two different agencies—ICE, which is forced to decline to deport, and then there is CIS, which is handing out this benefit. The latest word from the officers is now the supervisors are essentially holding the leash very tightly on the line officers and making sure that no officer ever initiates removal proceedings.

There is no discretion given to the officers and their supervisors are ensuring that they never go in the other direction, that they always turn the person loose.

The practice of DACA has been zero discretion.

Mr. RIVKIN. If I can add, very briefly, Senator. Let us forget about immigration law. Let us talk about constitutional law for a second.

The essence of constitutional interpretation is harmonizing—I will forebear citing various cases—but harmonizing different constitutional provisions.

We do have enforcement discretion, prosecutorial discretion that is the heart of what it means to be the executive. That is the reason you have Article II, because you cannot do everything by laying down rules in advance and not by any faithful execution requirements.

There has to be a meaningful, judicially enforceable cabining principle, that is so often the case. The court is entitled to look at the reality of a situation. Let us even forget about the DACA experience. Let us say it never existed. You have a situation where millions of people are applying by mail, with—in the presence of a categorical criteria for adjudicating the applications, to be processed very quickly by a very limited number of individuals, without any interactions.

I would submit to you it cannot possibly be meaningful discretion. If that is meaningful discretion, then the prohibition against dispensing power means nothing. You can easily say, for example, that because of limited resources, in a post-9/11 world, FBI is not going to prosecute bank robbery and we would have a nice set of

criteria which says that if you robbed the bank, but got less than this much money, you shall not be prosecuted, except that, of course, you still have discretion.

That is—there may be instances where the dividing line is difficult. But in this instance, the dividing line is not difficult. It is not discretion. It is dispensing power, which basically means you are not going to apply a given statute to a particular category of people and you create your own category.

That is exactly—I hate to sound highfaluting, that is exactly what James II did, that is exactly what the President did in the *Kendall* case, and that is not part of our constitutional architecture.

Senator BLUMENTHAL. Maybe if I were to restate it—and I apologize to the Chair for taking a little bit of extra time—but you are saying that there is no discretion because the categories and criteria are set forth.

Mr. RIVKIN. I am saying there is no discretion given the overall context for implementation of what Professor Family calls policy statement. Again, if we have 4-plus million—

Senator BLUMENTHAL. The overall context includes a factor that says present no other factors that in the exercise of discretion makes the grant of deferred action inappropriate—no other factors in the exercise of discretion.

I almost think you could say if that were a law, it would be void for vagueness.

Mr. RIVKIN. I understand the argument, Senator, but if I may.

Senator BLUMENTHAL. It is so broad, in the mandate for discretion, it says there are all these other factors, have no lawful status as of the date of this memorandum, but by the way, if you do not like those factors and if you think they are inappropriate, it is like playing tennis with the net down.

Mr. RIVKIN. I understand. Let me explain in two sentences why it would not work. That type of a process would work in a personal interview, which I mentioned earlier in my remarks, like consular affairs offices do.

Senator BLUMENTHAL. I apologize, I was not here.

Mr. RIVKIN. It does not work in a situation where people apply by mail and fill out the form, because the people processing the application—leaving political pressures aside, let us say they do not exist—would have no opportunity to discern any of the factors that would disqualify the application of those three criteria unless they are mind readers.

Senator BLUMENTHAL. I guess—and I—this is an interesting conversation and I appreciate your indulging me and your thoughtful responses.

When you mentioned the bank robbery example, it recalled for me exactly these kinds of criteria. When I was a United States Attorney for Connecticut and the Department of Justice had these kinds of criteria for a lot of different kinds of criminal prosecutions, one of them being bankruptcy—one of them being bank robbery, because the Department of Justice was, to put it sort of colloquially, trying to get out of the bankruptcy—out of the bank robbery business.

The Department of Justice was trying to shift responsibility for prosecutions of bank robbery, which were the bread-and-butter for many years of medium or small U.S. Attorneys' offices, Connecticut being one of them, and it was saying, in effect, you should be doing more serious criminal prosecutions.

It actually established monetary amounts and it has done maybe—they are no longer in effect, but it did so for a variety of criminal prosecutions and said, in effect, here are the guidelines and then exercise your discretion.

Mr. RIVKIN. If I may, Senator, actually making my case, I am all familiar with never-ending bureaucratic docket work between main Justice and the U.S. Attorney's office, particularly for the Seventh District of New York.

You have all the information at the fingertips. Let us say you had a small bank robber and you were not inclined to prosecute him, but you interviewed him or the Assistant U.S. Attorney interviewed him, he was arrogant, he would not give out his colleagues or he manifested some other bad faith, he lied to you, I would bet you would prosecute him, because prosecutors always go after people who lie to them, irrespective of how grave the original offense was.

The context in which you functioned allowed you the meaningful exercise of discretion. If, on the other hand, all you had was an application from somebody, I would ask you, how can you possibly exercise the discretion?

Senator BLUMENTHAL. Exactly. We did exercise discretion. If it was an organized crime case or if it involved drugs and not to say bank robbery, but the point is that—and this is the overall point I am making and I will just end with this.

These officials in this area exercise the same kind of discretion or can exercise the same kind of discretion and that is the intent of that last category and of the use of the term discretion. Mr. Kobach has called it artfully, but I think it is purposefully and correctly, because I think it is the essence of a prosecutorial decision, and that is why decisions made by prosecutors are so profoundly significant and why the power is so far reaching and important.

Secretary KOBACH. If I could just add one last comment. I would hope that most of the attorneys in this room, especially those with prosecutorial experience, would agree on this point.

Under no circumstances can prosecutorial discretion be used to confer a benefit. In this case, the benefit of employment authorization, which is statutorily a benefit, is being given in addition.

You could say if we had this broader definition of prosecutorial discretion, that we will exercise discretion not to remove you. In addition to not removing you, we are handing you a benefit; or to take your bank robbery example, the U.S. Attorney shall exercise discretion and not prosecute these bank robbery cases and, in addition, shall hand each potential defendant a bag of money worth \$5,000.

We would laugh at that. We would say that is not prosecutorial discretion. You have exercised discretion not to prosecute, but then you have handed a benefit, too. That is exactly what the agency has done.

Senator BLUMENTHAL. The benefit in that instance is not a bag of money, but liberty, which, for a lot of folks, matters as much as a bag of money.

Secretary KOBACH. The right to work is a very valuable—it is an authorization that many people do not have.

Chairman CRUZ. Thank you very much.

Senator BLUMENTHAL. Thank you.

Chairman CRUZ. Mr. Rivkin, I think this was a very good exchange between you and Senator Blumenthal and I would note prosecutorial discretion is a longstanding doctrine. It would certainly be an acceptable decision of prosecutorial discretion, for example, for the department to determine it would prioritize deportations or prioritize prosecutions for violent criminals, such as the individual, the case that Mr. Kobach pointed out.

That would be a traditional use of prosecutorial discretion. We are going to focus first on the most dangerous criminals.

There is a qualitative difference here. This is not simply saying where are we going to focus our prosecution resources first. This is affirmatively printing authorizations to violate Federal statute.

Indeed, Mr. Rivkin, you have a lot of years' experience in the Department of Justice. Are you familiar with any example, as Senator Blumenthal asked you, where not only did a U.S. Attorney decline to prosecute a bank robber, but the U.S. Attorney cranked up the printing press and printed up an authorization to rob banks and handed it to the person and said you are hereby authorized to each day forward violate Federal law and over the course of 365 days, you may rob 365 banks, because the work authorization, each and every day, purports to authorize an alien here illegally to violate Federal statute.

Are you aware of any other context in which the department has purported to issue a license to violate Federal law?

Mr. RIVKIN. No, I am not, Senator Cruz. In fact, I am thinking about this issue as to how else it could have been done, I pondered briefly the question of pardon power, because pardon power is one of those absolute powers, no limitations, not judicially reviewable. Then pardon power can only be exercised for past violations.

No President can pardon somebody for things you have done in the past and then say you can do a couple more in the future. No. It is—this is a compelling example, aside from not case-by-case, why this is not prosecutorial discretion.

In my testimony, I used the example of the IRS, another favorite Agency. If IRS decides that you violated tax law, at best, they will let you go. They may waive the penalties. But IRS is not going to send you a financial boon, even of a small magnitude, because they decided that you deserve it.

This is—this gives a bad name to prosecutorial discretion.

Chairman CRUZ. Let me go back, Professor Family, you and I had an exchange where you said that the statutes did not, if I understood you correctly, prohibit employment of those who are here illegally.

If you look at Section 7—274(a) of the Immigration and Nationality Act, it provides “It is unlawful for a person or other entity to hire or to recruit or refer for a fee for employment in the United States an alien knowing the alien is an unauthorized alien.”

Now, that is an explicit prohibition and every one of those work authorizations that is purported to be handed out under executive amnesty is an authorization that purports to give that individual the authority to violate that statute or their employer the authority to violate that statute.

Professor FAMILY. Yes, Senator. There is also another statutory section where Congress has, in its defining who is unauthorized to work, and has said that you are unauthorized—you are not authorized to work unless you have been authorized to work by this Act, meaning the Immigration and Nationality Act, or the Attorney General, which that is under the old language when the Immigration and Naturalization Service used to be part of the Department of Justice. That now means the Secretary of Homeland Security.

Congress has given the Secretary of Homeland Security—has delegated authority to make decisions about who is authorized to work. The Department of Homeland Security has taken that delegation and then through a regulation, has said that people who get deferred action, and this regulation predates DACA and DAPA, said that people who get deferred action are eligible to apply for work authorization.

Chairman CRUZ. You are referring to Section 1324(a), page three. At the same time—so your argument, in order to be correct, is that by using the words “or by the Attorney General,” that Congress has, in effect, given the Attorney General the authority to allow any person on the face of the planet the ability to work in this country.

Using ordinary canons of statutory construction, if that were the case, the entire rest of this statute is superfluous. It could have been written as a one-sentence statute, the Attorney General can let in anyone they want or keep out anyone they want.

I cannot imagine—and I would point out the alternative interpretation that any court would follow is Congress has periodically authorized the Attorney General to grant specific exemptions. For example, Congress has authorized the Attorney General to provide for work for battered spouses, as well as certain nationals of Cuba, of Haiti, of Nicaragua.

In that instance, the rational interpretation, consistent with the canons of statutory interpretation, is that the phrase, “or by the Attorney General”, refers to the specific categories where Congress has given the Attorney General or the Secretary of DHS the authority to make those determinations.

Professor FAMILY. I mean, I guess we just disagree on the interpretation of the statute, because to me, that would make the language “or by the Attorney General” superfluous. I mean, why would we need that language if it was only—if work authorization was only permitted by how Congress had said it was permitted under the Act?

Chairman CRUZ. I want to make sure I understand your interpretation correctly then. You believe that that phrase “or by the Attorney General” gives today the Secretary of Homeland Security the authority to allow any one of the seven billion people on the face of the planet the authority to work in this country.

Professor FAMILY. No, because work authorization is a wholly separate issue from who will be allowed to enter the United States.

Chairman CRUZ. You are saying that the Attorney General—anyone the Attorney General chooses can be granted a work authorization.

Could the Attorney General issue a work authorization—every resident of the Nation of China is hereby authorized to work in the United States, would that be consistent with Federal law?

Professor FAMILY. I think I disagree with your premise, because to me, who is allowed to enter or would be legally admitted to the United States is a different question than who could have work authorization.

Chairman CRUZ. With respect, you have not suggested any limitation that the Attorney General could only issue work authorizations to people in the United States. You have claimed the words “or by the Attorney General” give the Attorney General unlimited discretion to choose anyone to grant a work authorization.

Is there anything you are pointing to in the statute that says they have to be physically present here?

Professor FAMILY. I think my interpretation of the statute is that “or by the Attorney General” language means that Congress is delegated to the Department of Homeland Security the authority to make decisions about who is eligible for work authorization and the Department of Homeland Security has done that through a regulation. One of many categories of individuals who are eligible for work authorization are those who have been issued deferred action.

Chairman CRUZ. Would it be consistent with the theory you are putting forth for the Department of Homeland Security to grant work authorizations to every resident of the Nation of China?

Professor FAMILY. No, because, again, I disagree with the underlying premise of your question in that—

Chairman CRUZ. Which premise is that?

Professor FAMILY. Well, because I think that assumes that every citizen of China would be legally admitted into the United States.

Chairman CRUZ. There is nothing in what you laid out that says legally admitted to the United States, and indeed, Professor Family, if your qualification is that the Attorney General or the Secretary of DHS can only grant work authorizations to those legally admitted in the United States, then you have just admitted that the DAPA program is directly contrary to that statute, that the 4.5 million were not legally admitted.

Professor FAMILY. No, no, no. I was—I was just—Senator, respectfully speaking, I was just referring to your hypothetical about the—

Chairman CRUZ. Help me understand the legal difference you are positing between 4.5 million people here illegally and 1.2 billion people currently residing in another nation. What is the line? Because you are claiming unlimited discretion for the Attorney General and I want to understand what is the legal line.

Professor FAMILY. Again, I go back to my position that I think under the language of the statute, it gives the Secretary of Homeland Security discretion to decide who is eligible for work authorization.

Of course, those decisions have to be rational and I think if you look at the regulation, where the Secretary of Homeland Security

has made those decisions, they have made some careful decisions about who is eligible for work authorization and who is not.

Secretary KOBACH. Mr. Chairman, can I comment on this very topic?

Chairman CRUZ. Secretary Kobach, sure.

Secretary KOBACH. I think Ms. Family's analysis of this is missing—it is, being done out of acumen, missing several Federal statutes. The DHS Secretary does not have authority to give employment authorization to anyone. It has to be employment authorization to a person who is admissible to the United States and it cannot be contrary to another Federal statute.

There are two Federal statutes I can think of just off the top of my head that this is contrary to. One is 8 U.S.C. § 1225, which is in my testimony, which says that these aliens must be detained for a removal proceeding. Clearly, that is contrary to that statute and the only court—well, the two courts that have specifically reviewed that have said it is.

The second, I do not have the statutory cite memorized, but it is the unlawful presence 10-year bar statute. Most of these DAPA individuals, by being illegally in the United States the requisite amount of time, will have accumulated enough unlawful presence that there is a 10-year bar to them getting a visa to come into the United States and work. There are two statutory barriers to the Secretary of Homeland Security doing what Ms. Family suggests he could do or she could do.

Chairman CRUZ. Professor Family, let me go back, because one is positing a novel legal theory, the limits are highly relevant. Both the Obama administration and your testimony today have argued that prosecutorial discretion allows the President to refuse to prosecute and to grant work authorizations to some 4.5 million people here illegally.

Can you give me any principled line that would prevent that discretion from applying to all 12 million people currently here illegally?

Professor FAMILY. I think that prosecutorial discretion is always guided by statutory concerns. It is always guided by rationality. Right? It has to be rational. I think we are certainly nowhere near the situation—

Chairman CRUZ. You would not say it is irrational. You would not say it is irrational for the President to grant deferred status to the 12 million, would you?

Professor FAMILY. I think I would need to know more about the Administration's reasons why it was doing that.

Mr. RIVKIN. If I can just add, for 30 seconds. Unfortunately, for Ms. Family, if it is truly prosecutorial discretion, rationality is irrelevant. Maybe as a political accountability matter, but as a legal matter, it is irrelevant because it is not subject to judicial review.

