

## **The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others**

The Department of Homeland Security’s proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS’s discretion to enforce the immigration laws.

The Department of Homeland Security’s proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS’s discretion to enforce the immigration laws.

The Department of Homeland Security’s proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS’s enforcement discretion.

November 19, 2014

### MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security’s discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department (“DHS”) to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS’s proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement (“ICE”) Field Office Director determined that “removing such an alien would serve an important federal interest.” Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) (“Johnson Prioritization Memorandum”).

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United

States both when DHS announces its program and at the time of application for deferred action; and presents “no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate.” Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) (“Johnson Deferred Action Memorandum”). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals (“DACA”) program.

As has historically been true of deferred action, these proposed deferred action programs would not “legalize” any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS’s decision not to seek an alien’s removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an “economic necessity for employment”); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien’s accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS’s discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS’s discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

## I.

We first address DHS’s authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of

DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

**A.**

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and

enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens.” 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President’s constitutional duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, and it reflects a recognition that the “faithful[.]” execution of the law does not necessarily entail “act[ing] against each technical violation of the statute” that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to “balanc[e] . . . a number of factors which are peculiarly within its expertise.” *Id.* These factors include “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.” *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan” (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration’s refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency’s decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may “provide[] guidelines for the agency to follow in exercising its enforcement powers,” in the absence of such “legislative direction,” an agency’s non-enforcement determination is, much like a prosecutor’s decision not to indict, a “special province of the Executive.” *Id.* at 832–33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is “a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for “[e]stablishing national immigration enforcement policies and

priorities.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that “the broad discretion exercised by immigration officials” is a “principal feature of the removal system” under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, “[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, “[a]t each stage” of the removal process—“commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders”—immigration officials have “discretion to abandon the endeavor.” *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation’s international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials’ discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution’s allocation of governmental powers between the two political branches. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is “faithful[]” to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see*

*Chaney*, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, 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.” *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive’s discretion in enforcing the immigration laws.<sup>1</sup>

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect “factors which are peculiarly within [the enforcing agency’s] expertise.” *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as “whether the agency has enough resources to undertake the action,” or “whether agency resources are best spent on this violation or another.” *Id.* Other relevant considerations may include “the proper ordering of [the agency’s] priorities,” *id.* at 832, and the agency’s assessment of “whether the particular enforcement action [at issue] best fits the agency’s overall policies,” *id.* at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* at 833 (an agency may not “disregard legislative direction in the statutory scheme that [it] administers”). In other words, an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency’s decision about the proper administration of the statute unless, among other things, the agency “has relied on factors which Congress had not intended it to consider” (quoting

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<sup>1</sup> *See, e.g.,* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress’s response to its dissatisfaction with the Executive’s use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g., infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, “‘consciously and expressly adopt[ ] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, “the statute conferring authority on the agency might indicate that such decisions were not ‘committed to agency discretion’”). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, “the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law”).

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g., Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that “single-shot non-enforcement decisions” almost inevitably rest on “the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion.” *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute “general polic[ies] that [are] so extreme as to amount to an abdication of [the agency’s] statutory responsibilities.” *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all “general policies” respecting non-enforcement are categorically forbidden: Some “general policies” may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency’s use of “reasonable presumptions and generic rules” is not incompatible with a requirement to make individualized determinations). But 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. *Crowley Caribbean Transp.*, 37 F.3d at 677.

## B.

We now turn, against this backdrop, to DHS’s proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long

employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to “provide clearer and more effective guidance in the pursuit” of DHS’s enforcement priorities; namely, “threats to national security, public safety and border security.” Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id.* at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id.* at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they “qualify for asylum or another form of relief under our laws.” *Id.* at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner “commensurate with the level of prioritization identified.” *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy “requires DHS personnel to exercise discretion based on individual circumstances”). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, “there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.” *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.<sup>2</sup> The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.<sup>3</sup> In addition, the policy would expressly state that its terms should not be construed “to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities,” and would further provide that “[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority” if, “in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.” *Id.* at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) (“Shahoulian E-mail”). The proposed policy explains that, because DHS “cannot respond to all immigration violations or remove all persons illegally in the United States,” it seeks to “prioritize the use of enforcement personnel, detention space, and removal assets” to “ensure that use of its limited resources is devoted to the pursuit of” DHS’s highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS’s proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly “within [DHS’s] expertise.” *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS’s organic statute itself recognizes this inevitable fact, instructing the Secretary to establish “national

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<sup>2</sup> Under the proposed policy, aliens in the second tier could be deprioritized if, “in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.” Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, “in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.” *Id.* at 5.

<sup>3</sup> These factors include “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative.” Johnson Prioritization Memorandum at 6.

immigration enforcement policies and priorities.” 6 U.S.C. § 202(5). And an agency’s need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors “peculiarly within [an agency’s] expertise” are “whether agency resources are best spent on this violation or another” and “whether the agency has enough resources to undertake the action at all”).

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS’s enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.” Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 (“DHS Appropriations Act”). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as “aggravated felonies” under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied “on factors which Congress had not intended it to consider.” *Nat’l Ass’n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a “single-shot non-enforcement decision,” neither does it amount to an abdication of DHS’s statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS’s severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy’s identification of categories of aliens who constitute removal

priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id.* Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.<sup>4</sup>

## II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred

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<sup>4</sup> In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at \*5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. See *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at \*4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. See *Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, see, e.g., *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

### A.

In immigration law, the term “deferred action” refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); see USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) (“USCIS SOP”); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.<sup>5</sup>

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<sup>5</sup> Parole is available to aliens by statute “for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, see *id.* § 1255(a), and may eventually qualify them for Federal means-tested benefits, see *id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which “has no statutory basis” but rather is an exercise of “the President’s constitutional powers to conduct foreign relations,” may be granted to nationals of appropriate foreign states. USCIS, Adjudicator’s Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien’s departure. See 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); cf. 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of “discretionary relief formulated administratively under the Attorney General’s general authority for enforcing immigration law.” Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. See *U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that “since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based ‘extended voluntary departure,’ and there no longer are aliens in the United States benefiting from such a designation,” but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was “codif[ying] and supersed[ing]” extended voluntary departure). See generally Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 5–10 (July 13, 2012) (“CRS Immigration Report”).

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant “non-priority” status to removable aliens who presented “appealing humanitarian factors.” Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a “non-priority case” as “one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors”); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed “deferred action.” *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever “adverse action would be unconscionable because of the existence of appealing humanitarian factors”).

Although the practice of granting deferred action “developed without express statutory authorization,” it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions “to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]” in 8 U.S.C. § 1252(g) “seems clearly designed to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations”); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are “eligible for deferred action”). Deferred action “does not confer any immigration status”—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS’s decision not to seek the alien’s removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS’s statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an “economic necessity for employment.” 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an “unauthorized alien” not entitled to work in the United States as an alien who is neither an LPR nor “authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]”). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing “unlawful presence” for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

(May 6, 2009) (“USCIS Consolidation of Guidance”) (noting that “[a]ccrual of unlawful presence stops on the date an alien is granted deferred action”); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is “unlawfully present” if, among other things, he “is present in the United States after the expiration of the period of stay authorized by the Attorney General”).<sup>6</sup>

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as “ad hoc deferred action.” Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they “encounter cases during [their] normal course of business that they feel warrant deferred action.” USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing “[a]n explanation as to why he or she is seeking deferred action” along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as “Third Preference” visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a “Family Fairness” program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (“IRCA”). *See* Memorandum for Regional Commissioners,

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<sup>6</sup> Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (“Family Fairness Memorandum”); see also CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. *Deferred Action for Battered Aliens Under the Violence Against Women Act.* INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 (“VAWA”), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, “on a case-by-case basis, whether to place the alien in deferred action status” while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that “[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action.” *Id.* But because “[i]n an unusual case, there may be factors present that would militate against deferred action,” the agency instructed officers that requests for deferred action should still “receive individual scrutiny.” *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. See *Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) (“H.R. 3083 Hearings”).

2. *Deferred Action for T and U Visa Applicants.* Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a “T visa” available to victims of human trafficking and their family members, and a “U visa” for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate “possible victims in the above categories,” and to use “[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal” to prevent those victims’ removal “until they have had the opportunity to avail themselves of the provisions of the VTVPA.” Memorandum

for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—“T” and “U” Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make “deferred action assessment[s]” for “all [T visa] applicants whose applications have been determined to be bona fide,” Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants “determined to have submitted *prima facie* evidence of [their] eligibility,” Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. See 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents “*prima facie* evidence” of his eligibility should have his removal “automatically stay[ed]” and that applicants placed on a waiting list for visas “shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)”; *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) (“USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list” for visas.).

3. *Deferred Action for Foreign Students Affected by Hurricane Katrina.* As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include “pursuit of a ‘full course of study.’” USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf> (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students “based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina.” *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1–2 (Nov. 25, 2005), available at [http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf) (last visited Nov. 19, 2014). USCIS explained that such

requests for deferred action would be “decided on a case-by-case basis” and that it could not “provide any assurance that all such requests will be granted.” *Id.* at 1.

4. *Deferred Action for Widows and Widowers of U.S. Citizens.* In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that “no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen’s death” and USCIS had not yet adjudicated a visa petition on the spouse’s behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). “In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens,” USCIS issued guidance permitting covered surviving spouses and “their qualifying children who are residing in the United States” to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, “serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons.” *Id.* at 6.<sup>7</sup>

5. *Deferred Action for Childhood Arrivals.* Announced by DHS in 2012, DACA makes deferred action available to “certain young people who were brought to this country as children” and therefore “[a]s a general matter . . . lacked the intent to violate the law.” Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) (“Napolitano Memorandum”). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor “poses a threat to national security or public safety.” *See id.* DHS evaluates applicants’ eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 (“DACA Toolkit”). Successful DACA applicants receive deferred action for a

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<sup>7</sup> Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen “for at least 2 years at the time of the citizen’s death” to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance “obsolete,” USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and “confer[] no substantive right, immigration status or pathway to citizenship,” Napolitano Memorandum at 3.<sup>8</sup>

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.<sup>9</sup> On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that “[a]pproved [VAWA] self-petitioners are placed in deferred action status,” such that “[n]o battered alien who has filed a[n approved] self petition . . . has been deported.” H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be “eligible for deferred action and work authorization.” Victims of Trafficking and

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<sup>8</sup> Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

<sup>9</sup> Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS’s authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).<sup>10</sup>

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at

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<sup>10</sup> Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

49 U.S.C. § 30301 note), which makes a state-issued driver’s license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card’s recipient has “[e]vidence of [l]awful [s]tatus.” Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or “approved deferred action status.” *Id.* § 202(c)(2)(B)(viii).