We do have balanced prosecutorial discretion that cannot be either changed by Article I or by Article III and then that man says trust me and if people do not like it, they may not elect me, and if I am not standing for election, then it is irrelevant. It cannot possibly mean that.

Chairman CRUZ. Professor Family, let me also understand the extent of prosecutorial discretion, because not only, under the

Obama administration's terms, would it apply to immigration law, would it allow the President to grant amnesty to all 12 million people here illegally or, for that matter, would allow the President to prospectively grant amnesty to any person on the face of the planet who came illegally to this country going forward.

Would it also, in your view—let us imagine we have a subsequent President who chooses to exercise prosecutorial discretion with regard to the tax laws and he or she instructs the Secretary of Treasury, using prosecutorial discretion, you shall no longer collect taxes in excess of 25 percent.

I will tell you, I happen to think that is a terrific policy, as a matter of economic policy. I also believe in rule of law and I do not believe the President can unilaterally decree that.

Can you—Is there any reason, under your theory of prosecutorial discretion or, rather, under the Obama administration's theory of prosecutorial discretion, that a subsequent President could not simply decline to enforce the tax laws in excess of 25 percent?

Professor FAMILY. I think one of the things we would need to think about is what are the congressional policies underlying—underlying the statute that delegates the authority in the first place.

Thankfully, I am not a tax law expert. Immigration law is complicated enough. I do not know enough about the tax statutes. In terms of immigration law, you know, the priorities are rational here. They are consistent with congressional policies that are underlying the statute.

We need to keep in mind that what the Obama administration is doing is—they are not granting legal status. They are not giving out green cards. They are saying you are of low priority for us. It is a revokable thing. They could decide tomorrow to actually deport the person. It does not provide the same Security as a lawful immigration status.

Chairman CRUZ. Let me try to see if there are any limits to this theory. Earlier at this hearing, Senator Lee was here. Imagine in 2010 we have President Lee. Would President Lee have the authority under prosecutorial discretion to announce that the Lee Administration will not enforce any Federal environmental laws or any Federal labor laws against any citizens of the State of Utah? Would that be consistent with prosecutorial discretion?

Professor FAMILY. In my mind, that would fail the rationality test.

Chairman CRUZ. No, no. He has a very good reason that he thinks the environmental laws and labor laws are hurting the citizens of Utah.

Professor FAMILY. Not the citizens of any other State?

Chairman CRUZ. Okay. Fine. I will give you a second scenario. He announces we will no longer enforce the environmental laws or labor laws against any citizen of the United States. They are hurting everybody. Would that be permissible?

Professor FAMILY. That is not the situation that we have here. I mean, the Department of Homeland Security is still—

Chairman CRUZ. I understand it is a hypothetical. My question—and as you well know, having been a litigator, courts will frequently ask hypotheticals to determine the extent of a legal theory you are proffering.

You are suggesting that the Administration can choose to engage in prosecutorial discretion and not enforce particular laws. I am asking is there any limit to it. Could a President Lee say the Federal environmental laws are hereby suspended in the United States of America?

Professor FAMILY. No. I do not think that that would be permissible, but I do not think that is what we are talking about today.

Chairman CRUZ. Why would it not? Help me understand the principled legal distinction between that and what the President has done here.

Professor FAMILY. Because here the President is merely setting enforcement priorities as he has been directed to do by the Immigration and Nationality Act.

Chairman CRUZ. Then let me tweak the hypothetical. Suppose a President Lee says I am hereby directing the enforcement priorities of the United States. We will prosecute every other Federal law before we enforce any Federal environmental law. Since there are limited resources, we are not going to have time. President Lee also goes on television, as President Obama did, and says any Federal official who violates it, there will be consequences and employment consequences.

That is a matter of just resources. Would that be permissible?

Professor FAMILY. You are talking—are you asking about how the executive branch would—how they would prioritize in terms of order of things?

Chairman CRUZ. Could a subsequent President choose to enforce—to prioritize the enforcement of every other Federal law ahead of environmental laws such that no Federal environmental law would ever be enforced again?

Professor FAMILY. No. I think I said earlier I do not think a President could just say I am never going to enforce environmental law or I am never going to enforce immigration law. Again, I do not think that is what we have going on today.

Chairman CRUZ. How about could a President issue four-year temporary permits to violate Federal environmental law, print it up, we are deferring enforcement of all of these, we are printing you an environmental polluter pass, you may use this—now, this is temporary. It is purely deferred. We might one day come back and enforce the law. For the four years the President leads the Administration, you have this authorization to violate the law. Would that be permissible?

Ms. FAMILY. I guess the best answer to that I can give you, since I am not an environmental law expert, is that all agencies marshal their resources and engage in prosecutorial discretion. I do not know this for sure, but I would be very surprised if the EPA does not, you know, decide and think about and prioritize which types of environmental violations it is going to make higher priorities or not.

Chairman CRUZ. No doubt they do, but there is something qualitatively different issuing an authorization to violate law.

For my final set of questions, I would just like to ask Mr. Rivkin. You talked about the assertion of Federal power of this President and I am reminded of what President Obama said not too long ago when he was asked if he had the authority to grant amnesty and

his response was “I am not an emperor.” Those are not my words, those are Barack Obama’s words.

The obvious implication is to grant amnesty in contravention of Federal law would be to behave as an emperor. That is in the assessment of President Obama.

I am reminded of the assessment of Professor Jonathan Turley, a known liberal constitutional law professor, a Democrat who voted for Barack Obama, who has testified before Congress that Barack Obama has become the embodiment of the imperial presidency and he used terms very similar to what you used earlier in this hearing, Mr. Rivkin.

He said Barack Obama has become the President Richard Nixon always wished he could be. I would welcome your thoughts as to the consequences of a President having the sort of unbridled executive power to pick and choose which Federal laws to obey, which Federal laws to ignore, and which Federal laws to unilaterally alter.

Mr. RIVKIN. Thank you, Mr. Chairman. I wish I had an hour, but let me be brief.

I think that it is an extremely dangerous situation, as you elucidated in your hypotheticals. It violates separation of powers. My hope is that this is an aberrational—and by the way, I, frankly, think there is a broader pattern of usurpation of Article I prerogatives.

This Administration withdraws money from the Treasury not in consequence of appropriations and other contexts. This Administration X, with this name, whenever you try to exercise appropriations power, whether through an appropriations rider or capping the budget overall.

This Administration takes umbrage at the House’s ability to invite a foreign leader. This Administration takes umbrage in the Senate’s ability to send a letter to a foreign leader.

There is an utter disdain for Article I. My hope is it is aberrational, but if that new baseline emerges and, God forbid, it gets sanctified by Article III, and, as you well know from your litigation experience, Article III does look frequently at separation of powers and past practice, we are often in a horrible place. No matter how compelling the policy merits of this, he cannot be right, because individual liberty depends most profoundly not just on the Bill of Rights, but on cabinining of powers and exercising of powers only that are appropriate to the particular entity who is doing it.

Briefly, it is not just diffusion of power. The reason legislation is—for Article I is because it benefits from deliberation. It benefits from delays no matter what people have said about delays.

If you have a sole legislator, he is going to be as bad at legislating as, frankly, Article I when you are trying to wage war, because war requires unity of command and speed and dispatch.

It is—in my opinion, you cannot criticize this enough. You cannot be alarmed about this enough no matter what your political philosophy, no matter what your ideology or party affiliation is.

Chairman CRUZ. Thank you very much.

Senator Blumenthal, do you have any additional questions?

Senator BLUMENTHAL. Yes. I would point out, I think the point has been made before that this exercise of discretion in applying

the law dates back to I think the 1960's and deferred action itself goes back to 1975.

It is a long established policy of Presidential authority that is based on the statutes, long exercised by presidents well before this one, including, most prominently, President Bush.

It is based on limits of resources, humanitarian consideration, and appropriate consideration is exactly like the ones that are recognized in the November 20 policy guidance.

I think there is a mixing of arguments here. On the one hand, that the statute is somehow being disregarded and unimplemented, and, on the other hand, that there is no exercise of discretion in that the factors are slavishly dictated so as to, in effect, abrogate individual decisions based on those humanitarian considerations or limitations of resources.

I think that we are dealing here with the real world and the consequences of real world decisions, not with hypotheticals and scenarios about environmental laws disregarded in Utah or in the United States. These actions are deferred. No one is given a pot of money. No one is given a benefit. They remain here in a deferred status, which other Presidents potentially can reverse.

I think in a certain way, the debate we are having here demonstrates anew the importance of reforming these laws. I am just a country lawyer from Connecticut but what is very apparent to me is that the very interesting and important conversation we are having in this body and all around the United States that is ongoing shows that the law needs to be reformed. We need a better way of dealing with these individuals so that the exercise of discretion is given a sounder statutory basis in law.

Thank you very much. Thank you, Mr. Chairman.

Chairman CRUZ. I thank my friend, the country lawyer. I thank each of the witnesses for being here today. I think this was a very productive and informative hearing. Thank you for taking the time. Thank you for the preparation. Thank you for participating in the questioning and conversations.

We will keep the record open for one week for any Member who wishes to provide written questions. We would ask the witnesses to respond to those questions in a timely manner.

The hearing is now adjourned.

[Whereupon, at 5:32 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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Written Testimony of

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Before the

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

March 19, 2015

Mr. Chairman and Honorable members of the subcommittee, thank you for the opportunity to testify before you. My name is Jill Family. I am Professor of Law at Widener University School of Law in Harrisburg, Pennsylvania. At Widener, I teach Administrative Law, Immigration Law, Civil Procedure, and Introduction to Immigration Law Practice. Also, I am the director of Widener's Law and Government Institute. The Institute is dedicated to the study of government law, including study of administrative agencies. Through the Institute, students may earn a certificate in government law along with a law degree. I have been researching immigration law for 10 years, and my focus of study is the dynamic between immigration law and administrative law in general. This includes study of the administrative agencies that implement immigration law, the respective roles of notice and comment rulemaking and agency guidance documents, as well as the role of the federal courts in reviewing the decisions of administrative agencies. I had the privilege of serving as a member of the governing council of the Administrative Law Section of the American Bar Association. I am a Fellow of the American Bar Foundation, and before I became a law professor, I practiced immigration law.

The issues before the committee today are important, and I have thought about them deeply. President Obama announced actions affecting immigration law on November 20, 2014.¹ Among other things, he proposed to expand the already existing Deferred Action for Childhood Arrivals (DACA) policy and to establish the Deferred Action for Parental Accountability (DAPA) policy.² DAPA would allow the parents of US citizen children and the parents of lawful permanent resident children

¹ <https://www.whitehouse.gov/issues/immigration/immigration-action>

² http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

to request deferred action. Deferred action is a signal that the individual is a low priority for deportation. Deferred action does not provide a legal immigration status, but it does give revocable permission for an individual to be present in the United States for a certain period of time.³

As far as the legal authority for DACA and DAPA, I have signed two letters explaining that these two policies are well within President Obama's legal authority. The first letter, signed by 135 immigration law scholars and teachers, explains the history of and circumstances surrounding the exercise of prosecutorial discretion in immigration law and concludes that DACA and DAPA "are legal exercises of prosecutorial discretion."⁴

The second letter, which I helped draft, shows some of the flaws in US District Judge Andrew Hanen's opinion in *Texas v. United States*.⁵ On February 16, 2015, Judge Hanen preliminarily enjoined the expansion of DACA and the operation of DAPA.⁶ Judge Hanen, among other things, concluded that President Obama's policies are subject to judicial review under the Administrative Procedure Act (APA) because the policies are something other than "nonenforcement decisions."⁷ Judge Hanen is concerned because, in his view, "DHS has not instructed its officers to merely refrain from [arrest]."⁸ To him, this makes deferred action a "program" that provides immigration benefits.⁹

This conclusion allowed Judge Hanen to move on to the question whether the Department of Homeland Security (DHS) appropriately invoked an exception to notice and comment rulemaking under the APA.¹⁰ Judge Hanen concluded that DHS did not properly invoke that exception and preliminarily enjoined the DACA extension and DAPA based on that perceived APA procedural violation.¹¹ After Judge Hanen refused to rule on the United States' request for a stay of the injunction, on March 12, 2015 the United States filed with the US Court of Appeals for the Fifth Circuit an emergency motion for a stay of Judge Hanen's order pending appeal.¹²

³ Testimony of Stephen H. Legomsky before House Judiciary Committee at 7 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>

⁴ See <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>.

⁵ See <https://pennstatelaw.psu.edu/file/LAWPROFLTRHANENFINAL.pdf>

⁶ *Texas v. United States*, Civ. Action B-14-254 (S.D. Tex. Feb. 16, 2015), available at <http://crimmigration.com/wp-content/uploads/2015/02/Memorandum-Opinion-Texas-v-United-States.pdf>

⁷ Id. at 85-86.

⁸ Id. at 86.

⁹ Id. at 85-86.

¹⁰ Id. at 102-112.

¹¹ Id. at 123.

¹² See Appellants' Emergency Motion for Stay Pending Appeal, No. 15-40238 (5th Cir. Mar. 12, 2015), available at <http://crimmigration.com/wp-content/uploads/2015/03/03-12-2015-stay-mx-5th-cir.pdf>

This second letter clears up confusion about immigration law and immigration prosecutorial discretion that is evident in Judge Hanen's opinion. The letter emphasizes that the immigration statutes give DHS the authority to establish immigration enforcement priorities, and that deferred action is a longstanding form of immigration prosecutorial discretion. DACA and DAPA are not something other than prosecutorial discretion, in fact, they are simply a part of a long history of formulating enforcement priorities in immigration law. Contrary to Judge Hanen's characterization, DACA and DAPA do not afford the benefit of any kind of lawful immigration status.¹³ On this point, the Secretary of Homeland Security is explicit.¹⁴ In the technical world of immigration law, the difference between lawful status and lawful presence is important. Lawful presence merely means that the individual has the government's consent to be present.¹⁵ It does not grant the individual a legal immigration status, such as a green card, or even a temporary status. Additionally, the letter addresses Judge Hanen's misunderstanding of the role of work authorization, which he categorizes as a part of the "program."¹⁶ DHS did not create work authorization in November 2014 as a part of DACA or DAPA. A longstanding separate statutory provision gives DHS the authority to issue work authorization,¹⁷ and longstanding regulations allow DHS to issue work authorization to those who have received deferred action.¹⁸

I would like to focus the remainder of my testimony on the administrative law implications of the litigation over President Obama's immigration actions. First, I would like to provide some background about the APA and its exceptions from notice and comment rulemaking. Second, I will highlight some concerns I have about Judge Hanen's approach to the administrative law questions raised in the litigation. Third, I will present some broader thoughts for this committee to consider.

Procedurally speaking, President Obama did not issue any executive orders to announce these immigration policies. The extension of DACA and the institution of DAPA are addressed in a policy memorandum (DAPA Memo).¹⁹ This policy memorandum is from the Secretary of Homeland Security to other agency officials and explains what the Secretary would like to see accomplished. In administrative law, such a memorandum is known as a "guidance document." Other terms often used include "sub-regulatory rule" or "non-legislative rule."²⁰

¹³ Texas v. U.S. at 87.

¹⁴ DAPA Memo at 5, available at

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

¹⁵ That consent, authorized by INA § 212(a)(9)(B)(ii) (8 U.S.C. § 1182(a)(9)(B)(ii)), means that the person will not be accruing *additional* unlawful presence for purposes of the 3-year and 10-year bars on future admissibility.

¹⁶ Texas v. U.S. at 85-86.

¹⁷ INA § 274A(h)(3) (8 U.S.C. § 1324b(h)(3)).