## **B.**

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS’s authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their “broad discretion” to administer the removal system—and, more specifically, their discretion to determine whether “it makes sense to pursue removal” in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien’s continued presence in the United States for a fixed period (subject to revocation at the agency’s discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien’s continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful

presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an “unauthorized alien” not entitled to work in the United States as an alien who is neither an LPR nor “authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security].” This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as “permissive” and largely “unfettered”).<sup>11</sup> Although the INA

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<sup>11</sup> Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a “comprehensive scheme prohibiting the employment of illegal aliens in the United States,” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an “unauthorized alien.” As relevant here, Congress defined an “unauthorized alien” barred from employment in the United States as an alien who “is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.” 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that “the phrase ‘authorized to be so employed by this Act or the Attorney General’ does not recognize the Attorney General’s authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act.” *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude “that Congress, being fully aware of the Attorney General’s authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined ‘unauthorized alien’ in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the

requires the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established

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regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15–18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.<sup>12</sup> Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of “lawful status” for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy “rather than embarking on a frolic of its own.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139

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<sup>12</sup> For example, since 1978, the Department of Justice's Antitrust Division has implemented a “leniency program” under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (November 19, 2008), available at <http://www.justice.gov/atr/public/criminal/239583.pdf> (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), available at <http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice> (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information “may result in prosecution not being recommended”); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, available at <http://www.usmarshals.gov/safesurrender/faqs.html> (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the “Fugitive Safe Surrender” program are likely to receive “favorable consideration”).

(1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency’s assertion of regulatory authority by “refus[ing] . . . to overrule” the agency’s view after it was specifically “brought to Congress’s attention,” and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress “implicitly approved the practice of claim settlement by executive agreement” by enacting the International Claims Settlement Act of 1949, which “create[d] a procedure to implement” those very agreements).

Congress’s apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary’s broad authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6–7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency’s expertise, and that it does not seek to effectively rewrite the laws to match the Executive’s policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6–7 (citing *Youngstown*, 343 U.S. at 637, and *Nat’l Ass’n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress’s history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress’s own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are “faithful[.]” to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

### C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

#### 1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it

will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such “human concerns” in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) (“The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.” (quoting H.R. Rep. No. 85-1199, at 7 (1957))). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside

in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).<sup>13</sup> Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status

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<sup>13</sup> The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009–10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21–22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years “have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways”); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who “have become well settled in this country” would be a “wasteful use of the Immigration and Naturalization Service’s limited enforcement resources”); *see also Arizona*, 132 S. Ct. at 2499 (noting that “[t]he equities of an individual case” turn on factors “including whether the alien has . . . long ties to the community”).

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has

abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she “present[ed] no other factors that, in the exercise of discretion,” would “make[] the grant of deferred action inappropriate.” Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien’s deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status “takes time.” *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.<sup>14</sup> Immigration officials have on several

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<sup>14</sup> DHS’s proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been “inspected and admitted or paroled into the United States.” 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS’s proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the

occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18–20.<sup>15</sup> In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status

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amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

<sup>15</sup> Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually “acquire lawful permanent resident status” and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14–15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that “the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.” *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

## 2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those

discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 (“Deferred action . . . does not provide you with a lawful status.”). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the

proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

### III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

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JUNE 30, 2015

## USING PAROLE FOR FAMILY REUNIFICATION OF FILIPINO WAR VETERANS

*Beyond prosecutorial discretion, the Obama Administration can use the parole power as a way to overcome the family separation created by visa backlogs for urgent humanitarian reasons*

By Purna Lal

**W**hen Art Caleda donned the colors of the U.S. military uniform to serve in World War II in the 1940s, he was promised by then President Franklin Roosevelt that after the war, the United States would provide him, and the other Filipino nationals who served with him, U.S. citizenship and full veterans benefits.<sup>1</sup>

Unfortunately, the United States failed to keep its promise. For decades, thousands of Filipino veterans who served in World War II were denied official recognition and veteran benefits. To right this wrong, and after much litigation, Congress enacted § 405 of the Immigration Act of 1990, Public Law 101-649 (“IMMACT”) in 1990, to extend eligibility for United States citizenship to these aging Filipino veterans.<sup>2</sup> This late measure enabled 30,000 Filipino war vets to finally immigrate to the United States.<sup>3</sup>

However, no allowance was made for their children, and the Filipino war veterans had to individually sponsor their children who were residing in the Philippines. As soon as he received citizenship, in 1996, Art Caleda, now in his 90s, petitioned for his three sons to join him in the United States.<sup>4</sup> Alas, it has been almost twenty years since then, and he is still waiting to reunite with his children.<sup>5</sup>

Due to the overwhelming visa backlog, many of these Filipino war veterans have now passed away, without having the chance to reunite with their families still

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<sup>1</sup> David Nakamura, *Filipinos Who Fought to Aid U.S. in World War II Still Await Green Cards for Grown Children*, WASH. POST (Jan. 3, 2015), [http://www.washingtonpost.com/politics/filipinos-who-fought-to-aid-us-in-world-war-ii-still-await-green-cards-for-grown-children/2015/01/03/a370e704-913d-11e4-ba53-a477d66580ed\\_story.html](http://www.washingtonpost.com/politics/filipinos-who-fought-to-aid-us-in-world-war-ii-still-await-green-cards-for-grown-children/2015/01/03/a370e704-913d-11e4-ba53-a477d66580ed_story.html) [hereinafter Nakamura]

<sup>2</sup> See Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978 (1990).

<sup>3</sup> Ken McLaughlin, *World War II Filipino Veterans on the Verge of Getting Full U.S. Military Benefits*, SAN JOSE MERCURY NEWS (May 16, 2008), [http://www.mercurynews.com/ci\\_9286566?source=rss](http://www.mercurynews.com/ci_9286566?source=rss).

<sup>4</sup> Nakamura, *supra* note 1.

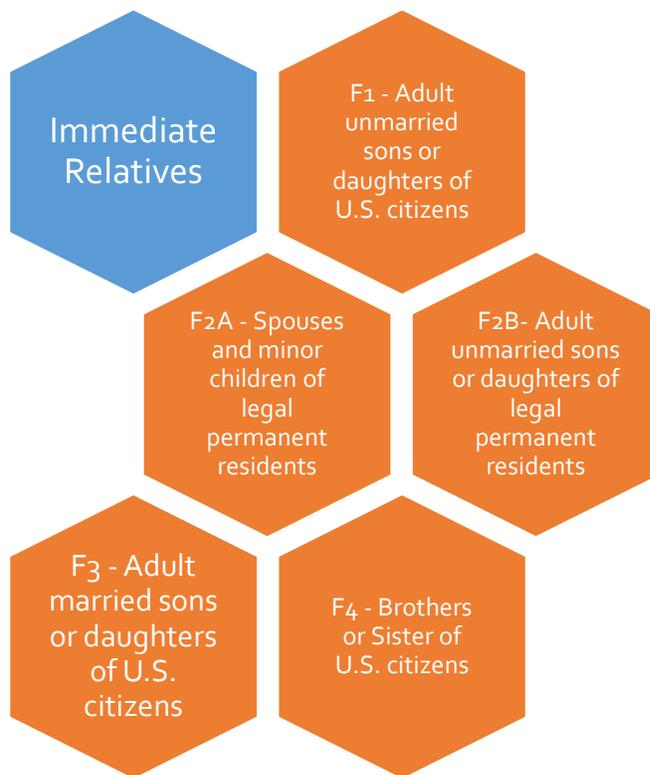
<sup>5</sup> *Id.*

living in the Philippines. Of the 250,000 Filipino vets of World War II, less than 40,000 are still alive.<sup>6</sup> The few thousand war veterans who live in the United States continue to be separated from their children, and other relatives, left behind in the Philippines.

## IMMIGRANT VISA BACKLOG LEAVES MANY IN LIMBO

Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000 and an annual limit of 140,000 for employment based visas.<sup>7</sup> For years now, this allotment has failed to cover all of the family-based and employment-based applicants seeking permanent residence.

For family-based immigration, individuals must fall into one of two groups: “immediate relatives” or a “family preference category.” The INA limits the definition of immediate relatives to the spouse, child under 21 and parents of U.S. citizens 21 and older. Persons who fall within the immediate relative category do not typically have to wait to apply for a visa to immigrate to the United States.



However, there are five family preference categories, as demonstrated in the chart above. If an individual falls within any of the family preference categories, she or

<sup>6</sup> Momar G. Visaya and Allyson Escobar, *Lawmakers Introduce Bill to Help Filipino Veterans Receive Deserved Benefits*, ASIAN JOURNAL (Jan. 15, 2015), <http://asianjournal.com/news/lawmakers-introduce-bill-to-help-filipino-veterans-receive-deserved-benefits/>.

<sup>7</sup> See 8 U.S.C. § 1151.

he can expect to wait a significant amount of time before she or he can even apply for admission to the United States.

This is due to the fact that the law sets numerical limits on how many people can come to the United States through the family preference categories each year, along with numerical limits on each preference category. For example, typically only 23,400 individuals who fall into the F1 category (unmarried adult sons or daughters of a U.S. citizen) can immigrate to the United States each year.<sup>8</sup> Immigration to the United States via the family preference categories is further limited by the fact that each country is only allowed seven percent of visas in each preference category,<sup>9</sup> which means that only seven percent of the 23,400 can come from the Philippines.

These numerical limits have created a backlog of applications in the family preference categories because the demand for visas each year exceeds the availability of visas. According to the Department of State's Annual Immigrant Visa Waiting List published in November 2014, over 4.2 million family members of U.S. citizens and lawful permanent residents are waiting in line to join their families in the United States.<sup>10</sup>

Given that the family-sponsored preference limit is capped at 226,000 a year, with 4.2 million applications backlogged, it would take many years to clear the backlog of family preference petitions. In particular, the family visa backlog is devastating for Asian Americans in the United States. Six of the top ten countries on the family-visa waiting list come from the Asian region: Philippines, India, Pakistan, Bangladesh, China, and Vietnam.<sup>11</sup> Together, these six countries comprise approximately 1.6 million of the 4.2 million immigrants waiting to join their families in the United States.<sup>12</sup> This means that almost one-third of potential immigrants to the United States are waiting in a long line to join Asian American families already living in the United States.

Moreover, the current backlog exacerbates family separation for countries such as the Philippines and China. For example, the number of visas available to the unmarried sons and daughters of lawful permanent residents from the Philippines is 1,838 per year (under the F-2B category).<sup>13</sup> However, the number of pending applications from the Philippines in this category is 50,298.<sup>14</sup> The length of time it would take to clear this backlog is 27.4 years. In other words, lawful permanent residents from the Philippines filing for their unmarried son or daughter today,

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<sup>8</sup> See 8 U.S.C. § 1153.

<sup>9</sup> *Id.*

<sup>10</sup> ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2014, DEPARTMENT OF STATE, *available at* <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf> [hereinafter DOS Report].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> There are only 26,266 visas available each year under the F-2B category with a 7 percent per-country cap, which amounts to  $26,266 \times .07 = 1,838$ .

<sup>14</sup> DOS Report, *supra* note 10.

would need to wait 27 years their son or daughter to legally join them in the United States.

Even if they naturalize to enable their relatives to immigrate faster, the F-1 visa category (unmarried adult sons and daughters of U.S. citizens) is also oversubscribed by more than a decade. As a result, many Filipino war veterans who were granted citizenship in the 1990s due to their service to the United States, continue to be separated from their children abroad, and many have died awaiting family reunification.<sup>15</sup> It is mathematically impossible for many families stuck in the visa backlog to ever reunite.