¹⁸ 8 C.F.R. § 274a.12(c)(14).

¹⁹ http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

²⁰ Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 572 (2012).

Agency guidance documents are used heavily throughout the executive branch, and have been for decades; they are common to administrative law.²¹ In administrative law, the term "rule" is used very broadly to include both legislative and non-legislative rules.²² Legislative rules are legally binding while non-legislative rules are not.²³ A legislative rule must follow either the formal or informal rulemaking provisions of the APA.²⁴ Under formal rulemaking, the agency holds a hearing where evidence is received.²⁵ Formal rulemaking rarely is required, partially due to the Supreme Court's high bar that statutes need to meet to trigger the use of formal rulemaking.²⁶ Informal rulemaking is more common: the executive branch agency places notice of a proposed rule in the Federal Register, allows for an opportunity for the public to comment and then considers those comments and publishes a final rule.²⁷

The APA allows for an exception to the informal rulemaking requirements for guidance documents.²⁸ The APA grants an exception to the informal rulemaking requirements for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."²⁹ Under the exception for general statements of policy, policy statements are not subject to the notice and comment requirements of the APA, but they are not legally binding on the public.³⁰ That means that a regulated party may argue that a different rule, other than the one in the policy statement, should apply in any enforcement proceeding.

All types of federal agencies use non-legislative rules. Guidance documents allow an agency to move more quickly, and to communicate more frequently with regulated parties.³¹ A policy statement such as the DAPA Memo expresses an agency's enforcement plans. It is important to highlight that guidance documents are not at all unique to immigration law or to the current administration. Guidance documents are a very common type of agency tool, and agencies rely on guidance documents to carry out statutory and regulatory directives.³²

²¹ Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. Mich. J. L. Reform 1, 4 (2013).

²² 5 U.S.C. § 551(4).

²³ Family, *Administrative Law Through the Lens of Immigration Law*, at 571-72.

²⁴ *Id.* at 569-70.

²⁵ 5 U.S.C. §§ 556-557.

²⁶ Family, *Administrative Law Through the Lens of Immigration Law*, at 570.

²⁷ 5 U.S.C. § 553; Family, *Administrative Law Through the Lens of Immigration Law*, at 569-70.

²⁸ *Id.* at 569-70.

²⁹ 5 U.S.C. § 553(b)(a).

³⁰ Family, *Administrative Law Through the Lens of Immigration Law*, at 570.

³¹ *Id.* at 589; Family, *Easing the Guidance Document Dilemma* at 20-22.

³² Family, *Easing the Guidance Document Dilemma* at 4, 31-38; Family, *Administrative Law Through the Lens of Immigration Law*, at 588.

It is also common to see challenges to an agency's use of guidance documents.³³ Again, this is something that is not at all unique to immigration law or to the current administration. In these challenges, a regulated party argues that the agency's use of a guidance document violates the APA. The argument is that the guidance document really is a legislative rule in disguise and that the agency should have used notice and comment rulemaking rather than invoking an exception. Distinguishing between appropriate and inappropriate uses of the exceptions to informal rulemaking is notoriously hazy.³⁴ There is no clear cut test. For example, the US Court of Appeals for the DC Circuit commonly hears challenges to agency use of guidance documents.³⁵ It is difficult to summarize the DC Circuit's approach to uncovering policy statements that really are improperly formulated legislative rules.³⁶ The court usually looks to the language of the policy statement and the agency's behavior.³⁷ If the document does not use binding language and the agency does not treat the rule as binding, the rule may truly be non-legislative.³⁸

To reach the question of whether the agency appropriately invoked the exception, a federal court must first determine that it has judicial review over the agency action. Here it becomes important that the DAPA Memo expresses how the agency will exercise its prosecutorial discretion. The APA states that federal court review is not available where "agency action is committed to agency discretion by law."³⁹ If the agency action is committed to the agency's discretion, then the APA precludes judicial review. It is this APA provision that makes essential to the injunction Judge Hanen's conclusion that the DAPA Memo is not agency action committed to DHS' discretion. If it is, then Judge Hanen was wrong to even reach the question whether DHS should have engaged in notice and comment rulemaking. According to the Supreme Court, "an agency's decision not to take enforcement action should be presumed immune from judicial review" under the APA.⁴⁰

Judge Hanen concluded that the DAPA Memo is not committed to the agency's discretion because it is something other than a non-enforcement decision. Judge Hanen characterized the memorandum as establishing a "program;" that the federal government is granting benefits, rather than exercising prosecutorial discretion. Further, Judge Hanen concluded that the Immigration and Nationality Act (INA) expressly forbids DHS to grant deferred action.⁴¹ He concluded that the INA "circumscribe[s] discretion" because, according to his reading of the statute, the INA

³³ Family, *Administrative Law Through the Lens of Immigration Law*, at 571-78.

³⁴ Id. at 570-71.

³⁵ *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (acknowledging the role of the US Court of Appeals for the District of Columbia in shaping how courts distinguish between legislative and nonlegislative rules).

³⁶ Family, *Administrative Law Through the Lens of Immigration Law*, at 575-78.

³⁷ Id.

³⁸ Id.; see also *Professionals and Patients for Customized Care*, 56 F.3d at 595-601.

³⁹ 5 U.S.C. § 701(a)(2).

⁴⁰ *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

⁴¹ *Texas v. U.S.* at 88-89.

mandates that all applicants for admission must be detained and put into removal proceedings if an immigration inspector does not admit the person.⁴² Therefore, according to the opinion, “potential DAPA beneficiaries who entered unlawfully are inadmissible . . . and the law dictates that they should be removed. . . .”⁴³

I believe that these conclusions represent a fundamental misunderstanding of the operation of immigration law, and that they uncomfortably stretch administrative law principles to allow for judicial review of this particular agency action. As I mentioned earlier, deferred action is prosecutorial discretion. It does, in fact, represent a non-enforcement decision. The agency is examining its limited resources⁴⁴ and is prioritizing individuals for deportation. A grant of deferred action does not confer legal immigration status. A grant of deferred action does not provide “immunity.”⁴⁵ The government may revoke the deferred action. The availability of work authorization does not stem from the DAPA Memo, but rather from an already existing, separate and legally binding framework. As also explained earlier, the INA expressly grants prosecutorial discretion authority to the agency. At its core, Judge Hanen’s argument about non-enforcement reflects his disagreement with how DHS has chosen not to enforce. But the APA contains the applicable exception to judicial review to prevent such judicial interference.⁴⁶

As for Judge Hanen’s conclusion that the INA forbids deferred action, Professor David Martin carefully examined a similar interpretation of the INA in 2012 and concluded that it “deeply misunderstands” the purpose of the statute it relies on.⁴⁷ If Judge Hanen’s interpretation is correct, then any kind of prosecutorial discretion exercised before an applicant for admission is placed into removal proceedings would be unlawful. For example, Professor Martin explained that parole, a type of prosecutorial discretion, is often granted to foreign nationals who come to the United States to help with a natural disaster.⁴⁸ If Judge Hanen’s reading of the statute stands, then no first responder volunteer would be allowed into the country without first being detained and put into a removal hearing.⁴⁹ Judge Hanen erroneously looked at these statutory sections in a vacuum and failed to square his conclusion that the INA forbids deferred action with his own acknowledgement that DHS has the authority to set enforcement priorities.⁵⁰

⁴² Id.

⁴³ Id. at 89.

⁴⁴ Testimony of Stephen H. Legomsky before House Judiciary Committee at 3 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>

⁴⁵ Texas v. U.S. at 87.

⁴⁶ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

⁴⁷ David A. Martin, *A Defense of Immigration Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 Yale L.J. Online 167, 172 (2012), available at http://www.law.yale.edu/documents/pdf/conference/ILR13_CCDavidMartin.pdf; see also Testimony of Stephen H. Legomsky before House Judiciary Committee at 18-20 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>

⁴⁸ Martin, *A Defense of Immigration Enforcement Discretion* at 179-81.

⁴⁹ Id. at 181.

⁵⁰ Texas v. U.S. at 69.

Also, I am concerned about Judge Hanen's ultimate conclusion that DHS' use of a guidance document, instead of notice and comment rulemaking, violates the APA.⁵¹ I want to emphasize that I believe that Judge Hanen should not have addressed this issue because the DAPA Memo is committed to the agency's discretion. Placing that concern to the side for the moment, I strongly disagree with Judge Hanen's characterization of the DAPA Memo as leaving no room for discretion.⁵²

In a leading Fifth Circuit case, the court of appeals determined that the FDA appropriately invoked the policy statement exception to notice and comment rulemaking.⁵³ In that case, the Fifth Circuit examined the agency's own words and actions in describing and implementing the policy contained in the memorandum. Before the court was a policy statement that listed "nine factors that the FDA 'will consider' in determining whether to initiate an enforcement action."⁵⁴ The FDA had explained in the memorandum that those nine factors were not exhaustive and that agency personnel could consider other factors.⁵⁵ Despite the "will consider" language, the Fifth Circuit concluded that the document left enough room for individualized determinations because the memorandum allowed for the consideration of other factors other than the nine.⁵⁶ Turning to how the agency actually treated the memorandum, the Fifth Circuit concluded that even though the memorandum had signaled how the agency would exercise its enforcement discretion, that in itself did not doom the memorandum. As the court stated, "all statements of policy channel discretion to some degree- indeed, that is their purpose."⁵⁷ In reaching this conclusion, the Fifth Circuit looked at how the FDA had implemented the actual memorandum that was before the court.

Similar to the policy memorandum that was before the Fifth Circuit, the DAPA Memo directs adjudicators to exercise discretion and gives them space to consider factors other than those listed in the memorandum. The language used by the agency, therefore, is the language of a policy statement. Also, the only evidence Judge Hanen considered regarding the agency's own behavior was the agency's implementation of a different policy, the original DACA policy.⁵⁸ Judge Hanen concluded that he knows how DHS will implement this policy based on his conclusion of how DHS is

⁵¹ This conclusion is closely related to the conclusion that the DAPA Memo is final agency action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006). Where a policy memorandum does not create legal consequences, it cannot be final agency action. *Id.* at 808. Therefore, if the DAPA Memo is truly a policy memorandum, it is not final agency action.

⁵² *Texas v. U.S.* at 108-110.

⁵³ *Professionals and Patients for Customized Care*, 56 F.3d at 600-601.

⁵⁴ *Id.* at 593-94.

⁵⁵ *Id.* at 597.

⁵⁶ *Id.* at 597, 600.

⁵⁷ *Id.* at 600.

⁵⁸ Judge Hanen concluded that DHS is not exercising discretion in the implementation of DACA. *Texas v. U.S.* at n.96 and n.101. Professor Stephen Legomsky has explained how the record refutes this conclusion. Testimony of Stephen H. Legomsky before House Judiciary Committee at 12 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>

implementing another policy. If the test is whether the memorandum is binding on its face or as applied, the memorandum is not binding on its face, and it is too early to know how it will be applied.

In closing, I would like to focus your attention on some broader administrative law issues. Guidance documents do have drawbacks. There are valid concerns that any agency, or any administration, could use a guidance document to bind a regulated party practically without undergoing the rigors of notice and comment rulemaking. The concern is that a regulated party will feel compelled to follow the direction of the guidance document and will not argue that some other rule should apply. Guidance documents do play a necessary role in administrative law, however. The APA contains the exception to notice and comment rulemaking for good reasons. Whether, as a matter of good governance, agencies should use more notice and comment rulemaking is an open question. But policy memoranda like the DAPA Memo will always play a role in administrative law. In evaluating the DAPA Memo, we should test it in the same way a court would test any guidance document, and not subject it to different scrutiny because the substantive subject is immigration law.

Also, we should commend and encourage DHS for its efforts to be transparent about the DACA and DAPA procedures. The listing of criteria, while not determinative, informs the public about the types of things DHS will think about when deciding whether to grant deferred action. This is immensely preferable to a scenario where the agency provides no signals to either the public or its own adjudicators and the guiding principles behind a decision are a mystery. Providing some criteria and explaining how the agency will approach requests for deferred action is undoubtedly fairer, and also makes it easier for the public to hold the agency accountable when it actually adjudicates requests.

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

Testimony of Kris W. Kobach

**Before the United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
Hearing on “Reining in Amnesty: *Texas v. United States* and its Implications”
March 19, 2015**

Mr. Chairman and Members of the Committee, although I serve as the Kansas Secretary of State, I come before you chiefly in my private capacity as an attorney who has litigated numerous immigration and preemption issues in the federal courts. I also served as Counsel to U.S. Attorney General John Ashcroft at the Department of Justice. I was Attorney General Ashcroft’s chief advisor on immigration law during 2001-03. In addition, I served as a professor of Constitutional Law at the University of Missouri – Kansas City School of law from 1996 to 2011.

At the outset, it is important for this subcommittee to be aware that the decision of the Southern District of Texas in *Texas v. United States* is not the only federal court decision finding that the President’s recent executive actions in immigration violate federal law. It is actually the second federal court to reach that conclusion. In August of 2012, ten ICE agents sued the Secretary of Homeland Security for the reason that the DACA Directive of June 2012 compels the agents to violate federal law. I am the lead attorney representing those ICE agents in that case. In April of 2013 the US District Court for the Northern District of Texas held that the DACA Directive compels ICE agents to violate the requirements of federal law found at 8 U.S.C. § 1225(b)(2)(A). *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788. The case is currently pending before the Fifth Circuit of the U.S. Court of Appeals. *Crane v. Johnson*, No. 14-10049. The reason that the Northern District of Texas did not issue a preliminary injunction in that case is that it subsequently concluded that the Civil Service Reform Act precluded the ICE agents from bringing their case in an Article III court and forced them to instead go through the administrative bodies normally reserved for garden variety employment disputes. We appealed the jurisdictional decisions of the district court, and the Department of Justice cross-appealed the merits decision.

Both cases present three independent reasons why the executive amnesty of June 2012 and its expansion in November 2014 are unlawful: (1) the executive actions do not comply with the requirements of the Administrative Procedure Act (APA); (2) even if they did comply with the APA, they would still be in direct violation of substantive provisions of federal law; and (3) even if they did not violate federal law, they would still be unconstitutional. My testimony is organized accordingly. The APA argument is most directly addressed by the *Texas v. United*

States decision; and the substantive violation of federal law is most directly addressed by the *Crane v. Napolitano* decision. Neither court needed to reach the constitutional question, but the plaintiffs' arguments on that question are also compelling.

I. Violation of the Administrative Procedure Act

The APA requires that agencies implementing federal statutes in whole or in part do so through rulemaking. Rulemaking is defined under the APA as the agency process for formulating, amending, or repealing a rule through notice and comment procedures under the APA. 5 U.S.C. § 553.

The Immigration and Naturalization Act (INA) delegates authority to the Secretary of Homeland Security and the Attorney General to implement its provisions through the formal promulgation of rules pursuant to the APA. Using specific eligibility criteria, the DACA and DAPA Directives enumerates the qualifications of a large class of individuals who are made eligible for non-removal and the specific benefit of employment authorization. Yet DHS has not promulgated any rule that establishes the criteria for eligibility for relief from removal from the United States or the granting of employment authorization as described in the Directive.

An administrative action that establishes criteria for exception from removal from the United States and defines a class with affirmative eligibility for benefits is quintessentially a "rule" under the APA. 5 U.S.C. § 551(4) ("rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). The United States Supreme Court has made clear that "on-off" or "yes-no" eligibility for benefits under a Congressional enactment must be defined through formal rulemaking:

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, ... but also to employ procedures that conform to the law. ... No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.