## VISA MODERNIZATION THROUGH EXECUTIVE ACTION

The recent bipartisan Senate immigration legislation, S. 744, provided a way to clear this tremendous family-visa backlog within ten years. It reclassified spouses and minor children of legal permanent residents—currently in the 2A family preference category—as immediate relatives, allowing them to immediately reunite with their families.<sup>16</sup> It allowed certain family members to live and work in the U.S. as they await their visas.<sup>17</sup> Additionally, due to an amendment from Senator Mazie Hirono (D-Hawaii) while S.744 was before the Senate Judiciary Committee, the omnibus legislation also included a critical exemption for the children of Filipino war veterans from the long immigrant visa wait times.<sup>18</sup>

However, S. 744 stalled due to inaction by the House of Representatives. In response to this, and mounting public outcry about the pace of deportations, on November 20, 2014, President Obama announced a series of changes to the immigration system to be executed through memos issued by the Department of Homeland Security (DHS).<sup>19</sup> As part of the November 2014 executive actions, President Obama issued a presidential memorandum creating an interagency task force charged with recommending areas for improvement in the legal immigration system, including family and employment-based visas.<sup>20</sup> On January 29, 2015, Advancing Justice | AAJC, submitted detailed recommendations on the many ways that the Obama Administration can modernize the legal immigration system to streamline and improve the processing of certain visas.<sup>21</sup>

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<sup>15</sup> Nakamura, *supra* note 1.

<sup>16</sup> See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

<sup>17</sup> *Id.*

<sup>18</sup> *Senate Judiciary Committee Adopts Hirono Amendment That Reunifies Filipino World War II Veterans and Their Families*, MAZIE HIRONO: A VOICE FOR HAWAII IN THE U.S SENATE (May 21, 2013), <http://www.hirono.senate.gov/press-releases/senate-judiciary-committee-adopts-hirono-amendment-that-reunifies-filipino-world-war-ii-veterans-and-their-families>.

<sup>19</sup> DEP'T OF HOMELAND SEC., *Fixing Our Broken Immigration System Through Executive Action - Key Facts* (Jan. 5, 2015), <http://www.dhs.gov/immigration-action>.

<sup>20</sup> Office of the Press Secretary, *Presidential Memorandum – Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century*, THE WHITE HOUSE (Nov. 21, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s>.

<sup>21</sup> ADVANCING JUSTICE | AAJC, *Advancing Justice | AAJC Written Comments: Streamlining the Legal Immigration System* (Jan. 29, 2015), <http://www.advancingequality.org/news-media/publications/advancing-justice-ajc-written-comments-streamlining-legal-immigration>.

Of the many proposals submitted to this task force, a couple that have resonated with advocates include enabling the recapture of unused visas, and moving forward, not counting derivative family members in the preference categories as individuals but as members of a single family unit.<sup>22</sup> Another recommendation is to use parole power to allow certain admissible family members who are currently waiting in the backlog to live and work in the United States while they await their immigrant visas. The Obama Administration can take administrative action now to reunite these families by using a little known mechanism called parole.

## HISTORICAL USES OF PAROLE POWER

The Secretary of Homeland Security has the discretion to parole temporarily into the United States, under such conditions as she or he may prescribe, any non-citizen applying for admission.<sup>23</sup> The Secretary may exercise this discretion only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit.” However, past administrations have used this executive authority to admit thousands of refugees and immigrants into the United States.<sup>24</sup>

At the end of World War II, the United States started practicing an ad hoc approach to refugee admissions because the existing immigration system proved insufficient for admitting large numbers of individuals facing humanitarian crises or other emergency situations. The Immigration Act of 1952 introduced the first provision codifying the Attorney General's parole authority.<sup>25</sup> Under INA § 212(d)(5)(A), executive parole power became the key instrument to facilitate the arrival of various foreign national groups who later adjusted their immigration status to permanent residence.

At no time was parole used as an invitation to avoid the normal requirements of immigration law. Rather, it was used in instances where the existing law fell short. One of the first uses of the parole power was to assist non-citizen orphan children in 1953. Under Section 5 of the Refugee Relief Act of 1953, Congress granted 4,000 special immigrant visas to orphans under the age of 10 who were adopted by U.S. citizens.<sup>26</sup> However, months before the expiration date of the program, the 4,000 cap had been reached, with many eligible orphans left without completed adoptions.<sup>27</sup> Responding to this emergency, President Dwight

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<sup>22</sup> *Id.*

<sup>23</sup> See 8 U.S.C. § 1182(d)(5) (Supp. IV 1980); see also 8 C.F.R. § 212.5(a) (1982) (revised 1982). The Secretary is constrained to use the parole power only ‘for emergent reasons or for reasons deemed strictly in the public interest.’ INS regulations have authorized the DHS Secretary and the district directors to grant parole at virtually any stage in the exclusion process, from prior to inspection to after a finding of inadmissibility has been made.

<sup>24</sup> See IMMIGRATION POLICY CENTER, *Executive Grants of Temporary Immigration Relief, 1956-Present*, AMERICAN IMMIGRATION COUNCIL (Oct. 2 2014), <http://www.immigrationpolicy.org/just-facts/executive-grants-temporary-immigration-relief-1956-present>.

<sup>25</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) The parole power includes various humanitarian or public interest justifications, 8 CFR §212.5, as well as securing advance permission to return to the U.S. from certain sojourns abroad.

<sup>26</sup> See Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953); ELIZABETH J. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* 511 (3d ed. 1975).

<sup>27</sup> See EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965* 550 (1981); see also 1917 Immigration Act §20, as amended by §23, 64 Stat. 987 of the Act (Sept. 23, 1950).

Eisenhower paroled the remaining orphans into the custody of their adoptive or prospective parents.<sup>28</sup> Later, Congress passed legislation that allowed the paroled children to adjust their status to lawful permanent residence.<sup>29</sup>

Parole power was used extensively since then. Between November 1956 and June 1958, President Eisenhower's administration granted parole to 31,915 Hungarians who escaped their country after a failed uprising against the former Soviet Union.<sup>30</sup> Congress concurred with this practice by enacting the Act of July 25, 1958 to provide permanent residence to these refugees.<sup>31</sup> Presidents Kennedy, Johnson and Nixon also used parole power expansively to destabilize the Cuban regime and grant status to most of the 621,403 applications received by Cuban asylum seekers fleeing the revolution in Cuba.<sup>32</sup> President Kennedy and President Johnson also employed the parole power to parole over 15,000 Chinese nationals who fled Hong Kong in 1962.<sup>33</sup>

Following the Vietnam War, Presidents Ford and Carter also used executive parole to bring over 360,000 Indo-Chinese individuals from Vietnam, Cambodia, and Laos to the United States when the number of available conditional entries was vastly exceeded.<sup>34</sup> From 1972 until 1980, Soviet refugees also received parole when enough conditional entries were not available.<sup>35</sup>

Congress enacted The Refugee Act of 1980, which provided a more deliberate way to admit refugees from abroad. The Attorney General, and later the Secretary of DHS, retained authority under Section 212(d)(5) to parole non-refugees or individual refugees if "compelling reasons in the public interest" dictated parole.<sup>36</sup> From 1982 to 1997, the parole power regulations' list of situations for which the exercise of the parole authority is justified included "aliens who have close family relatives in the United States (parent, spouse, children, or siblings who are United States citizens or lawful permanent resident aliens) who are eligible to file, and have filed, a visa petition on behalf of the detainee."<sup>37</sup>

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 brought some sweeping changes to the parole power. Through the enactment of IIRIRA Section 602(a), Congress amended section 212(d)(5)(A) of the INA to allow the granting of parole on a case-by-case basis for "urgent humanitarian reasons" or where such a grant would result in a "significant public benefit." Following the statutory changes in 1996, the former Immigration and

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<sup>28</sup> *Id.*

<sup>29</sup> Immigration and Nationality Act of September 11, 1957, Pub. L. No. 85-316, § 4(d), 71 Stat. 639, 710 (1957).

<sup>30</sup> George Springsteen, *Memorandum for Lieutenant General Brent Scowcroft, Waivers for Admission of Refugees* (Apr. 5, 1975) <http://fordlibrarymuseum.gov/library/document/0047/phw19750416-02.pdf>.

<sup>31</sup> Pub. L. No. 85-559, §2, 72 Stat. 419, 419-20 (1958).

<sup>32</sup> *Id.*

<sup>33</sup> 1966 Annual Report of the Immigration and Naturalization Service 7 (1966).

<sup>34</sup> *Refugees Arriving in the U.S.: 1956-1985*, 2 MIGRATION NEWS (1986); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965) (codified at INA § 203(a)(7) (1966)).

<sup>35</sup> *Congress Considers Proposals to Increase Soviet Émigré Flow*, 66 No. 14 Interpreter Releases 397 (1989).

<sup>36</sup> 8 USC §1182(d)(5)(B).

<sup>37</sup> *See* Detention and Parole of Inadmissible Aliens Interim Rule, 47 Fed. Reg. 30044, 30045 (July 9, 1982).

Naturalization Service issued regulations that removed close family relatives from the list of generally acceptable exercises of parole authority.<sup>38</sup> However, the Attorney General, and now the Secretary of Homeland Security, retained the discretion to determine who to parole into the United States, and have continued to use this power sparingly.

Since the statutory change in 1996, the parole power has generally been used in the following ways:

<b><u>TYPE OF PAROLE</u></b>	<b><u>AUTHORIZED USE</u></b>
<b>Advance parole</b>	Authorization to travel abroad and return to the U.S. without triggering the unlawful presence bars
<b>Deferred inspection</b>	Parole granted to a non-citizen at the border where there is insufficient evidence for lawful admission but the non-citizen does not appear to be clearly inadmissible. In these cases, inspection is deferred until a later time.
<b>Humanitarian</b>	Parole for non-citizens with serious medical conditions who are either detained in the U.S. and subject to removal, or residing abroad and need to come to the U.S. for medical reasons
<b>Port of Entry (POE)</b>	Parole granted at port of entry
<b>Public Interest</b>	Parole that is typically granted for non-citizens serving as witnesses to legal proceedings or who are subject to legal prosecution in the U.S.
<b>Parole-in-Place</b>	Parole granted to persons already in the U.S. who entered unlawfully or without inspection

## PAROLE FOR THE FAMILY MEMBERS OF FILIPINO WAR VETERANS FOR URGENT HUMANITARIAN REASONS

Previous examples demonstrate that the parole power has been used extensively in humanitarian emergencies by executives from both parties. However, past presidents have also used the parole power in cases that prompted no real emergency other than to promote family reunification and provide legal avenues for expedited migration to the U.S. where none existed.

Perhaps nothing exemplifies this more than the public interest parole granted by President Clinton to Cuban preference visa beneficiaries on the immigrant visa waiting list in September 1994 who could not receive a visa by the end of fiscal

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<sup>38</sup> Compare Detention and Parole of Inadmissible Aliens Interim Rule, 47 Fed. Reg. 30044, 30045 (1982) (including close family relatives), with Inspection and Expedited Removal of Aliens Interim Rule, 62 Fed. Reg. 10312, 10348 (Mar. 6, 1997) (removing close family relatives).

year 1995.<sup>39</sup> Such persons were paroled “no matter where their numbers would normally have come up.”<sup>40</sup> Parole was also offered to the unmarried sons and daughters of Cubans issued immigrant visas or granted refugee status, as well as to family members who resided in the same household.<sup>41</sup> According to the State Department under the Clinton Administration, parole was used in this specific case for political reasons: “to move from illegal and unsafe migration—the rafting—to legal, safe, reliable methods of migration.”<sup>42</sup> The United States continues to have in place various types of parole for Cuban nationals including, but not limited to, Special Cuban Migration parole, Cuban Family Reunification, parole for Cuban family of immigrant visa bearers, and parole for Cuban medical professionals.<sup>43</sup>

While there are now limits to the exercise of parole power, nothing precludes the current President from using parole on a case-by-case basis for urgent humanitarian reason or significant public benefit. Indeed, providing parole to assist ailing Filipino war veterans who served the United States courageously, would categorically fit the urgent humanitarian reasons for which parole should be granted.<sup>44</sup> These war veterans courageously served the United States, and need their loved ones beside them. Granting parole to their now adult children in the backlogs would ensure that these veterans are treated fairly and with respect. With only 6,000-10,000 Filipino war veterans remaining in the United States, and many needing urgent medical care, the number of eligible parolees would likely be small, albeit significant.

Nothing in the Immigration and Nationality Act precludes the Executive Branch from taking this action.<sup>45</sup> Moreover, the Obama Administration has specifically used the parole power on several prior occasions to promote family unity in

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<sup>39</sup> *State Dept. Implements Cuban Migration Agreement*, 71 NO. 41 Interpreter Releases 1409 (1994).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *U.S., Cuba Reach Important Migration Agreement*, 71 No. 35 Interpreter Releases 1213 (1994).

<sup>43</sup> Memorandum between United States Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection on Coordinating the Concurrent Exercise By USCIS, ICE, and CBP of the Secretary’s Parole Authority Under INA § 212(d)(s)(A) with Respect to Certain Aliens Located Outside the United States, Immigration and Customs Enforcement (Sept. 2008), <http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>.

<sup>44</sup> These recommendations on using the parole power are not meant to be exhaustive. Parole can also be used in the following circumstances:

- Humanitarian parole for the partners of LGBT asylum seekers who are still living in dangerous conditions abroad, and who can adjust through section 209 after receiving asylee status in the U.S.;
- A renewable humanitarian parole granted for up to a year to family members of sick, elderly and disabled U.S. citizens and lawful permanent residents;
- Parole for asylum seekers currently in U.S. detention who have demonstrated credible fear; and
- Humanitarian parole for the deported spouses of U.S. citizens and parents of U.S. citizens who are 21 and older provided the parents can also receive a concurrent waiver of the INA (9)(A)(ii)(I) bar from the DHS.

<sup>45</sup> See INA §201(c). The only apparent limitation on such use of the parole power involves overcoming the chargeability of parolees against available family visa numbers in each fiscal year. Section 603 of IIRIRA also made long-term parolees who do not depart the U.S. after 365 days chargeable against the 480,000 worldwide numerical limitation established for family-sponsored immigrant visas.

urgent humanitarian contexts. In the first instance, parole was used to enable Haitian orphans abroad to join their prospective and adoptive parents in the U.S., after the devastating January 2010 earthquake in Haiti.<sup>46</sup> As a result of this program, approximately 1,200 Haitian orphans were reunited with their families in the United States.<sup>47</sup>

In the second instance, the Administration extended parole-in-place (PIP) to the spouse, child, or parent of an individual who is currently a member of the U.S. Armed Forces or the Selected Reserve (or who previously served in the U.S. Armed Forces or Selected Reserve).<sup>48</sup> More recently and at the request of the Department of Defense, the Obama Administration also extended the use of parole-in-place to spouses, children and parents of U.S. citizen and lawful permanent residents seeking to enlist in the U.S. Armed Forces.<sup>49</sup>

Finally, in late 2014, DHS announced the Haitian Family Reunification Parole Program to expedite family reunification for certain eligible Haitian family members of U.S. citizens and lawful permanent residents.<sup>50</sup> Under the newly-established Haitian Family Reunification Parole program, Haitians who are paroled will be allowed to enter the United States and apply for work authorization but will not receive permanent resident status until their priority dates become current.<sup>51</sup> This is yet another example of how the Administration is using the parole power to reunite families who are impacted by the visa backlogs. Certainly then, precedent does exist to use parole similarly for nationals of other countries, such as the Philippines.

Once granted parole, the adult children of Filipino vets will be reunited with their aging parents in the United States. Eventually, these parolees would be able to apply for adjustment of status to lawful permanent residence.

## CONCLUSION

Ultimately, Congress should enact commonsense reforms that fix the legal immigration system in a manner that enables families to stay together. Until then, President Barack Obama should use the parole tool in his arsenal to reunite

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<sup>46</sup> *Special Humanitarian Parole Program for Haitian Orphan Fact Sheet*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Apr. 7, 2010), <http://www.uscis.gov/archive/archive-news/special-humanitarian-parole-program-haitian-orphan-fact-sheet>.

<sup>47</sup> *Id.*

<sup>48</sup> See Memorandum on Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act from U.S. Citizenship and Immigration Services § 212(a)(6)(A)(i) (Nov. 15, 2013), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115\\_Parole\\_in\\_Place\\_Memo.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo.pdf). A grant of “parole in place” eliminates two of the bars to adjustment of status normally applicable to those applicants who entered without inspection. First, the parole grant means that the individual is no longer inadmissible under § 212(a)(6)(A)(i) (covering persons who entered without inspection). Second, the grant of parole satisfies the requirement that an adjustment applicant must have been “inspected and admitted or paroled.”

<sup>49</sup> Memorandum from Jeh Johnson to León Rodríguez on Families of Armed Forces and Enlistees (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_parole\\_in\\_place.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf).

<sup>50</sup> *USCIS Announces Haitian Family Reunification Parole Program*, 91 NO. 41 Interpreter Releases 1925 (2014).

<sup>51</sup> *Id.*

families estranged by the broken legal system. The historical and more contemporary use of the immigration parole power points to the need for more flexible approaches to admissions of groups and individuals for humanitarian reasons and significant public benefit.

Without doubt, one of those reasons is family unity given the tremendous family visa backlogs that have separated the families of those who have so courageously served the United States. Whether through the use of parole or parole-in-place, the President can and must use his executive powers to reunite Filipino war veterans with their loved ones, and restore the promise of full citizenship that the United States had made to these veterans so long ago.

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# “Sanctuary Cities”: Legal Issues

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## Summary

Controversy has arisen over the existence of so-called “sanctuary cities.” The term “sanctuary city” is not defined by federal law, but it is often used to refer to those localities which, as a result of a state or local act, ordinance, policy, or fiscal constraints, place limits on their assistance to federal immigration authorities seeking to apprehend and remove unauthorized aliens. Supporters of such policies argue that many cities have higher priorities, and that local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local law enforcement, or violate humanitarian principles. Opponents argue that sanctuary policies encourage illegal immigration and undermine federal enforcement efforts. Pursuant to § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193) and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208), states and localities may not limit their governmental entities or officers from maintaining records regarding a person’s immigration status, or bar the exchange of such information with any federal, state, or local entity. Reportedly, some jurisdictions with sanctuary policies take a “don’t ask, don’t tell” approach, where officials are barred from inquiring about a person’s immigration status in certain circumstances. Though this method does not directly conflict with federal requirements that states and localities permit the free exchange of information regarding persons’ immigration status, it results in specified agencies or officers lacking information that they could potentially share with federal immigration authorities. In the 110<sup>th</sup> Congress, several bills were introduced that attempted to limit formal or informal sanctuary policies and induce greater sharing of immigration information by state and local authorities. Bills have also been introduced in the 111<sup>th</sup> Congress to restrict or expand states and localities’ information-sharing requirements.

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Over the past several years, the number of aliens who unlawfully reside in the United States has grown significantly, from an estimated 3.2 million in 1986 to more than 11 million in 2005.<sup>1</sup> Although the federal government is responsible for regulating the entry and removal of aliens from the United States, the impact of unauthorized immigration has arguably been felt most directly in the communities where aliens settle. The response of states and localities to the influx of illegal immigrants has varied. On one end of the spectrum, some jurisdictions have actively sought to deter the presence of illegal immigrants within their territory. Some jurisdictions have assisted federal authorities in apprehending and detaining unauthorized aliens, including pursuant to agreements (287(g) agreements) with federal immigration authorities enabling respective state or local law enforcement agencies to carry out various immigration enforcement functions.<sup>2</sup> More controversially, some jurisdictions have sought to deter illegal immigration by imposing their own restrictions upon unauthorized aliens’ access to housing, employment, or municipal services.<sup>3</sup> Moving toward the middle of the spectrum, some states and localities communicate with federal immigration enforcement officers under limited circumstances (e.g., after arresting an unauthorized alien for a criminal offense), but for various reasons do not take a more active role in deterring illegal immigration.

At the other end of the spectrum, some jurisdictions have been unwilling to assist the federal government in enforcing measures that distinguish between legal and non-legal residents of the community. Some of these jurisdictions have adopted formal or informal policies limiting cooperation with federal immigration authorities.<sup>4</sup> This latter category of jurisdictions is sometimes referred to as “sanctuary cities.” Although this term is not defined by federal statute or regulation, it has been used by some in reference to “jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.”<sup>5</sup>

The very existence of “sanctuary cities” has been the subject of considerable controversy. Supporters argue that immigration enforcement is the responsibility of the federal government, and that local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local enforcement, or violate humanitarian principles.<sup>6</sup> Opponents of sanctuary policies argue that they encourage illegal immigration and undermine federal enforcement efforts.<sup>7</sup>

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<sup>1</sup> See CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem. See also Jeffrey S. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, March 7, 2006.

<sup>2</sup> See the Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g). For additional background and analysis, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Blas Nuñez-Neto, Michael John Garcia, and Karma Ester.

<sup>3</sup> Many state and local ordinances restricting unauthorized aliens’ access to housing and/or employment have been the subjects of legal challenges. For background, see CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Michael John Garcia, Alison M. Smith, and Jody Feder.

<sup>4</sup> See Jesse McKinley, *Immigrant Protection Rules Draw Fire*, NY TIMES, November 12, 2006.

<sup>5</sup> U.S. Department of Justice, Office of the Inspector General, Audit Division, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES, January 2007 (redacted public version) [*hereinafter* “2007 OIG Report”], at 44 (defining “sanctuary” policies).

<sup>6</sup> The modern sanctuary movement has roots in efforts by U.S. churches in the 1980s to provide refuge to unauthorized Central American aliens fleeing civil unrest. Several states and municipalities subsequently issued declarations in support of the churches’ actions and offered to provide sanctuary to these aliens. See generally Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (continued...)