The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.

Morton v. Ruiz, 415 U.S. 199, 231-32 (1974) (citations and footnotes omitted). In this instance, DHS has set out in the Directive a determination of future rights, privileges, and benefits. In so doing, the Administration has attempted to bury, outside of the APA, rulemaking decisions that have the “inherently arbitrary nature of unpublished ad hoc determinations.” And as in *Morton*, “[t]he Secretary has presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met.” *Morton*, 415 U.S. at 235.

DHS is not free to vacillate between regulations, policy, and discretion at will. See *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012). Under prior Administrations, DHS, and the Department of Justice before it, consistently chose to formally promulgate regulations in order to establish or disestablish eligibility for immigration benefits.¹ At no time did DHS or its predecessors suggest that they had the authority to make a massive policy change to grant immigration benefits to more than fifteen percent of all unlawfully present aliens. Nor did they do so without promulgating a rule subject to advance notice and an opportunity for public comment and criticism.

The issuance of the DACA and DAPA Directives inherently requires rulemaking. The criteria imposed – for DACA, that the applicant must have entered the United States under the age of “sixteen”, have resided continuously in the United States for at least “five” years, and be under the age of “thirty” – are fundamentally arbitrary thresholds of eligibility. They are policy selections that define a terminus for deciding whether one is “in” or “out.” They are not clarifications of existing statutes or regulations; they are instead new policies establishing new standards of eligibility for a massive class of individuals.

A central facet of the APA is the exposure of a proposed rule to public comment and criticism, which in turn provides the promulgating agency an opportunity to answer such criticism, make changes to the proposed rule, or even decline to publish a final rule in light of the criticism. By attempting to make this policy change through executive fiat, DHS avoided this public scrutiny and plainly violated the terms of the APA.

The district court in *Texas v. United States* reached this conclusion easily. The court found “both factually based upon the record and the applicable law, that DAPA is a ‘legislative’ or ‘substantial’ rule that should have undergone the notice-and-comment rule making procedure mandated by 5 U.S.C. § 553. The DHS was not given any ‘discretion by law’ to give 4.3 million removable aliens what the DHS itself labels as ‘legal presence.’” *Texas*, slip op. at 112. It is difficult to see how any appellate court could reach a different conclusion. However, even if the DACA and DAPA Directives could somehow be seen as mere “guidance” that is not subject to the APA, it is equally clear that the Directives violate the express terms of federal law.

¹See, e.g., Department of Homeland Security, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 77 Fed. Reg. 19,902 (April 2, 2012) (proposed rule).

II. Violation of Substantive Provisions of Federal Law at 8 U.S.C. § 1225

In 1996, Congress acted to drastically limit the any discretion that ICE officers might otherwise have with respect to the initiation of removal proceedings. Frustrated with executive non-enforcement of federal immigration laws, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). “[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.” *Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 483-84 (1999). Congress therefore acted to statutorily restrict the discretion available to the executive branch. As a conference committee report in 1996 succinctly stated: “[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended.” H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.). To achieve its objective of maximizing the removal efforts of the executive branch, Congress inserted several interlocking provisions into the INA to *require* removal when immigration officers encounter illegal aliens. It was Congress’s objective to end the so-called “catch and release” practice that the INS had legitimized through a series of policy directives in the preceding years.

Those provisions requiring removal are as follows. 8 U.S.C. § 1225(a)(1) requires that “an alien present in the United States who has not been admitted ... shall be deemed for purposes of this chapter an applicant for admission.” This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission “shall be inspected by immigration officers.” This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.” The proceedings under 8 U.S.C. § 1229a are removal proceedings in United States Immigration Courts.

The DACA and DAPA Directives order the ICE-officers to violate these provisions of federal law by declining to place certain aliens into removal proceedings, when federal law clearly requires them to place such aliens into removal proceedings. The First Circuit has already characterized 8 U.S.C. § 1225(b)(2)(A) as mandatory in nature: “Congress did not place the decision as to which applicants for admission are placed in removal proceedings into the discretion of the Attorney General, but created mandatory criteria. *See* 8 U.S.C. §§ 1225(b)(1), (2).” *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). Because Congress has expressly limited DHS discretion not to initiate removal proceedings, any “prosecutorial discretion” that they exercise must be consistent with 8 U.S.C. § 1225.

Since that statute mandates the commencement of removal proceedings, such discretion can only be exercised *after* such proceedings have been initiated, and according to the procedures established by Congress, as is the case with cancellation or withholding of removal. See 8 U.S.C. §§ 1229b, 1231(b)(3). An executive agency's policy preference about how to enforce (or, in this case, not enforce) an act of Congress cannot trump the power of Congress: a Court may not, "simply ... accept an argument that the [agency] may ... take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

It is Congress that determines which aliens are to be removed from the United States, even though it exercises that power through executive officers: "The power of Congress ... to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised through executive officers" *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). Consequently, the Secretary of Homeland Security's authority to enforce the immigration laws under 8 U.S.C. § 1103(a)(5) cannot be construed to authorize him to order his subordinate employees to violate the requirements of federal law expressed in 8 U.S.C. § 1225.

The Supreme Court has recognized that Congress has the authority to statutorily restrict executive discretion in this manner: "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Through IIRIRA, Congress circumscribed the executive branch's discretion *not* to pursue the removal of illegal aliens. The interlocking provisions of 8 U.S.C. §§ 1225(a)(1), 1225(a)(3), and 1225(b)(2)(A) provide clear statutory direction to DHS. If an illegal alien is encountered by DHS, an inspection *must* occur, and if that illegal alien is not entitled to be admitted to the United States, he or she *must* be placed in removal proceedings. Any subsequent relief, whether it be through asylum, cancellation of removal, or withdrawal of removal, must be authorized by federal statute. Wholesale grants of "deferred action" are no longer possible after IIRIRA.

The district court in *Crane* read the plain terms of federal law to mean exactly what they say. "Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Crane*, slip op. at 15. Addressing the DHS contention that federal immigration laws allow for some discretion to be exercised, the court pointed out that such discretion has been taken away by Congress. "The Court finds that Congress, by using the mandatory term 'shall' in Section 1225(b)(2)(A), has circumscribed ICE's power to exercise discretion when determining against which 'applicants for admission' it will initiate removal proceedings." *Crane*, slip op. at 17.

The district court in *Crane* also explained why the mandatory language of 8 U.S.C. § 1225(b)(2)(A) is different from the more permissive federal statute at issue in *Heckler*:

The Supreme Court found that the Act's enforcement provisions, on the whole, committed "complete discretion to the Secretary to decide how and when they should be exercised." [*Heckler*, 470 U.S. at 835.] The INA, in contrast, is not structured in such a way that DHS and ICE have complete discretion to decide when to initiate removal proceedings. Instead, Section 1225(b)(2)(A) of the INA requires immigration officers to initiate removal proceedings whenever they encounter applicants for admission who are not "clearly and beyond a doubt entitled to be admitted," and nothing in the INA or related regulations suggests that Congress's use of the term "shall" imposes anything other than a mandatory duty.

Crane, slip op. at 19-20. The district court correctly applied *Heckler* to conclude that Congress had acted in unambiguous terms to restrict executive discretion.

In response, the Obama Administration protests that the DACA and DAPA Directives enable them to prioritize their allocation of limited enforcement resources more efficiently than the automatic approach of IIRIRA. They may or may not have a good policy argument. But they no longer have the legal authority to set policy in that respect – Congress has done it for them. If the DHS does not like the way IIRIRA forces it to utilize its limited enforcement resources, then it has two choices: (1) ask Congress for more resources, or (2) ask Congress to change the law. The Administration cannot circumvent the requirements of federal law through executive fiat. However, even if these provisions of federal law did not exist, the Administration's actions would still be impermissible, because they are unconstitutional.

III. Violation of the Constitutional Separation of Powers

Article I, § 1, of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." DACA and DAPA constitute an exercise of legislative power by an executive agency and represent an aggrandizement of the executive branch at the expense of the legislative branch. Consequently, the Directives plainly violate the constitutional separation of powers.

The Development, Relief, and Education for Alien Minors Act (DREAM Act), in various forms, has been proposed in Congress at least 24 times.² DACA is a mirror image of the

²It was introduced in the following bills: S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-13 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-32 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-32 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-32 (2007) (as amended by S.A. 1150 §§ 612-19); S. 1639, 110th Cong. §§ 612-20 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-42 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842,

DREAM Act, conferring non-removal and employment authorization upon substantially the same class of illegal aliens covered by the DREAM Act.³ The DREAM Act has never been passed by both houses of Congress and signed into law by the President. But the fact that the Act has been proposed in Congress two dozen times, and has been voted on by the House of Representatives and Senate, indicates Congress's plain understanding that federal legislation is required in order to achieve these objectives. Congress is correct in this understanding.

The constitutional separation of powers is fundamental to the Republic:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 951 (1983). The Supreme Court recognizes two types of separation-of-powers violations: (1) an attempt by one branch to exercise the powers entrusted by the Constitution to another, and (2) unconstitutional aggrandizement of one branch at the expense of another. The DACA and DAPA Directives represent both.

First, the Directives are legislative in nature. They attempt to confer continued presence in the United States, as well as employment authorization, on all aliens meeting specified criteria. The conferral of legal rights and privileges to a large class of persons meeting certain criteria is a legislative act. The Supreme Court has defined an action as "essentially legislative in purpose and effect" if it "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons." *Chadha*, 462 U.S. at 952. The Directives alter the rights and duties of a class of some 5.8 million persons, collectively, by giving them the legal rights to remain present in the United States and to be employed in the United States.

112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 112th Cong. (2012).

³The principal provisions of the DREAM Act, as reiterated in the two dozen DREAM Act bills introduced in Congress, are that it establishes a class of unlawfully present aliens who may apply for cancellation of removal and either temporary or conditional lawful residence, and then may adjust to lawful permanent resident status or have the conditions removed. The class is generally defined as those aliens who arrived in the United States as minors, have been physically present in the United States for a period of years (typically five years) prior to enactment, have not been convicted of a felony or two or more misdemeanors and do not pose a threat to national security or public safety, have earned a high school diploma or a general education development certificate in the United States, and are below a certain age (typically early to mid-thirties) on the date of enactment. Qualifying aliens whose removal is cancelled and who are granted temporary or conditional residence then must be admitted to, or earn a certain number of credits in, an institution of higher education or serve honorably in the U.S. Armed Forces for a certain period in order to adjust to lawful permanent resident status or have the conditions on their status removed.

The grounds for removal or dispensation from removal are set out in the INA. Because the establishment of those grounds has “the purpose and effect of altering the legal rights, duties and relations of persons,” it is a legislative act. *Chadha*, 462 U.S. at 952. The granting of deferred action and employment authorization to millions of aliens who are unlawfully present in the United States is not an exercise of executive branch discretion permitted by the Constitution. Rather, it is a legislative act of amnesty, the granting of a legislative benefit. Only Congress has the authority to make such a large class of individuals eligible for employment authorization in the United States. In sum, the Directives are the product of an executive officer attempting to use executive authority to effect change that is legislative in nature. They therefore constitute an attempt by one branch to exercise the powers of another.

Second, the Directives unconstitutionally aggrandize the executive branch at the expense of Congress. Congress has repeatedly considered and rejected enactment of essentially the same provisions embodied by the Directive. Rather than wait for Congress to adopt the executive branch’s way of thinking regarding the proposed DREAM Act and other amnesties, the Administration usurped Congress’s role and attempted to impose the same legislative changes under the guise of “prosecutorial discretion.” It is noteworthy that in 2011, the President himself stated that, as the chief executive, he lacked the power to provide such benefits to illegal aliens unilaterally without congressional action. In his words, while it was “very tempting” to “bypass Congress and change the laws on my own,” he could not do so because “that’s not how our system works.”⁴ The President’s assessment of his constitutional authority was correct. It is highly likely that the Article III courts will reach the same conclusion.

IV. Possible Congressional Responses

In summary, the illegality and unconstitutionality of the DACA and DAPA Directives are difficult to dispute. One might then ask what Congress should do in response to the executive branch’s violation of federal law and the Constitution.

⁴The full section of the President’s speech was as follows:

THE PRESIDENT: ... Now, I know some people want me to bypass Congress and change the laws on my own. (Applause.) And believe me, right now dealing with Congress –

AUDIENCE: Yes, you can! Yes, you can! Yes, you can! Yes, you can! Yes, you can!

THE PRESIDENT: Believe me – believe me, the idea of doing things on my own is very tempting. (Laughter.) I promise you. Not just on immigration reform. (Laughter.) But that’s not how – that’s not how our system works.

AUDIENCE MEMBER: Change it!

THE PRESIDENT: That’s not how our democracy functions. That’s not how our Constitution is written ..

Remarks by the President to the National Council of La Raza, Washington D.C. (July 25, 2011), available at www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza.

One possible reaction might be to attempt to amend the substantive provisions of the INA compelling removal of these aliens. I believe that this would be an unwarranted and unwise response. The provisions of federal law are clear; Congress need not restate what is already plain in the text of the law. Indeed, amending these unmistakable commands in the law might suggest that there is some ambiguity, when in fact there is none.

Another response is far more advisable: exercising Congress's power of the purse to restrict any appropriations that might be used to fund the Directives. Although this approach has recently faltered in the Senate, it is unquestionably the strongest response that Congress has available.

Finally, Congress should also consider taking steps to ensure that the federal courts retain jurisdiction over the cases challenging the Directives. Because of the weakness of the Administration's position on the merits, the Department of Justice has been particularly aggressive in challenging the jurisdiction of the federal courts in both *Texas* and *Crane*. If the Department of Justice is successful in this regard, it will have persuaded the federal courts that they cannot review the constitutionality and legality of what is arguably the greatest executive usurpation of legislative power in the past century. In the *Crane* case, the Department succeeded in persuading the district court that the Civil Service Reform Act (CSRA) precluded the ICE agents from even bringing their case in federal court. This was an incorrect interpretation of the CSRA, but the preclusive scope of the CSRA could be clarified. A helpful amendment to the CSRA would state that "the preclusive effect of this section does not extend to constitutional or statutory challenges to federal laws, regulations, or policies brought by federal employees or officers seeking declaratory or injunctive relief in the courts of the United States." In cases such as these, federal officers who want to faithfully enforce the law are among the plaintiffs who are best situated to challenge unlawful executive branch actions. The CSRA was never intended to preclude such litigation.

Written Statement

Hearing On

**“Reining In Amnesty: *Texas v. United States* and Its
Implications”**

Before the

**Subcommittee on Oversight, Agency Action, Federal Rights and Federal
Courts**

Committee on the Judiciary

United States Senate

**David B. Rivkin, Jr.
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March 19, 2015

Dirksen Senate Office Bldg., Room 226; 3:30 pm

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts: I thank you for the opportunity to testify today about legal problems associated with President Obama's unprecedented immigration executive orders, which constituted a unilateral presidential rewriting of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* I hope that my testimony will contribute to the Subcommittee's work.

Introduction

My name is David B. Rivkin, Jr. I am an attorney specializing in matters of constitutional law at the firm of BakerHostetler, LLP, and I co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including service in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy.

I have a particularly keen interest in the structural separation of powers, both vertical—between the federal government and the States—and horizontal—among Congress, the Executive and Judiciary. I have written extensively about these issues and I have also been involved professionally in a number of cases, both in and out of government, that have implicated the constitutional separation of powers. To name but some examples of my engagement with separation of powers matters, my colleagues at BakerHostetler and I served as outside counsel in the District and Circuit Court proceedings to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010, and represented the State of Louisiana in its challenge to the constitutionality of the 2010 census and the State of Texas in several of its challenges to EPA's regulations under the Clean Air Act.

I am testifying today on my own behalf and do not speak on behalf of either my law firm or any of our clients.

Analysis

On February 16, 2015, the Honorable Andrew S. Hanen, Judge of the United States District Court for the Southern Division of Texas, Brownsville Division, granted the preliminary injunction (PI) to the plaintiffs in *Texas v. United States*, No. 14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). This case, as it happens, was also brought by 26 States, and challenged the Administration's recently announced immigration program, collectively entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). As described by the Administration, DAPA is intended to legalize the presence of over 4 million individuals, who presently illegally reside in the United States, and would qualify these individuals to receive a variety of state and federal benefits, including work authorization.

However, a brief disclaimer first: I am planning to focus solely on the legality, or more precisely, the lack thereof, of the President's new immigration policy, to wit: DAPA. Being a constitutional lawyer, I am not going to get into the policy merits of what he is trying to do, nor do I plan to address whether or not the pre-existing immigration regime, based upon the duly-enacted INA, is dysfunctional or even broken. Aside from my own predilection for constitutional law issues, the main reason for not getting into the policy merits of what the President is trying to do is that those merits are not at all dispositive on the issue of the legality of his actions.

And, as to the INA's alleged dysfunctional nature, in my view, *most* of the statutory components of the modern administrative state are dysfunctional and even incoherent. In this

regard, the flawed nature of a duly-enacted statute provides absolutely no basis for the President to engage in an utterly unconstitutional practice of rewriting that statute, arrogating to himself in the process the lawmaking power that is vested exclusively in Congress and violating his solemn constitutional duty to faithfully execute the law.

Let me also say at the outset that I am going to give short shrift to the argument, advanced by some pundits, that the scope of duly-enacted federal laws has grown so vast that no President can faithfully execute all of them across-the-board, but must target for compliance some subset thereof and, as a result, inevitably under-enforce others. This isn't to say that I am not concerned about how much the administrative state has grown and, in particular, at how many things are criminalized at the federal level. These regrettable phenomena do not, however, provide any basis for the President to suspend any validly enacted statute or dispense with its application to certain categories of people or entities or circumstances.

But please, don't take my word for this. What matters is that the Supreme Court confronted in 1838 this very question of whether the President can exercise suspending or dispensing power. The case was called *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), and the President's lawyers there argued, rather forthrightly—which is more than we can say for the current President's lawyers—that Congress has simply passed too many statutes, that the federal government could not faithfully execute them all, and that the most faithful way to proceed would be to enforce *well* a portion of them at a time and defer enforcing others entirely, instead of doing an across-the-board *poor* enforcement. The Supreme Court did not buy this argument, calling the suspending and dispensing power utterly alien to our constitutional tradition.

This controversy, by the way, did not originate in 1838, but dates to a much older confrontation between King James II and the Parliament, which eventually culminated in the Glorious Revolution. An interesting historical footnote, worthy of mention: King James refused to enforce parliamentary laws that were not just dysfunctional, but which blatantly and viciously discriminated against Catholics. So the policy merits were very much on his side. But the law was not on his side, for to endow the King with suspending or dispensing power would've rendered the Parliament utterly irrelevant, enabling the King to amass all powers in his hands.

It is this historical backdrop that led the Framers to adopt the faithful execution language, which is one of the only two places in the Constitution that imposes a duty of faithfulness—it imposes on the *President* the duty of good faith when enforcing congressional statutes. In this regard, Article II, Section 3, requires that the President “shall take Care that the Laws be faithfully executed.” (The other such provision is the Full Faith and Credit Clause—Article IV, Section 1, requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State” - - which imposes on the *States* the duty to give full faith and credit to the acts and decisions of other States.)

In my view, in both instances, the party doing the enforcing is carrying water for another entity and thus, the all-powerful self-interest that usually animates individuals and governments alike may be missing. The Framers, who generally viewed ambition counteracting ambition as the key mechanism to make the separation of powers work, clearly appreciated the fact that it *wouldn't* work when one branch was supposed to enforce the writ of another branch. To address this problem, Congress came up with an obligation to act in “good faith.” So the faithful-execution and full faith-and credit-provisions are the very important glue that holds together our separation of powers architecture.

And so, the *Kendall* Court was right in rejecting the President's claim of suspending or dispensing power, for unless decisively rejected, such a power would eviscerate Article I and enable Article II to amass all power in its hands. This would be a disaster for individual liberty and threaten the very survival of our body politic. Thus, the President's duty of faithful execution is a compelling constitutional obligation, to be discharged vigorously, subject only to the proper constraints of enforcement discretion and resource limitations.

Judge Hanen's excellent 123-page Memorandum Opinion in justifying his grant of the PI focuses primarily on the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, *see, e.g.*, 2015 WL 648579, at *37-61, deferring the disposition of most of the constitutional issues towards the later stages of litigation. By contrast, I will now focus primarily on describing why DAPA is indeed an exercise of constitutionally-proscribed dispensing power and is neither an exercise of constitutionally-permissible enforcement discretion nor a permissible prioritization of government's limited resources. In so doing, I will focus on the opinion that President Obama received from the Office of Legal Counsel (OLC) a few hours before announcing DAPA.

I do want to say a few things, however, about Judge Hanen's Opinion. First, it does discuss at some length why DAPA cannot be justified as a legitimate exercise of agency discretion, the relevant agency here being the Department of Homeland Security (DHS). "[T]he government claims that the DAPA program is merely general guidance issued to DHS employees, and that the delineated elements of eligibility are not requirements that DHS officials are bound to honor. The government argues that this flexibility, among other factors, exempts DAPA from the requirements of the APA." 2015 WL 648579, at *9.

Judge Hanen, of course, decisively rejects these arguments. His analysis strongly suggests that he is at least favorably disposed towards the plaintiffs' constitutional arguments.

Indeed, one can say that, because enforcement discretion lies at the heart of the Administration's defense of DAPA, Judge Hansen has rejected it pretty vigorously. This is very significant.

Second, the plaintiffs' APA claims, far from being a mere technical statutory argument, provide an additional powerful indictment of DAPA and are further indicia of its fundamental illegality. Let's briefly consider what the significance is of the Administration's violation of APA in this instance? Statutes like APA, and the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. § 1501 *et seq.*, represent a considered congressional effort to cabin the exercise of authority by the Executive Branch in the context of broad congressional delegation of power to that branch. The notice and comment requirements, the requirement for public participation, coupled with the requirement to consult with the States when the federal action is imposing costs on them—found in UMRA—and the eventual opportunity for judicial review are all meant to discipline what essentially amounts to the executive exercise of delegated legislative power. So, the combination of the Obama Administration's rewriting of the INA—arrogating to itself the core aspects of Congress's lawmaking authority and doing so without deliberation that is appropriate for all lawmaking—its decision not to comply even with the APA and UMRA, followed by its effort to claim that its actions were beyond judicial review, all manifest a stubborn determination by the Administration to function as a sole lawmaker, accountable to no one.

Switching now to the OLC opinion, while it has blessed DAPA's legality, regrettably, OLC's legal analysis is shockingly flawed in five major respects. First, OLC justified DAPA as a prioritization of government's "limited resources." But it isn't merely a prioritization of resources—it rewrites existing law. Now, illegal immigrants won't be deported if they aren't a

threat to national security, public safety, or border security. Beyond these three categories, deportation may be pursued only if it would serve an “important federal interest.”

But, under INA, by contrast, whoever enters the country illegally, is a “deportable alien” who “shall, upon the order of the Attorney General, be removed.” DAPA thus transforms an entire category of aliens deemed deportable—those who’ve entered illegally—into two different categories, whereby some are deportable and some aren’t. This is a shift in kind, not merely degree.

A President merely prioritizing resources would do what prior Presidents have done: enforce the entirety of immigration *law*, while allowing prosecutors to make case-by-case determinations about which *cases* to pursue first. By announcing a *global* policy of non-enforcement against certain categories, President Obama condones unlawful behavior, weakening the law’s deterrent impact, and allows lawbreakers to remain without fear of deportation. In the President’s own words, “All we’re saying is we are not going to deport you.” These individuals are no longer deportable, although Congress has declared them so.

Second, OLC incorrectly claims that DAPA involves case-by-case scrutiny. As OLC properly 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.” This is indeed the case, both because the Supreme Court said so in the leading case called *Heckler v. Chaney*, 470 U.S. 821 (1985) and, more fundamentally, because an across-the-board categorical non-enforcement policy amounts to the very constitutionally-proscribed suspending or dispensing power already rejected 175 years ago in *Kendall*. The OLC argues, however, that there are no “removable aliens whose removal may not be pursued under any circumstances.” And although the policy “limits the discretion of immigration officials . . . it

does not eliminate that discretion entirely.” But it’s absurd to assert that a mere theoretical possibility that a small percentage of 4+ million applicants may be rejected amounts to meaningful enforcement discretion.

This absurdity is illustrated by the Administration’s 2012 Deferred Action for Childhood Arrivals (DACA) policy. Of 521,815 DACA applications considered on a “case-by-case” basis, *only three percent* have been rejected. With an approval rate of ninety-seven percent, a claim of meaningful discretion falls flat. In reality, those meeting the President’s criteria are rubberstamped. This is a categorical exemption from—and rewriting of—the law. And numbers aside, since millions of claimants to Obama’s immigration largesse would be applying by mail, the administrative context chosen by the President to implement DAPA is inherently not susceptible to the use of case-by-case discretion.

Third, even if DAPA is accepted as involving case-by-case discretion, it creates a remedy—deferred deportation—for a category Congress hasn’t allowed and the President lacks authority to create. The OLC memo blithely lumps deferred deportation together with other kinds of deportation relief, such as parole, temporary protected status, and deferred enforced departure. But each of these other types of relief either has been specifically authorized by Congress, or—in the case of deferred enforced departure—is supported by the President’s independent foreign affairs power. (I should note here that one feature of the OLC opinion that I quite like is that it correctly disclaims any possibility that the President has an inherent constitutional authority to defer deportation across-the-board. To be sure, given the teaching of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the notion that the President’s foreign affairs power gives him a generic deportation deferral authority, despite the congressional statute that says otherwise, would be an utterly specious claim.)

What matters here is that, while Congress has authorized deferred deportation for specific categories, it hasn't authorized it for those to whom President Obama wishes to extend it—the parents of U.S. citizens and lawful permanent residents. OLC claims this isn't important because, although the President lacks statutory authorization, deferred deportation “has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court.” In support, it cites the Supreme Court decision, *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AAADC*). Its analysis is flat-out wrong.

In *AAADC*, members of the Palestinian Liberation Front asserted that the INS's refusal to defer their deportation constituted discrimination. The Court disagreed, ruling that a recently passed statute was “clearly designed to give some measure of protection to ‘no deferred action’ decisions” and deny adjudication of such discrimination claims. Thus, *AAADC* merely acknowledged that Congress didn't want federal courts entertaining discrimination lawsuits *from deportees* based on a failure to grant deferred action in a particular instance. It didn't consider or endorse the legality of the broader program of deferred deportation *itself*.

OLC next claims that Congress has “acquiesced” to deferred deportation. In support, it cites statutes specifically authorizing deferred deportation for battered spouses of U.S. citizens, and instances where individuals entitled to visas—such as victims of human trafficking or college students affected by Hurricane Katrina—needed more time to obtain their visas or fulfill the visa's purpose. However, Congress's authorization of deferred deportation for specific narrow categories of individuals doesn't allow a President to create broad new categories, particularly since his deferred deportation creates entitlement to benefits such as work permits and different types of government's largesse, *e.g.* the earned income tax credit, and because the

category of aliens created by President Obama's policy weren't entitled to stay in the United States, either now or in the future.

These two points are worth a brief elaboration. Enforcement discretion, in addition to having to be exercised on a true case-by-case basis and not across-the-board, is limited only to a simple decision not to prosecute a person who has technically broken the law. It never entails granting this person some other boons or benefits. Thus, if the IRS decides, in the exercise of its enforcement discretion, not to seek jail time or monetary penalties for a taxpayer who has broken tax laws, it does not send that taxpayer a financial reward.

And, in all previous instances where Congress opted to defer deportations of specific narrow categories of individuals, said individuals were entitled under INA eventually to stay in the United States. This is emphatically not the case with the new President Obama-created broad category of deferred deportation recipients.

Fourth, OLC claims past Presidents have taken analogous deportation deferral actions, yet fails to acknowledge the actual legal basis for them. The primary example it cites is the 1990 Family Fairness Policy (FFP) of President George H.W. Bush, which affected an estimated 1.5 million children and spouses of those granted amnesty by the 1986 Immigration Reform and Control Act. The FFP, however, was consonant with existing statutes. And the FFP granted not deferred deportation, but "voluntary departure," for up to one year. Voluntary departure allows deportable individuals to voluntarily depart the country, on their own dime, in lieu of being forcibly removed. Their status as "deportable" individuals never changes.

In this regard, the FFP was grounded in the then-existing voluntary departure statute, which stated, "[t]he Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of

deportation.” The FFP certainly didn’t contradict existing law or attempt to re-categorize deportable aliens.

Fifth, OLC totally ignored DAPA’s adverse impact on federalism, specifically its violation of States’ rights. It profoundly harms the States, who must bear the costs of educating and providing health care to millions of illegal immigrants now allowed to remain. Equally important, DAPA unconstitutionally injures state sovereignty.

To elaborate on this point briefly, in *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court ruled that federal immigration law field-preempts much of the States’ power over immigration. But when a President unilaterally acts, it deprives States of both their police power and their representation in Congress, imposing changes without democratic deliberation. To emphasize, all of the States exercise their police power, which is to say their sovereignty, in the shadow of the Constitution’s Supremacy Clause.

But the Framers, who drafted the Constitution in Philadelphia, and the people of the 13 States who ratified it, have agreed to this arrangement because they were given a formidable set of tools to shape preemptive federal legislation, primarily through the States’ representation in the Senate. These tools are inapposite when the President becomes the sole law maker. Thus, while duly-enacted federal immigration law can preempt state power, there can be no preemption when a President exceeds his constitutional authority by rewriting the law. Yet, INA’s preemptive effect remains in place, even though the statute has been rewritten by President Obama.

DAPA, and OLC’s memo that blesses it, reflect an utterly unconstitutional view of imperial presidency President as a sole law-maker—that has never been advanced by even the boldest presidential power advocates. If this view holds, future Presidents can unilaterally gut

tax, environmental, labor, or securities laws, by enforcing only those portions of them with which they happen to agree and rewriting the rest at will. President Obama's actions on immigration set a dangerous precedent that warps the separation of powers, which is the primary way in which the Constitution protects individual liberty. It cannot be allowed to stand, and I have every confidence that the 26 States, plaintiffs in *Texas v. United States*, will emerge victorious.

Prepared Statement by U.S. Senator David Vitter of Louisiana

“Reining in Amnesty: *Texas v. United States* and Its Implications”

Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Thursday, March 19th, 2015

Mr. Chairman,

I appreciate you holding a hearing on Judge Andrew Hanen’s very important ruling in *Texas v. United States*. I welcome the opportunity to discuss President Obama’s lawless and unconstitutional implementation of executive amnesty from November 2014, and the role the courts can play in reining-in this administration’s rampant lawlessness.