## Applicable Law

The primary federal restrictions on state and local sanctuary policies are § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193)<sup>8</sup> and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208).<sup>9</sup> PRWORA § 434 proscribes any prohibition or restriction placed on state or local governments to send or receive information regarding immigration status of an individual to or from federal immigration authorities.<sup>10</sup> IIRIRA § 642 is broader in scope. It bars any prohibition on a federal, state, or local governmental entity or official’s ability to send or receive information regarding immigration or citizenship status to or from federal immigration authorities.<sup>11</sup> The statute also provides that no person or agency may prohibit a federal, state, or local government entity from (1) sending information regarding immigration status to, or requesting information from, federal immigration authorities; (2) maintaining information regarding immigration status; or (3) exchanging such information with any other federal, state, or local government entity.<sup>12</sup>

The constitutionality of the foregoing provisions was challenged by the City of New York. The mayor of the City of New York had issued an Executive Order prohibiting any city officer or employee, in most circumstances, from transmitting information regarding immigration status to federal immigration authorities.<sup>13</sup> This Executive Order was in direct conflict with both PRWORA § 434 and IIRIRA § 642.<sup>14</sup>

The United States Court of Appeals for the Second Circuit held in *New York v. United States (City of New York)* that PRWORA § 434 and IIRIRA § 642, on their face, do not violate the anti-commandeering doctrine under the Tenth Amendment.<sup>15</sup> The anti-commandeering doctrine prohibits the federal government from commandeering either a state’s legislature (e.g., by requiring that a state enact particular regulatory standards<sup>16</sup>) or its executive officers (e.g., by requiring that state officers directly participate in enforcing federal law<sup>17</sup>) to achieve federal goals. While this might mean that Congress cannot directly compel states to collect and share information regarding immigration status with federal immigration authorities, merely prohibiting states and localities from blocking their agents from sharing with the federal government

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(...continued)

(1989).

<sup>7</sup> See Federation for American Immigration Reform, *Non-Cooperation Policies: “Sanctuary” for Illegal Immigration*, at [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters0173](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0173).

<sup>8</sup> 8 U.S.C. § 1644.

<sup>9</sup> *Id.* § 1373.

<sup>10</sup> *Id.* § 1644.

<sup>11</sup> *Id.* § 1373(a).

<sup>12</sup> *Id.* § 1373(b).

<sup>13</sup> *New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 33-37.

<sup>16</sup>

*New York v. United States (State of New York)*, 505 U.S. 144 (1992).

<sup>17</sup> *Printz v. United States*, 521 U.S. 898 (1997).

information already in their possession may be permissible, according to the Second Circuit, absent specific proof of greater interference with state and local functions.<sup>18</sup>

## State and Local Compliance with Federal Law

Although several localities reportedly have adopted formal or informal policies limiting cooperation with federal immigration authorities, the precise number is unclear.<sup>19</sup> In 2006, Congress required the Office of the Inspector General (OIG) for the Department of Justice to study and report on whether states and localities receiving federal compensation for incarcerating criminal aliens were cooperating with federal immigration enforcement efforts. Among other things, the OIG was required to determine whether any states or localities receiving compensation were in violation of the information-sharing requirements of IIRIRA § 642. In a January 2007 report, the OIG stated that auditors were

able to locate an official “sanctuary” policy for only two jurisdictions that received at least \$1 million in SCAAP [State Criminal Alien Assistance Program] funding, the State of Oregon, which received \$3.4 million, and the City and County of San Francisco, which received \$1.1 million and has designated itself as a “City and County of Refuge.” We also located an Executive Order issued by the Mayor of the City of New York limiting the activities of local law enforcement agencies and officers in the enforcement of immigration law. However, in each instance the local policy either did not preclude cooperation with ICE [Immigration and Customs Enforcement] or else included a statement to the effect that those agencies and officers will assist ICE or share information with ICE as required by federal law.<sup>20</sup>

The OIG report identified two jurisdictions receiving at least \$1 million in SCAAP funding that had official sanctuary policies, but it concluded that neither violated federal law. The OIG estimate of jurisdictions with policies in direct violation of IIRIRA § 642, however, is not comprehensive. While the OIG report indicated that few, if any, jurisdictions that received at least \$1 million in SCAAP funding during FY2005 had formal policies violating IIRIRA § 642, the report did not identify, for example, whether any jurisdictions receiving less the \$1 million were in violation of federal law.<sup>21</sup>

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<sup>18</sup> *City of New York*, F.3d at 35-36. Congress is constrained by constitutional limitations when attempting to induce information sharing between state and federal authorities. The Constitution limits Congress to either adding financial incentives or conditioning federal funding on compliance with information sharing mandates. *See State of New York*, 505 U.S. at 167.

<sup>19</sup> The difficulty in estimating the precise number of jurisdictions stems, at least in part, from conflicting interpretations as to what constitutes a sanctuary policy. *See* 2007 OIG Report, *supra* note 4, at viii (noting conflicting views found in survey of federal immigration authorities and local jurisdictions as to whether localities were “fully cooperating” with federal efforts to remove undocumented criminal aliens).

<sup>20</sup> *Id.*, at viii.

<sup>21</sup> The OIG Report includes a description of the methodology used to identify jurisdictions with sanctuary policies: We were guided initially in our research by listings of sanctuary cities posted on the websites of several organizations. Later, we focused our search on jurisdictions that received SCAAP funding of at least \$1 million from the FY2005 appropriation. We searched the websites for those jurisdictions in an effort to locate policy statements affecting how local law enforcement agencies interact with ICE in the effort to remove criminal aliens from the United States. *Id.*, at 41. According to the OIG, attempts to identify local policies limiting enforcing of immigration legislation “revealed much anecdotal information, but little in the way of formal policies.” *Id.*

Although IIRIRA § 642 prohibits states and localities from barring the transfer or maintenance of information regarding immigration status, it does not require entities to collect such information in the first place. Reportedly, some states and localities seeking to limit assistance to federal immigration authorities have barred agencies or officers from inquiring about persons’ immigration status, a practice sometimes described as a “don’t ask, don’t tell” approach.<sup>22</sup> Though this method does not directly conflict with federal requirements that states and localities permit the free exchange of information regarding persons’ immigration status, it results in specified agencies or officers lacking any information about persons’ immigration status that they could share with federal authorities.<sup>23</sup>

## Legislative Activities

In the 110<sup>th</sup> Congress, several bills were introduced that attempted to limit formal or informal sanctuary policies and induce greater sharing of immigration information by state and local authorities. Some proposals would have mandated that directors of state and local law enforcement agencies report any immigration information collected in the course of the directors’ normal duties to the Secretary of Homeland Security, and would have made compliance with this requirement a condition for continued funding under the State Criminal Alien Assistance Program (SCAAP).<sup>24</sup> Other proposals would have required state and local law enforcement officers to provide information to the Secretary of Homeland Security concerning apprehended aliens who are believed to have committed a violation of U.S. immigration laws, and would have provided grants to those agencies that had policies for assisting in the enforcement of U.S. immigration laws.<sup>25</sup> Some proposals would have made compliance with IIRIRA § 642 a requisite for a state or locality to receive specified federal grants or funding.<sup>26</sup> These proposals were not enacted into law.

Bills have been introduced in the 111<sup>th</sup> Congress to modify requirements on states and localities concerning the sharing of immigration-related information with the federal government. H.R. 150, the Illegal Alien Crime Reporting Act of 2009, introduced by Representative Walter B. Jones, would bar any state or subdivision thereof from receiving funds under any program or activity administered by the Department of Homeland Security, unless the state reports to the Federal Bureau of Investigation certain immigration-related information regarding persons who have been arrested, charged with, or convicted of a crime by the state. S. 95, introduced by Senator David Vitter, would prohibit any funds appropriated for the Community Oriented Policing Services Program from being used in contravention of IIRIRA § 642. H.R. 264, the Save America Comprehensive Immigration Act of 2009, introduced by Representative Sheila Jackson-Lee, would repeal IIRIRA § 642 and PRWORA § 434, thereby permitting states and localities to restrict the sharing of immigration-related information with federal authorities.

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<sup>22</sup> Lisa Anderson, “Sanctuary Cities” *Draw Fire, No Light*, CHI. TRIB., December 12, 2007, at 6.

<sup>23</sup> Some jurisdictions might fear, for example, that active collection of immigration data would impair the delivery of services to the community-at-large.

<sup>24</sup> S. 850, H.R. 1355, 110<sup>th</sup> Cong.

<sup>25</sup> H.R. 3494, 110<sup>th</sup> Cong.

<sup>26</sup> House-passed H.R. 3093, House-passed H.R. 2638, H.R. 4192, 110<sup>th</sup> Cong.

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Testimony Before the  
**U.S. Senate Homeland Security & Governmental Affairs Committee**  
**“Deferred Action on Immigration: Implications & Unanswered Questions”**

Testimony of  
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Of Counsel  
Wasserman, Mancini & Chang, PC  
Former  
Deputy Ombudsman for Citizenship & Immigration Services  
and  
Assistant Commissioner for Customs & Border Protection  
U.S. Department of Homeland Security

February 4, 2015  
10:00 AM  
SD-342 Dirksen Senate Office Building

**“Is U.S. Citizenship & Immigration Services Ready to  
Take on the President’s New Immigration Initiative?”**

Luke P. Bellocchi

Mr. Chairman, Ranking Member, and Committee Members: thank you for allowing me the honor of testifying before this committee, for which I was once a staff member. By way of background, I have worked on immigration law and policy since 1996, starting as an attorney advisor at the State Department, and later as a senior executive at the Department of Homeland Security (DHS) from 2007-2009. In between, I worked as a Congressional staff member on various immigration reform and border security bills in both the House and Senate. I am now a practicing immigration attorney in the private sector.

The President’s initiative to stay deportation of an estimated four to five million undocumented immigrants in the United States will greatly increase pressure on U.S. Citizenship & Immigration Services (USCIS) to handle millions of new immigration applications in the coming months of 2015. There is clearly a potential for bottlenecks to form at the intake, fee processing, data-collection, adjudication, request-for-evidence, document manufacturing stages, in corollary applications, and even perhaps at foreign consular offices (that are issuing passports and foreign official documents). At each of these bottlenecks, there may be a temptation to streamline processing or change processing priorities.

**Background on DAPA/DACA and Immigration Reform Efforts**

The President announced on November 20 of last year a program, known as Deferred Action for Parental Accountability (DAPA), that would allow an estimated five million undocumented immigrants in the United States to obtain protection from deportation and legal work authorization; it would also expand an earlier program called DACA (Deferred Action for Childhood Arrivals) which has seen 692,000 initial applications, with 610,000 approvals. Many commentaries have been made that this program including that many of those eligible for the program will not take up the offer for fear that the program will be rescinded at a later date when their location and employment might be revealed to enforcement agencies. Others have commented on whether this program usurps Constitutional and traditional Congressional authority over immigration and naturalization law and policy.

During consideration of the 2005, 2006 and 2007 comprehensive immigration bills, I was a staffer in the House and then Senate but I witnessed a monumental effort by the George W Bush administration to pass comprehensive immigration reform, to include sending two cabinet officials – Secretary of Homeland Security Chertoff and Secretary of Commerce Gutierrez – to negotiate a bill over countless hours in Senate Chambers. A similar effort is needed in working with Congress to reform our immigration system in a way that can be accepted by all sides and constitutes good long-term immigration policy. To be sure, most law-abiding immigrants have and will contribute greatly to the wealth of the nation and Congress should consider how best to handle and process immigration applications in a safe and secure manner.

Based on the President's announcement, USCIS has begun work to handle a massive surge in workload from incoming DAPA and DACA-expansion applications and DACA extensions. USCIS is slated to take in DACA-expansion cases later this month, and DAPA applications are expected to be available 180 days after the President's announcement in November (i.e., May 20, 2015). The Administration estimates that about five million individuals are eligible to apply under the DAPA and expanded-DACA program.<sup>1</sup> Various organizations, including DHS and Pew Foundation have estimated the undocumented immigrant population to be 10-12 million.<sup>2</sup> All of these are *estimates*, however, and it is impossible to know exactly how many individuals will actually apply under the program. Thus, USCIS' workload may be much greater or less than estimated, and USCIS needs to be ready for any contingency for handling the intake of initial DAPA applications as well as processing documents and security checks.

### Impact of USCIS Processing Timeliness

Talk within the immigrant community indicates some unease with applying for the program. There are questions over whether the program will continue in future years and whether their application information will be shared with law enforcement, but there is also concern that the process will not be smooth and that they and their employers may be left in a lurch. From their perspective, they may be in a relatively stable, albeit unauthorized, position with an employer, but the moment they apply for DACA or DAPA, compliance and Employment Authorization Documents (EADs) come into the picture. USCIS processing can have quite an impact on both employers and immigrants.

For employers, they must fill out I-9 forms (for employment eligibility verification) and check EADs or other documents, and comply with wage, insurance, and other requirements, which may increase their costs. That means if an EAD is not processed before expiration, there will be work stoppage. Unlike normal processing for legal employment-based immigrants, there is usually a labor certification process with the Department of Labor, which takes measures to assure that no American worker is willing and available to take positions that a foreign worker is applying to take. Since the DACA and DAPA program skips these labor market tests, the impact of millions of new workers with legal employment authorization documentation on the economy will be uncertain and processing speed for EADs could be influenced by changing economic conditions. The impact on wages and business costs becomes more unclear if USCIS cannot process DAPA and DACA cases in timely manner.

For DAPA and DACA applicants, delays in or simply lengthy USCIS processing may put them in a more-difficult position as they may not have stable employment once they enter the program. The Citizenship & Immigration Services Ombudsman held a teleconference last month

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<sup>1</sup> White House, <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>. I have been given estimates from DHS officials that the expected number may be closer to 2-3 million applicants.

<sup>2</sup> Pew Research Center, Unauthorized Immigrants: 11.1 million in 2011. <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>. See also Ruth Wasem, Congressional Research Service, "Unauthorized Aliens in the United States: Estimate Since 1986," <http://fpc.state.gov/documents/organization/39561.pdf>. Hoefler, et al, DHS, "Estimates of the Unauthorized Immigrant Population Residing in the United States," [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf).

with immigration practitioners concerning DACA renewals; some participants revealed that a significant number of DACA applicants who were approved for EADs are not able to get reauthorized in time to keep their employment authorization current, forcing them to stop work indefinitely. Timely production and control of EADs has been an issue in the past as reported by the CIS Ombudsman in 2011.<sup>3</sup> Although USCIS is required by regulation to approve EADs within 90 days,<sup>4</sup> they have asked DACA applicants to file 120 days in advance of expiration, but are still not able to process EADs in time.<sup>5</sup> Reliable sources have informed me that USCIS actually adds 90 days EAD processing time to the end of the DACA processing, which might be more justified for an initial DACA application, but makes no sense for a DACA renewal, which will take just as long (i.e., an applicant for renewal can expect to be out of employment authorization for up to 180 days while the renewal and then EAD applications are considered one after another).<sup>6</sup> Few American employers and employees are satisfied with this result as work stoppage results in hardship for both.<sup>7</sup> I can imagine how a DACA applicant under these circumstances might feel as if the DACA (or DAPA) program is not worth it.

The addition of an estimated five million more applicants may overwhelm USCIS' ability to issue EADs in time and USCIS may consider extending the validity of EADs to keep processing under control.<sup>8</sup> In fact, almost all EADs (i.e., the employment authorization cards) are produced at one facility, and it is not clear that the facility has the physical capacity to produce that many EADs in short order.

#### General Description of USCIS as an Application Processing Agency

USCIS is an organization of roughly 13,000 full-time officers and 5,000 contractors, who engage in the processing of about six million immigration benefit applications of one type or another each year. Contractors can only fulfill support functions and not actual adjudication, as that is considered an inherently governmental function. Both the number of personnel and applications changes each year, but over the past few decades, the number of both have grown

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<sup>3</sup> CIS Ombudsman, "Employment Authorization Documents," Meeting the 90 Day Mandate and Minimizing the Impact," July 18, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf>.

<sup>4</sup> 8 CFR 274a.12.

<sup>5</sup> USCIS data for Fourth Quarter, FY2014, indicates 374,589 EAD applications are pending, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all\\_forms\\_performancedata\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2014_qtr4.pdf)

<sup>6</sup> USCIS apparently has stopped the issuance of interim EAD documents (as it make no sense for USCIS to divert resources from approving the regular EAC) and there have been past concerns regarding fraud and security in issuing them from local USCIS offices. The Department of Justice Inspector General found "thousands of controlled employment authorization documents unaccounted for and equipment missing" and another audit found "thousands of unaccounted for certificates of naturalization." Office of Inspector General, Department of Justice, "Follow-up Inspection of the Immigration and Naturalization Service Document Fraud Records Corrections," Report Number I-2000-021, and "Document Fraud Records Corrections," Report Number, I-96-09, citing various other OIG Reports.

<sup>7</sup> CIS Ombudsman, "Employment Authorization Documents," Meeting the 90 Day Mandate and Minimizing the Impact," July 18, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf>.

<sup>8</sup> Normally, an EAD is valid for one year, but in certain cases, EADs are issued with two years or more validity. USCIS, <http://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers>.

dramatically. However, the USCIS systems and processes remain the same: it is fundamentally a labor-intensive, case-intensive, *paper*-based adjudicatory entity. That is, by-and-large, each year six million *paper* applications are taken in through the mail by USCIS, data-entered, and reviewed by officers with support from contractors. Note that most application adjudications are handled at one of four service centers that are not open to the public, but other services are handled at hundreds of local USCIS offices.

The first step in application processing is intake, which has in recent years changed somewhat for security and control purposes, but is also fundamentally a paper mail-based intake system. Once an applicant sends an application and fee to USCIS, most applications are scanned and payment taken at USCIS “lockbox” facilities. Fees fund almost all of USCIS’ \$3.2 billion budget, but all of it until recently was taken in by paper checks. In 2008, when I investigated USCIS’ “lockbox” (there are now there) where fees are collected for applications, I could not get an answer as to why USCIS refused to accept other forms of payment such as credit cards, especially as private bank executives who were present said it would be easily possible. The fact is, all applicants are required to calculate total amounts from a menu of USCIS fees and pay *the exact amount* by check – if that amount is off by even a penny (overpayment or underpayment) the check and application are rejected and sent back. At that time, the Ombudsman’s office calculated that *seven percent* of applications were mailed back, costing USCIS millions in postage and processing, but more damaging, many applicants missed deadlines to maintain their status and employers waited longer to get their employees on board. USCIS recently has made efforts to allow applicants to pay for some applications by credit card, but as the Citizenship & Immigration Services Ombudsman recently reported, the system still faces many challenges.<sup>9</sup>

In addition to credit card payments for some applications, the USCIS Transformation Office has finally set up a Web-based application system for a small handful of applications.<sup>10</sup> However, none of these applications are A to Z electronic processes, and often supporting documents and a copy of the application must still be sent in to USCIS by mail. Although the application for an EADs is one of these applications, it cannot be used in conjunction with an application for DAPA or DACA. Thus, all 692,000 previous DACA applications were paper-based applications mailed to USCIS, and as it stands, the estimated millions of DAPA and expanded-DACA applications will be accepted in this manner.

Normally, acceptance of paper applications in the mail do not face problems in intake processing, but application surges in the past have resulted in mail and applications sitting in vulnerable and exposed overflow areas and in some cases purposely destroyed.<sup>11</sup> The Transformation Office at USCIS has spent roughly \$1 billion to date and is slated to spend \$1.7 billion to get an electronic application system (now called Electronic Immigration System, ELIS) in place.<sup>12</sup> USCIS has finally set-up a small number of applications that can be entered

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<sup>9</sup> DHS CIS Ombudsman, 2014 Annual Report to Congress.

<sup>10</sup> There are currently eight USCIS applications that can be filed electronically (including I-140 Petition for Alien Worker, I-90 Application to Replace a Lost/Stolen Green Card, I-131 Application for Travel Document, I-765 Application for EAD, I-821 Application for Temporary Protected Status, I-907 Premium Processing, I-526 Alien Entrepreneur Application, I-539 Change of Status). <http://www.uscis.gov/e-filing>.

<sup>11</sup> John Broder, “INS Shredder Ended Work Backlog, U.S. Says,” The New York Times, January 31, 2003.

<sup>12</sup> GAO, “Consistent Adherence to DHS Acquisition Policy Could Help Improve Transformation Program Outcomes,” November 2011.

electronically,<sup>13</sup> but many of them still require sending in a paper copy and supporting documents. One has to wonder whether there is really an incentive for USCIS to transition to electronic processing as new systems may require a new personnel structure. Electronic-filing, through ELIS or otherwise will not be ready for DAPA and DACA intake.<sup>14</sup>

Once paper applications are taken in by USCIS, and fees accepted, most applications are sorted out and sent to one of four service centers around the country where they are adjudicated. Officers and contractors at Service Centers take applications and manually check information in the paper-application with a “Wang-era” computer database system called CLAIMS3 which serves as USCIS’ primary case management and information database concerning applications and applicants.<sup>15</sup> CLAIMS3 has almost no search functionality and provides very limited information about application numbers and case status.

Normally, once an adjudicator actually examines a paper application from the pile sitting in their cubical, the application is reviewed against a checklist of required items and requirements for the relevant type of immigration status (“visa”). Often an officer finds some deficiency or weak evidence and types up what is known as a Request for Evidence (RFE) that is sent back to the applicant. The applicant has a set amount of time to respond to the RFE or the application is rejected. Many applicants have complained about the amount and nature of RFEs as some appear to be perfunctory or sometimes nonsensical. In some cases, during the pendency of the case, an adjudicator may find an indicator of fraud, or may conduct a name check, and send the case to the USCIS anti-fraud office (called Fraud Detection & National Security Directorate, FDNS) for investigation. With or without RFE response, an adjudicator approves or rejects an application, usually within a certain target timeframe for differing application types – six months is the longest USCIS-stated target, while EADs must be done within 90 days by regulation. If the application is denied, USCIS normally sends the applicant an explanation as to why the application did not meet the relevant criteria. If an application is approved, an approval form is sent to the applicant.

For some applications, this may be all that is needed to form a basis to remain in the U.S. or work legally. For others who are waiting abroad, they must make an appointment at a U.S. Consulate or Embassy to be interviewed for an actual visa stamp. If the interviewing consular officer believes, even with the approved USCIS application, that the case is fraudulent or otherwise does not meet the criteria for a visa, the consular officer may conduct an investigation abroad and/or send the application back to USCIS for review. USCIS can reaffirm or deny the application, but many cases are simply lost in the shuffle.

### USCIS DAPA Processing and Possible Pitfalls

The regulations and guidance for DAPA have not yet been issued, but preliminary documents from the Department of Homeland Security (DHS) indicate that applicants must

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<sup>13</sup> See note 9.

<sup>14</sup> I understand that USCIS has plans to introduce a computer “wizard” program that may assist applicants in filling out DAPA and DACA applications by posing queries and inputting responses into the applications, but that ultimately the application and supporting documentation must be mailed to USCIS.