Under the guise of prosecutorial discretion, the Obama Administration unilaterally implemented executive amnesty for illegal immigrants contrary to the will of Congress and the American people. On November 20, 2014, Department of Homeland Security Secretary Jeh Johnson released a memo entitled “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” (DAPA), which expanded on President Obama’s 2012 deferred-action for childhood arrivals (DACA) amnesty and established new deferred action standards for the parents of children that are US citizens or lawful permanent residents.

Judge Hanen stated that the DAPA program issued via the November 2014 memo went “far beyond” inaction on federal immigration law in this country. Judge Hanen said, “Instead of merely refusing to enforce the INA’s removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel.” Furthermore, Judge Hanen notes, “The responsibility of the federal government, who exercises plenary power over immigration, includes not only the passage of rational legislation, but also the enforcement of those laws. The States and their residents are entitled to nothing less. DAPA, no matter how it is characterized or viewed, clearly contravenes the express terms of the INA.” Because of this overt attempt at reversing current US immigration laws by policy memo from the DHS without Congressional approval, along with the irreparable harm and hardship the States will suffer if this policy is enacted, and the public interest in ensuring that the Government complies with current U.S. immigration laws, the Judge granted a temporary injunction on this executive amnesty.

Like Judge Hanen, I’m concerned that President Obama’s executive action goes beyond merely prioritizing the use of limited enforcement resources and infringes on Congress’s

unquestioned authority to enact legislation regarding the immigration policy of the United States. By exempting an entire category of illegal aliens—as many as 5 million according to some estimates—President Obama is rewriting immigration law. The Supreme Court has recognized that “over no conceivable subject is the power of Congress more complete” than its power over immigration. President Obama himself has acknowledged at least 22 times publicly that he does not have the power to suspend deportations through executive action. Specifically, the President said, “This notion that somehow I can just change the laws unilaterally is just not true.” Furthermore he stated, “For me to simply, through executive order, ignore those congressional mandates would not conform with my appropriate role as president.”

And yet, that is exactly what the President has done. Beyond the clear constitutional crisis posed by this executive overreach, I’m concerned that the President’s actions will grow the problem—the exact opposite goal we should be pursuing. President Obama’s illegal executive amnesty will surely create another wave of illegal border crossings because rewarding illegal behavior with the prospect of amnesty for that illegal act only encourages more of the illegal behavior. My state, like many throughout the country, is still feeling the squeeze from the Unaccompanied Alien Child (UAC) crisis this summer. Remember that the vast majority of the children that illegally entered our country did so believing they would receive an amnesty. The President’s executive amnesty from November 2014 will only serve to bolster this mistaken belief and give human traffickers—which are controlled by dangerous Mexican drug cartels—further evidence to point to in their effort to induce more and more vulnerable women and children to attempt the perilous journey north. Only real, strong enforcement will discourage future illegal border crossings.

It is my sincere hope that this hearing highlights the need for Congress to reassert its role as the legislative body that creates and shapes the immigration policy of the United States. If Congress continues to abdicate its legislative authority to the Executive Branch, the rule of law will forever be undermined by the political whims of the Office of the President. In addition to being fundamentally-undemocratic, this outcome would render duly-passed legislation by Congress meaningless. All Senators, regardless of political party, should be concerned with this possibility.

Senator Cruz Questions for the Record for
Kansas Secretary of State Kris W. Kobach
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Reining in Amnesty: *Texas v. United States* and Its Implications
Thursday, March 19, 2015

I. Limits of Prosecutorial Discretion

- During your testimony before the Subcommittee, you discussed the limits of prosecutorial discretion, particularly within the immigration context, and how the President's Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parental Accountability (DAPA) amnesty programs exceeded the normal boundaries of acceptable prosecutorial discretion.
1. Please explain how acceptable prosecutorial discretion cannot reverse the requirements of a law, or undermine the purpose of a law, but rather must be used within the context of a law to achieve the purpose of that law.
 2. If a statute uses the word "shall" in its instructive language, is it your legal opinion that such an instruction is a mandatory or discretionary agency function?
 3. Proponents of the Administration's executive actions claim that the DACA and DAPA amnesty programs mirror a chain of precedential amnesty-like programs from prior presidential administrations. Can you explain how those prior programs differ from the current Administration's DACA and DAPA amnesty programs?

II. Financial Impact of Implementation of DACA and DAPA on Kansas

- During your testimony before the Subcommittee, you discussed the potential impact of full implementation of the President's DACA and DAPA amnesty programs. In terms of costs, you specifically testified that costs to the state of Kansas solely for the issuance of driver's licenses to illegal alien expanded DACA and DAPA recipients are estimated to be in the vicinity of \$600 million, but that this cost did not include secondary or indirect costs.
4. Please explain what type of secondary costs you anticipate that Kansas would have to endure in the event the Administration were to implement the expanded DACA and DAPA amnesty programs.
 5. Please explain the role that driver's licenses would play in the availability of other benefits to illegal alien DACA and DAPA recipients. Would an illegal alien DACA or DAPA recipient's mere possession of a driver's license make it easier for these individuals to access state financial and other benefits?

Senator Cruz Questions for the Record for
Kansas Secretary of State Kris W. Kobach
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Reining in Amnesty: *Texas v. United States* and Its Implications
Thursday, March 19, 2015

III. Impact of Implementation of DACA and DAPA on State Voter Integrity

- It is my understanding that the state of Kansas is one of a handful of states that requires individuals present clear proof of citizenship in order to vote in elections. It is also my understanding, however, that the current Administration has resisted providing the names and/or other identifying information of illegal aliens to state officials, which prevents states from removing those aliens from their voter rolls. For all intents and purposes, this means the federal government is making it possible for illegal aliens to vote (or continue voting) in elections.
- 6. Have you or any other states or state officials that you are aware of asked the federal government for the names and/or other identifying information of the illegal alien DACA and DAPA recipients in order to ensure that they do not obtain public benefits or become registered to vote?
- 7. If so, was the federal government responsive to your request?

IV. Possible Violation of the Unfunded Mandates Reform Act

- The Unfunded Mandates Reform Act of 1995 (Public Law 104-4) was designed to, among other things, prevent the executive branch from issuing burdensome regulations that push significant costs onto state, local, and tribal governments. Section 204 of the Unfunded Mandates Reform Act requires federal agencies to develop an “effective process” in order to help agencies receive input from elected state, local, and tribal officials.
- 8. Do you know if any current Administration officials at any point approached any elected officials in the state of Kansas, including either yourself, the Governor of Kansas, or any elected state or federal legislator in Kansas, about the state government’s concerns regarding the existing DACA amnesty program or the expanded DACA or DAPA amnesty programs?

V. General Question

- 9. Are there any other points or issues that were not explored during the hearing that you would like to bring to the Subcommittee’s attention?

Senator Cruz Questions for the Record for
David B. Rivkin, Jr.
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Reining in Amnesty: *Texas v. United States* and Its Implications
Thursday, March 19, 2015

General Questions

1. Proponents of the current Administration's Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) amnesty programs claim that the U.S. Department of Homeland Security personnel who will be processing expanded DACA and DAPA applications possess the discretion to deny so-called deferred action to applicants on a case-by-case basis, even to those who otherwise satisfy all of the criteria. Can you please respond to this specific claim?
2. Proponents of the current Administration's DACA and DAPA amnesty programs also claim that the Administration is merely exercising long-accepted prosecutorial discretion. Is there a difference, however, between exercising discretion to not remove an alien from the United States (as is required by statute), and conferring a status (such as "lawful presence") on that alien that can then be used to obtain certain federal and state economic and other benefits? Please provide an explanation.
3. In discussing the potential harm that would be suffered by states as a result of the current Administration's DAPA amnesty program, you acknowledged the monetary costs (such as those associated with the issuance of driver's licenses and other services and benefits that will have to be provided by states to illegal alien DAPA recipients), but you also emphasized the damage to states' sovereignty. Please elaborate on this topic, with some discussion on whether all presidential usurpation of congressional authority *per se* inflicts legally cognizable harm on states.
4. Please discuss some of the remedies that may be available to *Congress* to address the current Administration's DACA and DAPA amnesty programs.
5. Are there any other points or issues that were not explored during the hearing that you would like to bring to the Subcommittee's attention?

Answer for the Record

Jill E. Family
Professor of Law
Director, Law and Government Institute
Widener University School of Law
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Before the

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

April 13, 2015

Senator Amy Klobuchar asked the following question for the record:

For Professor Family:

In your testimony, you discussed how *Texas v. United States* involves interpretation of both immigration law and administrative law. What relevance does the case-by-case review process for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA) have on your analysis under these two areas of law?

Answer:

Implementing enforcement priorities through deferred action is a longstanding practice in immigration law.¹ In his opinion in *Texas v. United States*, Judge Hanen concluded that the Department of Homeland Security (DHS) did not appropriately use a policy memorandum under the Administrative Procedure Act (APA) when it announced the DAPA program and the extension of the DACA program in November 2014. This would amount to an agency procedural error. In his view, DHS chose the wrong procedure; Judge Hanen concluded that DHS should have used notice and comment rulemaking instead.

The APA provides for notice and comment rulemaking, but also provides exceptions for when notice and comment rulemaking is required. An agency policy statement is one such exception. All types of administrative agencies use policy memoranda

¹ For more information on the legal authority for deferred action, see Open Letter from Immigration Law Professors, <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>; Open Letter from Immigration Law Professors <https://pennstatelaw.psu.edu/file/LAWPROF.LR.HANENFINAL.pdf>.

frequently; policy memoranda are a common feature of administrative law. Also common is the type of challenge raised in *Texas v. United States*, that an agency did not properly invoke the policy memorandum exception to notice and comment rulemaking. To determine whether an agency properly invoked the policy memorandum exception, courts ask whether the policy memorandum is binding on its face or whether the agency treats the memorandum as binding.

Here is where what the agency's policy memorandum says and how the agency implements the memorandum becomes important. Because the DAPA November 2014 memorandum instructs adjudicators to engage in case-by-case evaluation and to exercise discretion, it is not binding on its face.² The language in the memorandum demands case-by-case adjudication.

Regarding how the agency treats the memorandum in practice, it should be emphasized that the existence of factors for adjudicators to consider does not doom a policy memorandum.³ DHS has not yet implemented DAPA, so it is too early to know how the agency will treat the memorandum. It is speculation to conclude that DHS adjudicators will disobey the explicit instructions to exercise discretion. Judge Hanen projected his interpretation of how DHS has implemented the 2012 DACA memorandum to conclude that he knows how DHS will implement DAPA. This projection is inappropriate, and even if it was appropriate, Judge Hanen mischaracterized DHS' implementation of DACA.⁴ DHS provided to Judge Hanen examples of cases where it had denied DACA in the exercise of discretion even when all the threshold criteria had been met, and DHS emphasized that several of the threshold criteria are themselves discretionary.⁵

Also, a court may question an agency's choice of procedural mechanism only if there is judicial review of the agency action under the APA (and whether there is judicial review becomes relevant only if there is standing). As I explained in my testimony, I do not believe that Judge Hanen should have reached the question of the APA procedural violation because establishing enforcement priorities is committed to the agency's discretion.

Please see my written testimony for elaboration.

² The memo states that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." DAPA Memo at 5, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

³ *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 597-98, 600 (5th Cir. 1995).

⁴ On April 7, 2015, the US Court of Appeals for the Fifth Circuit dismissed, on standing grounds, a lawsuit brought by Immigration and Customs Enforcement (ICE) agents and by the state of Mississippi challenging the implementation of DACA. *Crane v. Johnson*, No. 14-10049 (5th Cir. April 7, 2015). The ICE agents argued they had standing because they had been threatened with employment sanctions as a result of noncompliance with the 2012 DACA memorandum. In rejecting that argument, the Fifth Circuit concluded that the DACA memorandum, and the 2014 DAPA memorandum, explicitly leave room for discretion, and that ICE agents may decline to exercise deferred action.

⁵ Testimony of Stephen H. Legomsky before House Judiciary Committee at 12-13 (Feb. 25, 2015), available at <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf>.

EXHIBIT 24

STATE OF TEXAS, et al.,)
)
 Plaintiffs,)
)
 v.) Civil Action No. 1:14-cv-00254
)
 UNITED STATES OF AMERICA, et al.,)
)
 Defendants)

My name is Joe Peters, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

2. I was appointed to my current position in August 2013. Prior to that, I served as interim Assistant Director beginning in June 2013. From January 2012 to June 2013, I served as Special Assistant to DPS Director Steven McCraw.

3. Pursuant to Section 521.142(a) of the Texas Transportation Code, an individual applying for an original driver license “who is not a citizen of the United States must present to the department [DPS] documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license.” Section 521.1425(d) of

the Transportation Code provides that DPS “may not deny a driver’s license to an applicant who provides documentation described by Section 521.142(a) based on the duration of the person’s authorized stay in the United States, as indicated by the documentation presented under Section 521.142(a).”

4. If an individual presents documentation issued by the federal government showing that they are authorized to be in the United States (such as an Employment Authorization Document), and otherwise meets eligibility requirements, DPS will issue a limited term driver license to a non-citizen resident of Texas. A license issued to such an applicant is limited to the term of the applicant’s lawful presence, which is set by the federal government when it authorizes that individual’s presence. In fiscal year 2014 (September 2013 through August 2014), DPS issued 275,874 limited term licenses.

5. For each non-United States citizen resident of Texas who seeks a limited term driver license, DPS verifies the individual’s lawful presence status with the United States government using the Systematic Alien Verification of Entitlements (“SAVE”) system. Attached as Exhibit 1 to the declaration is a true and correct copy of the Memorandum of Agreement between the U.S. Department of Homeland Security and the State of Texas governing the use of the SAVE system for the purpose of verifying citizenship and immigration status information of non-citizens applying for driver licenses. The State of Texas currently pays an average of \$0.75. per customer for SAVE verification purposes.

6. I am aware of the President’s recent executive action authorizing the lawful presence of certain undocumented immigrants currently in the United

States. My understanding is that the new deferred action plan may extend to more than 500,000 undocumented individuals residing in the State of Texas. Based on these estimates, DPS anticipates that the Driver License Division will require a substantial increase in operating funds to support the implementation of the President's executive order. This is because if those individuals are determined to be lawfully present in the United States, they will be eligible to receive a limited term driver license.

7. DPS estimates that for each additional 1,750 driver license customers seeking a limited term license, DPS would have to hire 2.03 full time equivalent (FTE) employees to process those issuances. If the DPS customer volume increases by 100,000 individuals, DPS estimates a total cost of approximately \$16.23 million (or \$ 162.39 per license issued). This estimate includes the expenses that DPS would incur to hire and train 124 additional FTEs, purchase additional office equipment and technology to equip the available square footage at driver license offices, and produce the driver licenses. For every 60,000 additional customers above the 100,000 customer threshold, DPS would have to open additional driver license offices or expand current facilities to meet that increase in customer demand.

8. The table below outlines the estimated costs that DPS would incur for employee hiring and training, office space, office equipment and technology, and card production cost, based on an increase in customer volume up to 520,000 people.

Cutomer Volume Scenario	Additional Employees Required	Additional Office Space Required (SqFt)	Biennial Cost for Additional Employees	Cost for Adding Customer Counters at Existing Offices	Biennial Cost for Facilities & Technology Expansion	Card Production Cost	Biennial Cost to DPS	Additional Cost to DPS per License Applicant
25,000	30.9	0	\$3,829,139	\$0	\$0	\$43,000	\$3,872,139	\$154.89
100,000	123.4	0	\$15,316,557	\$750,000	\$0	\$172,000	\$16,238,557	\$162.39
160,000	197.5	24,000	\$24,506,492	N/A	\$4,800,000	\$275,200	\$29,581,692	\$184.89
220,000	271.6	48,000	\$33,696,426	N/A	\$7,800,000	\$378,400	\$41,874,826	\$190.34
340,000	419.7	96,000	\$52,076,295	N/A	\$13,800,000	\$584,800	\$66,461,095	\$195.47
400,000	493.8	120,000	\$61,266,229	N/A	\$16,800,000	\$688,000	\$78,754,229	\$196.89
520,000	641.9	168,000	\$79,646,098	N/A	\$22,800,000	\$894,400	\$103,340,498	\$198.73

The cost per license identified in this table only reflects the costs DPS would incur for processing original applications for driver licenses.¹ Standard term licenses issued to most citizens are valid for a period of six years with an allowance to renew online once after an office visit. Therefore, most license holders only have to visit a driver license office once every twelve years. Because limited term licenses are limited to the term of the applicant's lawful presence, it is possible that an individual would have to renew his limited term license four times during the same twelve year span. Every renewal for a limited term license requires an additional in-person visit to a DPS facility, and thus requires additional costs related to employee hiring and training, verification of lawful presence status through the SAVE system, office space, office equipment, and infrastructure. Thus, the estimated costs identified above that DPS would incur would only increase if more limited term licenses are issued.

9. DPS further anticipates that the State's cost of conducting SAVE verifications will rise to the extent that DPS's customer base increases as a result of

¹ The costs per license identified in the chart do not include costs for card design and additional programming for the Driver License System.

the President's executive action. This potential cost increase is in addition to the table of costs identified above and would not otherwise be incurred but for the President's executive action.

10. DPS has also observed that its driver license services do not grow on pace with the State's population growth. This is particularly true in areas like Houston, Dallas-Fort Worth, San Antonio, Austin, El Paso, Midland-Odessa, and the Rio Grande Valley, where the population growth rate exceeds that of less populated counties. Based on the Texas Data Center information, the more populated counties grow by 4-5% each year, while the less populated counties grow by 1-2%.

11. The added customer base that may be created by the President's executive action, assuming an applicant will be able to demonstrate they are authorized to be in the United States, will substantially burden driver license resources without additional funding and support.

12. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of January, 2015.


JOE PETERS

Exhibit 1 to
Declaration of Joe Peters

MEMORANDUM OF AGREEMENT

BETWEEN THE DEPARTMENT OF HOMELAND SECURITY,
U.S. CITIZENSHIP AND IMMIGRATION SERVICES,
AND
TEXAS DEPARTMENT OF PUBLIC SAFETY, DRIVER LICENSE DIVISION

STATE OR LOCAL GOVERNMENT AGENCY

I. PARTIES.

The parties to this Memorandum of Agreement (MOA) are the Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS-USCIS), and the **Texas Department of Public Safety, Driver License Division** (User Agency).

II. AUTHORITY.

The authorities governing this MOA include, but are not limited to, the following:

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended.

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, as amended.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended.

Privacy Act, 5 U.S.C. § 552a, as amended.

The Inter-Governmental Cooperation Act, 31 U.S.C. § 1535, as amended.

Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, as amended.

TX Trans. Code § 521.001(3), as amended.

TX Trans. Code § 521.101, as amended.

TX Trans. Code § 521.142(c)(7), as amended.

TX Admin Code § 15.171, as amended.

Pursuant to the requirements of OMB Circular A-97, which establishes the President's guidelines for implementing the Intergovernmental Cooperation Act, 31 U.S.C. Section 6501, et seq., as amended, the User Agency certifies that it cannot procure

the immigration status verification services requested pursuant to this MOA reasonably and expeditiously through ordinary business channels.

III. PURPOSE.

The purpose of this MOA is to establish the terms and conditions governing the participation of the User Agency to provide the specified benefit in the DHS-USCIS Systematic Alien Verification for Entitlements (SAVE) Program for the purpose of verifying citizenship and immigration status information of non-citizen and naturalized or derived U.S. citizen applicants (applicant) applying for **Driver's Licenses and Identification Cards** (benefits). The limited data will be provided to the User Agency by an:

- 1) Initial response (initial verification) by SAVE to an on-line inquiry by the User Agency; and
- 2) Additional verification procedures where applicable; or
- 3) A response to a properly submitted Form G-845.

IV. RESPONSIBILITIES.

A. DHS-USCIS agrees to:

- (1) Maintain and make available to the User Agency in limited part and manner determined by DHS-USCIS after consultation with the User Agency, an immigration and naturalized or derived citizenship status information verification system under the SAVE Program known as the Verification Information System (VIS), which can be found at http://www.dhs.gov/xinfo/share/publications/gc_1185458955781.shtml#10;
- (2) Respond through VIS to properly submitted verification requests from the User Agency by providing the limited information noted in point (1) of **PURPOSE** immediately above;
- (3) Process and respond to properly submitted additional verification requests submitted by the User Agency through VIS or on Form G-845. Response time may vary, depending on DHS-USCIS workload, resources available to process additional verification requests, and the applicant's specific circumstances;
- (4) Provide to the User Agency operating instructions necessary to use VIS so that the User Agency can designate Users within the agency;
- (5) Provide to the User Agency SAVE Program point of contact information for questions or problems regarding the User Agency's participation in SAVE;

(6) Provide access to training and information regarding the laws, policies, and procedures that govern verifying, safeguarding, using, maintaining, and disclosing certain citizenship and immigration status information;

(7) Provide the User Agency access to Form G-845, and other forms and/or supplements as appropriate, which may be reproduced and/or computer generated without prior DHS-USCIS approval;

(8) Recover no more than its actual costs. The total estimated cost of the agreement is specified on the attached USCIS Anticipated Collections from Non-Federal Sources Addendum. The User Agency certifies that it has obligated at least the amount specified on the USCIS Anticipated Collections from Non-Federal Sources Addendum to pay for its SAVE usage. DHS-USCIS shall notify the User Agency's designated Point of Contact (POC) in writing when the amount paid plus what is owed for unpaid usage equals 80% percent of the estimated total costs. DHS-USCIS will not provide services that would result in the amount paid plus the amount owed for unpaid usage exceeding the amount specified on the USCIS Anticipated Collections from Non-Federal Sources Addendum. In this instance, DHS-USICS will be excused from further performance of the work unless and until the User Agency's authorized official increases estimated total cost of this agreement by modification pursuant to provision VIII of this MOA;

(9) Submit invoices to the User Agency's payment office at the address specified on the USCIS Anticipated Collections from Non-Federal Sources Addendum, with a copy furnished to the POC. DHS-USCIS may submit invoices when the work is completed or as otherwise authorized. The High Level Identifier, tax identification number, and associated dollar amounts will be referenced on all invoices; and

(10) Promptly initiate year-end and closeout adjustments once final costs are known.

B. User Agency agrees to:

(1) System Use.

(a) Establish the identity of the applicants and require each applicant to present the applicant's immigration or naturalization documentation that contains the information (e.g., alien registration number) required by the SAVE Program;

(b) Physically examine the documentation presented by the applicant and determine whether the document(s) reasonably appear(s) to be genuine and to relate to the individual;

(c) Provide to the SAVE Program the information the SAVE Program requires to respond to User Agency requests for verification of immigration or naturalized or derived citizenship status information, including (1) information from the applicant's immigration or naturalization documentation for initial automated verification, (2) additional information obtained from the alien's immigration or naturalization documentation for

automated additional verification, and (3) completed Forms G-845 and other documents and information required for manual additional verification. For manual only verification, ensure that Forms G-845 and other documents and information required for manual verification are provided;

(d) Ensure that, prior to using VIS, all Users performing verification procedures complete SAVE required training including: reading the SAVE Program Guide, taking the latest version of Web tutorial(s) and maintaining a working knowledge of requirements contained therein and in this MOA as updated;

(e) Ensure that User Agency representatives are provided with and maintain User Ids only while they have a need to perform verification procedures;

(f) Ensure all Users performing verification procedures comply with all requirements contained in the SAVE Program Guide, web-based tutorial, and this MOA, and updates to these requirements;

(g) Ensure that all Users performing verification procedures have contact information for the SAVE Program and SAVE Monitoring and Compliance;

(h) Ensure all Users perform any additional verification procedures the SAVE Program requires and/or the applicant requests after the User Agency initiates a request for verification;

(i) Use any information provided by DHS-USCIS under this MOA solely for the purpose of determining the eligibility of persons applying for the benefit issued by the User Agency and limit use of such information in accordance with this and all other provisions of this MOA;

(j) Comply with the requirements of the Federal Information Security Management Act (FISMA (PL-107-347), Title III, Section 301) and OMB guidance as applicable to electronic storage, transport of records between agencies, and the internal processing of records received by either agency under the terms of this MOA;

(k) Safeguard such information and access methods to ensure that it is not used for any other purpose than described in this MOA and protect its confidentiality; including ensuring that it is not disclosed to any unauthorized person(s) without the prior written consent of DHS-USCIS;¹

(l) Comply with the Privacy Act, 5 U.S.C. Section 552a, and other applicable laws, regulations, and policies, including but not limited to all OMB and DHS privacy guidance, in conducting verification procedures pursuant to this MOA, and in

¹ Each applicant seeking access to information regarding himself/herself may do so by submitting a written signed request to DHS-USCIS. Instructions for submitting such requests may be found on the Freedom of Information/Privacy Act page of www.uscis.gov.

safeguarding, maintaining, and disclosing any data provided or received pursuant to the MOA;

(m) Comply with federal laws prohibiting discrimination against applicants and discriminatory use of the SAVE Program based upon the national origin, color, race, gender, religion, or disability of the applicant;

(n) Provide all benefit-applicants who are denied benefits based solely or in part on the SAVE response with adequate written notice of the denial and the information necessary to contact DHS-USCIS (see attachment 1: Fact Sheet, which is subject to revision and reposting on the SAVE Website and Online Resources) so that such individual may correct their records in a timely manner, if necessary;

(o) Provide all benefit-applicants who are denied benefits based solely or in part on the SAVE response with the opportunity to use the User Agency's existing process to appeal the denial and to contact DHS-USCIS to correct their records prior to a final decision, if necessary; and

(p) Refrain from using SAVE, or assisting any person or entity, to comply with the employment eligibility verification requirements of section 274A of the Immigration and Nationality Act, 8 U.S.C. Section 1324a.

(2) Monitoring and Compliance.

(a) Provide the SAVE Program and SAVE Monitoring and Compliance with the current e-mail, U.S. postal service address, physical address, name and telephone number of the User Agency authorized representative for any notifications, questions or problems that may arise in connection with the User Agency's participation in SAVE and with notification of changes in the benefit offered by the User Agency;

(b) Notify the SAVE Program and SAVE Monitoring and Compliance immediately whenever there is reason to believe a violation of this MOA has occurred;

(c) Notify the SAVE Program and SAVE Monitoring and Compliance immediately whenever there is reason to believe an information breach has occurred as a result of User Agency action or inaction pursuant to Office of Management and Budget (OMB) Memorandum M-07-16, "Safeguarding Against and Responding to the Breach of Personally Identifiable Information";

(d) Allow SAVE Monitoring and Compliance to monitor and review all records and documents related to the use, abuse, misuse, fraudulent use or improper use of SAVE by the User Agency, including, but not limited to original applicant consent documents required by the Privacy Act, 5 U.S.C. Section 552a or other applicable authority;

(e) Allow SAVE Monitoring and Compliance to conduct desk audits and/or site visits to review User Agency's compliance with this MOA and all other SAVE-related policy,

procedures, guidance and law applicable to conducting verification and safeguarding, maintaining, and disclosing any data provided or received pursuant to this MOA;

(f) Allow SAVE Monitoring and Compliance to perform audits of User Agency's User Ids use and access, SAVE Training Records, SAVE financial records, SAVE biographical information, system profiles and usage patterns and other relevant data;

(g) Allow SAVE Monitoring and Compliance to interview any and all User Agency SAVE system users and any and all contact persons or other personnel within the User Agency regarding any and all questions or problems which may arise in connection with the User Agency's participation in SAVE;

(h) Allow SAVE Monitoring and Compliance to monitor system access and usage and to assist SAVE users as necessary to ensure compliance with the terms of this MOA and the SAVE Program requirements by its authorized agents or designees; and

(i) Take corrective measures in a timely manner to address all lawful requirements and recommendations on every written finding including but not limited to those of SAVE Monitoring and Compliance regarding waste, fraud, and abuse, and discrimination or any misuse of the system, non-compliance with the terms, conditions and safeguards of this MOA, SAVE Program procedures or other applicable law, regulation or policy.

(3) Reimbursement.

(a) Pay the transaction prices provided in the attached current standard billing rates, which along with methods of payment are subject to change upon prior written notification to the User Agency. Each year, the User Agency will obligate funds sufficient to reimburse DHS-USCIS under a current appropriation upon execution of the attached USCIS Anticipated Collections from Non-Federal Sources Addendum;

(b) Pay in full within 30 days of the invoice date. The User Agency will pay any applicable sales, use, excise, and like taxes, where required by law, that are stated on each invoice. Regardless of payment type, the User Agency will clearly indicate the High Level Identifier with remittance;

(c) If the User Agency pre-pays for its usage, it shall submit the entire committed amount before being allowed access to VIS; and

(d) Promptly discuss and resolve issues and questions with DHS-USCIS regarding payments. Delinquent payments shall be handled in accordance with the Debt Collection and Improvement Act of 1996, 31 U.S.C. Section 3701. Interest on all unpaid balances shall be charged at the rate of the current value of funds to the United States Treasury effective on the date of the invoice. The rate is the Treasury tax and loan rate. It is published annually or quarterly by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. Handling charges will accrue at monthly rates of \$5.00 for each of the first two months of delinquency and \$10.00 for

each month thereafter. In addition to interest and handling charges, if DHS-USCIS does not receive payment within 90 days of the invoice, 6% per annum additional interest will be assessed. Charges will be computed from the date of the invoice and will accrue monthly with the applicable interest and handling charges. In the case of any late payment, the amount received will be applied in this sequence: (1) to any accrued penalty and handling charges; (2) to any accrued interest; and (3) to outstanding principal. Failure to make timely payment may result in termination of services.

V. POINTS OF CONTACT.

USCIS SAVE Program MS 2620, U.S. Citizenship and Immigration Services,
Department of Homeland Security, Washington, DC 20529-2620, (888) 464-4218,
Attn: SAVE Operations. E-mail: SAVEregistration@dhs.gov.

USCIS SAVE Monitoring and Compliance MS 2640, U.S. Citizenship and Immigration
Services, Department of Homeland Security, Washington, DC 20529-2640,
(888) 464-4218. E-mail: SAVE.monitoring@dhs.gov.

USER AGENCY- Ron Coleman, Program Administrator, 5805 N. Lamar Blvd., Austin,
TX 78752, (512) 424-7652. E-mail: ron.coleman@txdps.state.tx.us.

VI. OTHER PROVISIONS.

(A) MOA Responsibilities. Only authorized employees, agents, or designees of DHS-USCIS and the User Agency will carry out the requirements of this MOA. In carrying out these responsibilities, they will operate within the scope of applicable regulations, specifically delegated authorities, the program authorities and funding limitations and terms and conditions of this MOA.