<sup>15</sup> Other types of applications, such as naturalization applications, will go into another database, CLAIMS4.

submit an application and provide proof that they have continuously resided in the U.S. since January 1, 2010, similar to the residency requirements under DACA.<sup>16</sup> To prove residence, applicants must submit utility bills, employment records, bank, school, or religious records, and affidavits. DACA applicants are required to prove identity by providing a passport, birth certificate, or “any other document with a photo.” They are also required to show their criminal record, and are barred from the program if they have been convicted of a felony, significant misdemeanor,<sup>17</sup> or three misdemeanors.<sup>18</sup> The irony of this program is that applicants must *prove that they were in the United States illegally* during this time, and USCIS was known under the DACA program to send requests for more evidence that applicants were actually in the U.S. *illegally* before the relevant date (while most of the time other applicants are trying to prove that they are legally in the U.S. and USCIS is determining whether they were actually legally here). Under DACA, applicants filled out an application, known as an I-821D, with supporting documents as just described above. DAPA applicants will have to fill out an application that is substantially similar to this.

The previous DACA application process appears on its face to have been run through USCIS without too much difficulty and without hiring significant numbers of permanent staff<sup>19</sup> to handle the 690,000 DACA applications.<sup>20</sup> However, USCIS practiced a surge tactic used in the past of diverting officers working on one type of application to concentrate on a higher-priority application – in this case DACA.<sup>21</sup> The result of this diversion of resources is not usually recognized outside of USCIS until significant backlogs of other applications are discovered and applicants begin to complain. In the case of DACA, backlogs formed for I-90 (renew/replace green cards) and I-130 (family-based green cards),<sup>22</sup> in some cases, such that processing times exceeded 12 months. Backlogs at USCIS in the past, such as in 2003-2004, have required specific appropriated backlog funds to obtain additional temporary resources.

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<sup>16</sup> Note that resided is a term that could mean someone left and reentered the country, but still intended to live in the U.S.

<sup>17</sup> This generally includes crimes involving domestic violence, sexual abuse, drug distribution, unlawful possession of a firearm, and driving under the influence. See Immigrant Legal Resource Center, [http://www.ilrc.org/files/documents/ilrc-2012-daca\\_chart\\_1.pdf](http://www.ilrc.org/files/documents/ilrc-2012-daca_chart_1.pdf).

<sup>18</sup> These bars are similar to bars used in the 1986 legalization program, Immigration Reform and Control Act of 1986. Note these are substantially different bars than are used to exclude persons abroad who wish to enter the U.S. under normal legal processing (which include bars for conviction of a crime of moral turpitude, health-related reasons, terrorism or other security concerns, likelihood to become a public charge, child abduction, intent to work without labor certification, intent to immigrate permanently, and a host of others).

<sup>19</sup> It has been reported that 900 new employees (mainly contractors) were hired in response to the increased workload from DACA. J. Gerstein, “Bureaucratic Nightmare on Immigration?” Politico, Nov 21, 2014. <http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html>.

<sup>20</sup> See latest USCIS DACA figures at:

[http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf), including FY2014 numbers that indicate that 32,395 applications were denied and 59,715 are pending to date.

<sup>21</sup> J. Gerstein, “Bureaucratic Nightmare on Immigration?” Nov 21, 2014.

<http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html>

<sup>22</sup> See USCIS Data Sets for 2012 - 2014, <http://www.uscis.gov/tools/reports-studies/data-set-form-i-130-petition-alien-relative>. In FY2012, third quarter, USCIS had a total of 82,496 pending I-130s; in June 2013, there were 1.9 million pending I-130s; that number went down in September 2013 to 885,935 and in March 2014 to 840,017. In fourth quarter, FY2014, there were 478,121 I-90 applications pending.

[http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all\\_forms\\_performancedata\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2014_qtr4.pdf).

USCIS has typically shifted workload away from other types of applications to handle priority or high-profile applications, and will probably do so with the DAPA applications. Using this tactic alone will not be sufficient to meet the flood of millions of applications expected under DAPA and expanded-DACA, and the question arises whether it is fair for these other applicants to be waiting extended periods because of DAPA.

The administration has informed this Committee that it plans to hire 1000 new workers (700 of which will be new federal agents, and 300 contractors). However, questions immediately surface whether this number will be sufficient without either creating extreme backlogs in one or more applications type, or damaging the quality of application adjudications. DACA involved application numbers that are about 1/10<sup>th</sup> the estimated size of the DAPA applicant pool at five million (versus 690,000 for DACA). It is hard to see how an additional 1000 workers, even if fully trained and experienced, can make up for an additional five million applications USCIS is expected to receive – meaning each new worker would have to process and adjudicate 4500 applications within the six month target (including weekends, that would mean 25-27 applications per day for 1000 adjudicators).

Further, it is unclear how USCIS will hire 700 full time federal agents, screen them for employment and then for security clearances, train them, and deploy them in time to handle millions of new applications and meet the six-month turn-around time for each application submitted. Training new employees in the complexity of immigration law and policy is no small matter – a number of federal courts and Congressional Research Service (CRS) have likened the complexity of immigration law to that of the tax code.<sup>23</sup> The Department of Justice Inspector General discussed numerous problems with new officers' inadequate training that led to a host of problems under a program called Citizenship USA, conducted during the end of the Clinton administration. Internal sources inform me that USCIS intends to quickly hire new officers (many veterans are expected to qualify for these jobs under veterans preference and quickly be selected). Further, some retirees are expected to take the new positions, and some more seasoned officers will move over from other parts of USCIS. This may create gaps in other parts of USCIS' application processing.

#### Past Experience with Citizenship USA Program and Background Checks

Under the Citizenship USA program, USICS (then called the Immigration & Naturalization Service, INS) saw a massive increase in and prioritization of what turned out to be over one million naturalization applications from 1995 to 1996. To handle the increased workload, INS abbreviated training, from 16 weeks to one week (in some cases less than 40 hours of training), of newly hired officers.<sup>24</sup> INS at the time also requested abbreviated FBI background checks for new employees (and I have heard rumors that USCIS intends to do the same with their new hires for DAPA). Depending on the security clearance and background check type, this process currently may take an average of 53 days.<sup>25</sup> In the rush to complete over

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<sup>23</sup> Stephen Vina, Congressional Research Service, July 29, 2005.

<sup>24</sup> Department of Justice, Office of Inspector General, Report on Citizenship USA, <http://www.justice.gov/oig/special/0007/cusaimp.pdf>.

<sup>25</sup> Christensen, et al, Congressional Research Service, "Security Clearance Process: Answers to Frequently Asked Questions," September 9, 2013.

one million naturalizations, thousands of applications were incorrectly approved. Some 10,800 approvals included persons with felony records, and another 60,398 had no record of any background check at all, according to the Department of Justice. In the end, DOJ underwent a long program of trying to denaturalize many of them through court proceedings.<sup>26</sup> What happened was in part due to poor planning and coordination with FBI, which could not handle the massive upsurge in background checks, but also because of a disregard for fraud checks.

Background checks are important not only for USCIS employees but for any applicant we legalize or allow into the country as well. Those who have entered the U.S. with a visa that was issued abroad, including those who may have overstayed their visa, have undergone some background screening before entering the U.S. Those who entered the U.S. without any inspection have probably never been screened. In either case, it is incumbent on USCIS to conduct vigorous background checks on those we invite into legal status in the U.S.

However, one report last year, based on a Freedom of Information Act (FOIA) request, revealed that USCIS memorandums instructed USCIS to conduct “lean and lite” background checks, including an abbreviated TECS<sup>27</sup> check, on DACA applicants, before their applications are adjudicated, and that “biometric processing should not be refused because an applicant does not present an acceptable ID.”<sup>28</sup> Informal responses to this report indicate that DACA applicants were biometrically checked with the FBI, but that the anti-fraud office, FDNS, was not invited to investigate or examine specific cases or patterns of fraud.

#### Criminal and Terrorism Checks – Boston Marathon Bomber Case

According to the Administration, all applicants for DAPA will be checked through IDENT, FBI, and TECS databases. Since the time of Citizenship USA, most FBI checks are conducted electronically, and responses are quick if there is no derogatory information about an applicant; however, any flags that arise from a check must be examined manually and resolved, creating a potential bottleneck with a surge of cases.

The FBI check is mainly for criminal background checks (for suspects and crimes committed in this country) and it is less clear how vigorous the counter-terrorism check is, but all the more important for individuals in this country who have never been screened before entry. As you may recall, the Boston Marathon bombing, April 15, 2013, involved two brother perpetrators, one of whom (Dzhokhar “Jahar” Tsarnaev) was naturalized September 11, 2012, despite the FBI having information from Russian authorities that the brothers were involved with

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<sup>26</sup> Chicago Tribune, “33 Felons’ Citizenship to be Revoked by INS,” March 6, 1997, [http://articles.chicagotribune.com/1997-03-06/news/9703060195\\_1\\_citizenship-usa-citizenship-applications-citizenship-last-year](http://articles.chicagotribune.com/1997-03-06/news/9703060195_1_citizenship-usa-citizenship-applications-citizenship-last-year).

<sup>27</sup> The Treasury Enforcement Communications System, TECS, is Customs and Border Protection’s main immigration screening database.

<sup>28</sup> Judicial Watch, June 11, 2013, “Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama’s DACA,” which has links to various USCIS emails obtained by Freedom of Information Act requests.

terrorist activity.<sup>29</sup> If the counter-terrorism namechecks were working in conjunction with immigration application background checks, a red flag should have been raised.

While applicant background checks are vetted through the FBI Terrorism Screening Center (TSC), this database only contains an abbreviated terrorist watch list (i.e., the no-fly and “selectee” lists) and it is not clear that immigration applications are checked against the larger database of known or suspected terrorists, the Terrorist Identities Data-mart Environment (TIDE).<sup>30</sup> This can result in a “no record” response to an FBI background check, even if the Intelligence Community has derogatory information concerning an applicant. Information-sharing and coordination on known or suspected terrorists has been a problem with past cases, such as with Umar Abdulmuttalab, the “underwear bomber,” who ignited explosive materials on a flight on its approach to Detroit in December, 2009. In that case, the perpetrator was placed in the TIDE database, but not on the no-fly list.<sup>31</sup> The terrorist (no-fly and selectee) watch list still also relies on agencies to nominate individuals to the list and that does not always happen.<sup>32</sup> In addition to foreign-based terrorism, homegrown terrorism continues to be a threat, with the year between May 2009 and November 2010 alone seeing 22 homegrown jihadist-inspired terror plots in the U.S. (many resulting in arrests).<sup>33</sup>

USCIS FDNS has officers at almost all Joint Terrorism Task Forces (JTTFs), at FBI TSC and the National Counterterrorism Center (NCTC), to resolve immigration related terrorism issues, but it is not clear that they have access to all information needed to resolve immigration application issues related to suspected terrorists. Even with access, the background check that is run for USCIS applicants apparently does not automatically check against the entire TIDE database and flag cases so that an officer can examine the case more closely.

#### USCIS Fraud Detection & National Security Directorate (FDNS) and Anti-Fraud Efforts

Fraud can be hard to measure – you do not really know how many fraudulent applications get through. When I was stamping visas early in my career at overseas posts, we generally assumed many documents would be fraudulent. But at USCIS, when a facially valid application is presented, it can be hard to deny. Something has to trigger an adjudicator to send it to the anti-fraud office to investigate.