(B) Determining Benefit Eligibility. This MOA is limited to the provision of verification services. DHS-USCIS will verify limited citizenship and immigration status information, but will not recommend to the User Agency whether to issue the benefit. The DHS-USCIS response is not intended to be, and should not be construed as, an opinion on the part of DHS-USCIS or the United States regarding any right or benefit under any program administered by the User Agency. The User Agency has the responsibility to determine the applicant's eligibility for the benefit.

(C) Criminal Penalties.

(1) DHS-USCIS reserves the right to use information from the User Agency for any purpose permitted by law, including, but not limited to, the prosecution of violations of Federal administrative or criminal law.

(2) The User Agency acknowledges that the information it receives from DHS-USCIS is governed by the Privacy Act, 5 U.S.C. Section 552a(i)(1), and that any person who

obtains this information under false pretenses or uses it for any purpose other than as provided for in this MOA may be subject to criminal penalties.

(D) Third Party Liability.

(1) Each party to this MOA shall be solely responsible for its own defense against any claim or action by third parties arising out of or related to the execution and/or performance of this MOA, whether civil or criminal, and retain responsibility for the payment of any corresponding liability.

(2) Nothing in this MOA is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any third party against the United States, its agencies, officers, or employees or the User Agency.

(E) Disputes. Disagreements on the interpretation of the provisions of this MOA that cannot be resolved between the DHS-USCIS program office and the User Agency point of contact should be provided in writing to the authorized officials at both agencies for resolution. If settlement cannot be reached at this level, the disagreement will be elevated to the next level in accordance with DHS-USCIS procedures for final resolution.

(F) Conflicts. This MOA, its attachments and addenda constitute the full MOA on this subject between DHS-USCIS and the User Agency. Any inconsistency or conflict between or among the provisions of this MOA, will be resolved in the following order of precedence: (1) this MOA and (2) other documents incorporated by reference in this MOA, i.e., the USCIS Anticipated Collections from Non-Federal Sources Addendum, and standard billing rates.

(G) Severability. Nothing in this MOA is intended to conflict with current law or regulation or the directives of DHS, DHS-USCIS, or the User Agency. If a term of this MOA is inconsistent with such authority, then that term shall be invalid but, to the extent allowable, the remaining terms and conditions of this MOA shall remain in full force and effect. In the event of a conflict that prevents either party from fulfilling its obligations, this MOA may be immediately canceled without providing the 30 day notice period referenced in Section IX.

(H) Assignment. The User Agency may not assign this MOA, nor may it assign any of its rights or obligations under this MOA. To the extent allowable by law, this MOA shall inure to the benefit of, and be binding upon, any successors to DHS-USCIS and the User Agency without restriction.

(I) Waiver. No waiver by either party of any breach of any provision of this MOA shall constitute a waiver of any other breach. Failure of either party to enforce at any time, or

from time to time, any provision of this MOA shall not be construed to be a waiver thereof.

VII. EFFECTIVE DATE.

This MOA shall be effective when the DHS-USCIS authorized official and User Agency authorized official have both signed the MOA. This MOA shall continue in effect unless modified or terminated in accordance with the provisions of this MOA.

VIII. MODIFICATION.

(A) This MOA is subject to periodic review by DHS-USCIS, its authorized agents or designees, and, if necessary, periodic modification and/or renewal to assure compliance with current law, policy, and standard operating procedure(s). This MOA and the attached USCIS Anticipated Collections from Non-Federal Sources Addendum constitute the complete MOA between the parties for its stated purpose, and no modification or addition will be valid unless entered into by mutual consent of both parties evidenced in writing and signed by both parties and appended to this agreement; and

(B) The User Agency may accomplish a unilateral administrative modification to add funds to the MOA, and either party may accomplish a unilateral administrative modification to change POC information. A written bilateral modification (i.e., agreed to and signed by authorized officials of both parties) is required to change any other term of this MOA.

IX. TERMINATION.

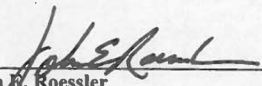
Either party may terminate this MOA at any time by providing 30 days written notice of intent. DHS-USCIS, when feasible, will consult with the User Agency and attempt to reconcile issues before terminating this MOA. Notwithstanding any other provision in the MOA, DHS-USCIS may suspend or terminate this MOA without prior notice if deemed necessary because of a requirement of law or policy, upon a determination by DHS-USCIS that there has been a breach of system integrity or security by the User Agency or a failure by the User Agency to comply with established procedures or legal requirements, including but not limited to failure to pay.

Written notices shall be sent to the addresses of the POCs listed herein and shall be effective upon receipt. Either party may change its POC by written notice to the other party.

The foregoing, in conjunction with the referenced and incorporated attachments, constitutes the full agreement on this subject between DHS-USCIS and the User Agency.

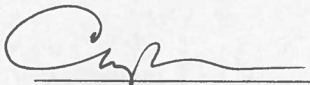
This MOA supersedes all previous agreements governing the provision of verification services. Those agreements are explicitly acknowledged to be null and void.

The undersigned represent that they are authorized to enter into this MOA on behalf of DHS-USCIS and the User Agency, respectively.



John E. Roessler
Chief, SAVE Program
U.S. Citizenship and Immigration Services
Department of Homeland Security

6/3/11
Date



Cheryl MacBride
Deputy Director,
Services
Texas Department of Public Safety

6/8/11
Date

U.S. Department of Homeland Security
 U.S. Citizenship and Immigration
 Services
 Verification Division
 Washington, DC 20024



U.S. Citizenship
 and Immigration
 Services

Fact Sheet

Information for Applicants: Verification of Immigration Status and How to Correct Your Record with USCIS

Many federal, state and local agencies verify the immigration status of benefit applicants to ensure that only qualified aliens or naturalized and derived citizens receive benefits. These agencies verify immigration status by using the Systematic Alien Verification for Entitlements (SAVE) Program of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS).

The benefit-granting agency has submitted your information to the SAVE Program for verification. Because the SAVE Program cannot confirm your immigration status after completion of a process that includes the agency providing USCIS with a copy of your immigration documentation, you must be given an opportunity to correct your records with USCIS and reapply for the benefit and/or appeal the denial of the benefit. Please note that there are a number of reasons why the SAVE Program may not be able to verify your immigration status. The inability of the SAVE Program to verify your status does not necessarily mean that you are not authorized to be in the United States or are ineligible to receive the benefit for which you applied.

If you believe that the SAVE Program response to the benefit-granting agency did not provide accurate information about your actual immigration status and/or you need to make corrections to your immigration record, please contact USCIS by using one of the following methods:

- 1. Schedule an appointment for an in-person interview at a local USCIS office.** You may schedule an appointment at a local USCIS office at the InfoPass website, <http://infopass.uscis.gov>, or by calling the National Customer Service Center, 1-800-375-5283. Scheduling an appointment is the fastest way to correct your records. We recommend that you bring to your appointment this Fact Sheet, documentation evidencing your immigration status, and any information provided by the benefit-granting agency concerning why your immigration status makes you ineligible to receive the benefit.
- 2. Submit a request in writing.** If you know the information that needs to be corrected in your record, you may submit a request to correct your records to the Freedom of Information Act/Privacy Act (FOIA/PA) Office at the following address:

Privacy Act Amendment
 U.S. Citizenship and Immigration Services
 National Records Center
 FOIA/PA Office

Rev. Ver. June 16, 2009

P.O. Box 648010
Lee's Summit, MO 64064-8010

We recommend that you include the following information in your submission, if available:

- State that you were denied benefits
- Information that is inaccurate
- Proposed change(s) to the record
- Date and place of birth
- A return address
- Copies of your immigration /naturalization status documents
- Reason it is inaccurate
- A-File number and/or the full name
- Notarized signature of the applicant
- Other information that may assist in locating the record

If you do not know the information you need to correct, you may submit a written request to obtain your records by submitting Form G-639, *FOIA/PA Request*. This form is available from the nearest USCIS office or online at <http://www.uscis.gov/files/form/g-639.pdf>. You should use the address specified above, but mark the envelope "*Privacy Act Request*" rather than "*Privacy Act Amendment*."

Rev. Ver. June 16, 2009

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Verification, SAVE Program
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

USCIS Anticipated Collections from Non-Federal Sources Addendum

The following information must be listed on this addendum and submitted to complete the Memorandum of Agreement

Please Complete the Below		Please Update Information as Necessary in this column
1. Agency Name:	Texas Department of Public Safety	
2. Billing (Accounts Payable) Point of Contact		
Name:	Courtney Behrens	
Phone # (Area Code):	512-424-2070	
Fax # (Area Code):	512-424-2816	
E-mail:	apinvoices@txdps.state.tx.us	
Address:	PO Box 4087	
Address (2nd line):		
City, State Zip:	Austin, Texas 78773	
Tax Identification Number (TIN):	74-6000130	
Data Universal Numbering System (DUNS) or Business Partner Network (BPN) number	806782272	
You may obtain your DUNS/BPN at http://duns.biz.gov/		
3. Billing and Payment & Budgeting Information		
Purchase Commitment Number:	405-11-06599	Update:
Payment Method (Choose and Insert one of the following: wire transfer, check, or credit card):	Check	Update:
Amount Obligated (Budgeted):	\$349,904.00	Update:
Funds Expiration Date:	June 30, 2012	Update:
4. Payment Point of Contact		
Name:	Ron Coleman	
Phone Number:	512-424-7652	
POC e-mail address:	ron.coleman@txdps.state.tx.us	

This agreement will commence as soon as all signatures are obtained in accordance with the Memorandum of Agreement. Both parties must agree to any amendments prior to their implementation in accordance with the Memorandum of Agreement.

Agency High Level Identifier:

DLTX

Cheryl MacBride
Deputy Director - Services

Date

5/24/11

John E. Roessler
Chief, SAVE Program, DHS USCIS

Date

5/13/11

Please return this document to the SAVE Program by one of these three methods.

1. By E-mail: save_help@dhs.gov

2. By US mail
SAVE Program MS 2620
U.S. Citizenship and Immigration Services
Department of Homeland Security
Washington, DC 20529-2620
Attention: SAVE Operations

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Verification, SAVE Program
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

USCIS Anticipated Collections from Non-Federal Sources Addendum

The following information must be listed on this addendum and submitted to complete the Memorandum of Agreement

Please return this document to the SAVE Program by one of these three methods.

- | | | | |
|---------------|--|----------------|---|
| 1. By Fax: | 202-358-7867 | 3. By US mail: | SAVE Program |
| 2. By e-mail: | Save.Help@dhs.gov (must be a signed scan) | | 490 L'Enfant Plaza East, SW, Suite 7112 |
| | | | Washington, DC 20024-2135 |
| | | | Attention: Chief, SAVE Liaison |



COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

19 March 2015

Senator Charles Grassley
 Chairman, Senate Committee on the Judiciary
 Senator Patrick Leahy
 Ranking Member, Senate Committee on the Judiciary
 Senator Ted Cruz
 Chairman, Senate Committee on the Judiciary Subcommittee on Oversight, Agency Action,
 Federal Rights and Federal Courts
 Senator Chris Coons
 Ranking Member, Senate Committee on the Judiciary Subcommittee on Oversight, Agency
 Action, Federal Rights and Federal Courts
 224 Dirksen Senate Office Building
 Washington, D.C. 20510-6050

RE: Hearing “Reining in Amnesty: Texas v. United States and Its Implications”

Dear Chairman Grassley, Ranking Member Leahy, Chairman Cruz and Ranking Member Coons:

Since 1986, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) has worked to advance the human and civil rights of immigrants and refugees; promote harmonious multi-ethnic and multi-racial human relations; and through coalition-building, advocacy, community education and organizing, empower immigrants and their allies to build a more just society in Los Angeles and across California. We promote pro-immigrant programs and legislation at the local and state levels, including the California Driver License Bill, the TRUST Act, the Domestic Workers Bill of Rights and the California DREAM Acts. At the federal level, we have done so by fighting for Deferred Action for Childhood Arrivals (DACA), the Senate Immigration Bill (S.744) as well as President Obama’s November 2014 executive actions including the expanded DACA. This letter restates our strong support for those actions and aims to clarify some confusion about them as exemplified in the plaintiffs’ case in Texas v. United States.

The confusion centers on three main areas: **the legality of the actions, their scope and their cost**. First, the overwhelming majority of the nation’s immigration law experts unequivocally state that what President Obama proposed falls well within his powers.ⁱ As recently as in *United States v. Arizona*, the Supreme Court affirmed that the Executive Branch’s authority in this realm is “broad” and “undoubted”. Indeed, Federal District Judge Andrew Hanen’s ruling regarding the expanded DACA and the new program, Deferred Action for Parental Accountability (DAPA), focused narrowly on adherence to administrative regulations instead of their obvious “illegality” as the critics would have it.ⁱⁱ

Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
 2533 W 3rd St, Suite 101, Los Angeles, CA 90057
www.chirla.org

As the title of this hearing would have it, the scope of these programs represents “amnesty.” However, the long established legal remedy of prosecutorial discretion called “deferred action” is nothing of the sort, and it bears no resemblance to the type of amnesty signed by President Ronald Reagan in 1986. Deferred action creates no affirmative rights whatsoever, has been applied in numerous different scenarios during all Administrations since the 1970s and does not erase any previous unlawful presence prior to its granting.ⁱⁱⁱ The benefit of being eligible to apply for an Employment Authorization Document is certainly not unique to DACA/DAPA recipients, but one that is available to a range of visa classes as well as asylum seekers and others.^{iv} Amnesty, on the other hand, would grant permanent residency or another legal status that is far from as easily revoked as the temporary deportation reprieve under DACA/DAPA.

Finally, much of the plaintiffs’ case centers on the costs of DACA/DAPA. By not counting the economic boost and tax revenues expected when workers come out of the shadows, ignoring that these programs are self-sustaining and fee-based and only focusing on cost in the form of e.g. processing driver licenses, Texas et. al. have created a straw man. A broader, holistic outlook on costs and gains clearly show that these programs would be economically beneficial to all participating parties, including the states. This is the very case made by California, 11 other states and various municipalities including Los Angeles County in their amicus briefs. According to a USC study, DAPA could lift as many as 40,000 California children out of poverty while the Center for American Progress forecasts that the programs will bring in billions in tax revenue to the US Treasury.^v

We hope and expect that once the confusion dissipates regarding the President’s actions that the Judiciary Committee will repeat the efforts of its 113th Congress counterpart and craft a piece of legislation like S.744. When that time comes, we will be proud to support those efforts. Please contact our Policy Director, Joseph Villela, jvillela@chirla.org or our Senior Policy Advocate, Rita Medina, rmedina@chirla.org, if we can answer any questions or be of any further assistance.

Sincerely,



Angelica Salas,
Executive Director, Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)

ⁱⁱ <http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2015/02/22/legomsky-on-legality-of-dapa-expanded-daca-senate-testimony.aspx>

ⁱⁱⁱ The claim that regulations were not followed is not likely to survive appeal. See http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_immigration_program_is_legal_judge_hanan_s_injunction_will.html;

^{iv} <http://iftedlamp.com/2012/07/23/ten-things-you-may-not-know-about-deferred-action/>

^v <http://www.uscis.gov/iframe/iframe/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-28757/0-0-0-29424.html>

^v <http://dornsife.usc.edu/csii/dapa-impacts-children>;

<https://www.americanprogress.org/issues/immigration/report/2014/09/04/96177/administrative-action-on-immigration-reform/>

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