FDNS is the primary office for USCIS anti-fraud investigations. FDNS has a budget of around \$100 million, \$40 million of which comes from a set-aside of a portion of employment-

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<sup>29</sup> U.S. House of Representatives, Committee on Homeland Security, “The Road to Boston: Counterterrorism Challenges and Lessons from the Marathon Bombings,” March 2014. Reuters, “Russia Warned U.S. about Boston Marathon bomb suspect Tsarnaev, report,” March 25, 2014.

<sup>30</sup> See Krouse, et al, Congressional Research Service, “Terrorist Watchlist Checks and Air Passenger Prescreening,” December 30, 2009, RL33645, for an explanation of various watchlist formation, dissemination, and use.

<sup>31</sup> Eileen Larence, Government Accountability Office, “Terrorist Watchlist: Routinely Assessing Impact of Agency Actions Since the December 25, 2009 Attempted Attack Could Help Inform Future Efforts,” May 2012, GAO-12-476.

<sup>32</sup> Id. See also, Senate Homeland Security & Governmental Affairs Committee, “A Ticking Time Bomb,” report on Fort Hood shootings of 2009, February 3, 2011, [http://www.hsgac.senate.gov/imo/media/doc/Fort\\_Hood/FortHoodReport.pdf?attempt=2](http://www.hsgac.senate.gov/imo/media/doc/Fort_Hood/FortHoodReport.pdf?attempt=2).

<sup>33</sup> Bjelopera, et al, Congressional Research Service, “American Jihadist Terrorism: Combating a Complex Threat,” December 7, 2010.

based non-immigrant visa fees that is mandated in law. Fraud does occur in the context of more than just temporary employment visa applications and one can question why a substantial portion of the FDNS budget comes from that alone. It is hard to say whether that budget is sufficient to deter or combat fraud when dealing with six million, and with DAPA perhaps far more, immigration applications. FDNS provides indicators of fraud to USCIS adjudicators and asks them to refer cases. It follows up with investigations of cases when warranted; this includes sending personnel to the field to verify businesses and offers for employment, or the veracity of a claimed family relationship. Sometimes investigations can take many months, possibly because of limited resources. At this time, FDNS has limited capacity to conduct proactive data-mining of CLAIMS3 to search for indications of fraud in particular cases or examine fraud trends. If it had expanded ability to electronically verify facts, perhaps using private database services, fraud investigations could be less time consuming. Without transformation of CLAIMS3 to a more advanced case processing system, like ELIS, FDNS capability is also limited. Nevertheless, I understand FDNS has extracted some data from CLAIMS3 to conduct limited searches.

DACA applications had a low refusal rate (at about four percent) and this may not be unexpected because with a population of individuals who have little to no records or identity trail, there will also be little in the way of derogatory information. However, I have been informed that another reason was that the anti-fraud office (FDNS) was taken out of processing so that no investigations would be conducted. That is not to say that there was a high rate of fraud or basic background checks are not conducted, but it would be difficult to verify without FDNS involvement.

For DACA and DAPA entrants who entered the U.S. without inspection, we have never conducted a background check on them and have very little knowledge of their identity; much of their base identity and documents will be established through foreign embassies and consulates (e.g., passports, birth certificates).<sup>34</sup> In addition, DAPA applications will be based on family relationships that will only be verified by assertions, affidavits, foreign documentation, or easily manufactured documentation.

To improve security and anti-fraud measures on this application pool, USCIS might consider the following. In the short term, USCIS could contract with independent data services to verify employment and employer relationships and verify residency and identity inputs in DAPA and DACA applications. USCIS also could have FDNS extract data on already approved DACA applications to study trends or search for fraud indicators. Applications are scanned at intake and used to populate CLAIMS3 data; FDNS may be able to use the scanned data to examine patterns of fraud. USCIS may want to consider random or data-driven checks of applications and possible interviews by FDNS officers. FDNS could run random or data-driven checks on DAPA family relationships (i.e., possible DNA testing) if there are indications of fraud. FDNS could build relationships with foreign official document issuing agencies to verify documents and understand the strength of foreign official documentation used in conjunction with DAPA and DACA applications. Although FDNS does conduct checks with INTERPOL for wanted criminals that may be in the applicant pool, further coordination with foreign law enforcement may raise flags for applicants with little known background. USCIS should modernize application intake through the ELIS system or some other system, in such a way that

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<sup>34</sup> See Instructions for I-821D, <http://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf>.

USCIS anti-fraud efforts can “data-mine” for indicators of fraud. USCIS also may expand FDNS data-driven anti-fraud capability through further USCIS access and better resources (as this type of anti-fraud effort is less intrusive and time-consuming than the current field investigation).

### Conclusion

I want to be clear that most USCIS officers are hardworking and patriotic officials of the DHS and I am confident in the ability of USCIS officers to handle any major increase in workload, but DAPA and expanded-DACA would be an unprecedented increase in applications submitted at any one time. Currently, USCIS officers handle six million applications of varying degrees of complexity each year,<sup>35</sup> and each application type has a current stated processing time (or backlogs) of between two to six months (the targeted maximum length of time for USCIS processing), including six months for DACA applications.<sup>36</sup> The addition of an estimated five million applications to the system will be no small matter and there is a strong possibility that bottlenecks will form at the intake, fee processing, data-collection, adjudication, request-for-evidence, document manufacturing stages, in corollary applications, and even perhaps at foreign consular offices (that are issuing passports and foreign official documents). At each of these bottlenecks, there may be a temptation to streamline processing without proper quality checks.

So in answering the theme of this testimony – is USCIS ready for DAPA – I would say that it is of course “ready” if expectations are tempered. USCIS can take in four to five million additional applications, but certain facilities and processes must be ready for the flood. At the intake level, there may be physical limitations for excess mail and throughput at fee collection. At other levels USCIS must be ready for additional data-entry/collection, anti-fraud review, and document production (especially employment authorization cards). At the adjudication level, there must be enough *fully-trained* officers to handle millions of new applications, and USCIS must be given clear direction on priorities – should American businesses that went through the legal process to get (often specialty or low-supply) foreign workers on board expect longer processing periods because resources have been pulled to handle DAPA applications? Should American citizens expect longer processing times for their spouses or immediate relatives because of the same? These questions should not be left unresolved, and hidden in months old backlog data, but should be clarified up-front. And if the answer to these questions is “no,” then USCIS should expect to ramp up resources sufficient to meet the expected DAPA application inflow, or temper expectations for processing times.

Thus, with DAPA, USCIS and the administration should be realistic about the speed and care with which they can process millions of DAPA applications. In being realistic and forthcoming about expectations for processing times, USCIS will increase trust with policy-makers and the public, and will be able to fulfill its mandate to handle quality adjudications of all its applications.

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<sup>35</sup> USCIS Data, <http://www.uscis.gov/tools/reports-studies/immigration-forms-data>.

<sup>36</sup> USCIS Processing Times, <https://egov.uscis.gov/cris/processingTimesDisplay.do>. (It should be noted that many applicants for green cards, once processed, must wait in line for years to obtain their legal green card.)

Statement of

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Before the

**United States Senate  
Homeland Security and Governmental Affairs Committee**

**Hearing on Deferred Action on Immigration: Implications and Unanswered Questions  
February 4, 2015**

Thank you Chairman Johnson, Ranking Member Carper, and distinguished members of the Committee. I am grateful to have the opportunity to join you at this hearing and to try to contribute to the Committee's consideration of the critical questions at issue today.

My name is Bo Cooper. I am a partner at Fragomen, Del Rey, Bernsen, & Loewy LLP, an international immigration law firm. In recent years, I have taught immigration law at schools in Washington, D.C. and Michigan, including courses on immigration and national security, and on prosecutorial discretion and other key aspects of federal immigration enforcement policy. From 1999 up until the launch of the Department of Homeland Security in 2003, I served as General Counsel of the U.S. Immigration and Naturalization Service (INS). I served in this position during Administrations of both parties. At that time, the border enforcement, interior enforcement, and adjudications functions that are now distributed among the three separate DHS immigration agencies—U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS)—were all the combined responsibility of the agency whose legal function I oversaw.

Drawing on these three perspectives—public service, private practice, and academics—I will try today to help address some of the Committee's concerns about the implementation of the recent DHS directives on immigration, a set of administrative policies to enhance the effectiveness and rationality of the nation's immigration system. These measures are not a substitute for Congressional action, but they do represent an important first step in the process of reforming an outdated system that has suffered from legislative stalemate. While these directives touch on many areas of immigration policy, the issues that have garnered the most attention and concern are the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents<sup>1</sup> (DAPA) program.

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<sup>1</sup> This program is also called Deferred Action for Parental Accountability. See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.

This hearing raises questions that are key to a proper evaluation of the recent DHS directives. Policy makers must necessarily address the financial, logistical, enforcement, and security concerns surrounding any new or expanded program, especially one affecting a complex, crucial, and sensitive national policy priority like immigration. I hope to assuage some of the concerns that have been expressed in the congressional and other public debate over the DHS directives, including the expansion of DACA and the implementation of DAPA as part of an integrated series of initiatives announced by the Secretary of Homeland Security. I will focus my testimony on the following key points:

- The DACA and DAPA programs rest on solid legal and policy grounds. They represent a sensible and principled application of the prosecutorial discretion that DHS must exercise given the scope of the problems facing our nation's immigration system today, coupled with DHS's finite resources.
- DHS has the tools and capacity to handle implementation of these programs from a logistical, financial, and enforcement perspective. In meeting the challenges ahead, DHS is operating from the considerable advantage of having, with the 2012 implementation of DACA, a recent model and experience on which to base its current planning. DHS ran an effective initial rollout of DACA, and can use that experience and the several-month implementation period to prepare for the further expansion of DACA and the impending launch of DAPA. Moreover, DHS has designed these programs to present no cost to taxpayers and to be self-funded by the fees requestors must pay. These new and expanded programs are of course broader than DACA, but our immigration agencies are designed to have the flexibility to scale to evolving caseloads and demands.
- Based not only on this experience but also on decades of expertise, sharpened forcefully by the thinking, resources, and energy that have poured into the immigration function since the terror attacks of 2001 and the creation of DHS, the agency should be well-equipped to handle public safety or national security issues relating to the DACA and DAPA initiatives. DHS has long prioritized border enforcement, security, and the apprehension and removal of criminal aliens, just as Congress has specifically mandated. The DACA and DAPA programs are designed to help the agency further focus its resources in that regard.
- DHS's new policies should also strengthen public safety, as millions of undocumented individuals currently living and working outside the system will come forward. They will make their presence known, enter into federal law enforcement databases, and undergo background checks. DHS has strong measures in place to conduct national security and criminal background checks and detect fraud. DHS will be able to leverage its extensive and sophisticated screening experience in its implementation of the new DACA and DAPA programs.
- The enforcement prioritization reflected in the recent DHS directives represents an improvement to the administration of our country's outdated and insufficiently effective immigration system. These measures should not be viewed as usurping the congressional function. To the contrary, I believe that these actions serve up to Congress a set of

important improvements, made within the confines of existing law, to an immigration system that does not serve our national interest in the way that it must. But only Congress, through reforms enacted through the legislative process that has always been such a proud feature of the American political system, can change our laws so that immigration fuels American creativity, economic strength, and competitiveness to the maximum possible extent.

**I. Congress can reasonably debate whether DACA and DAPA are the right policy, but the programs rest on sound and well-established legal foundations.**

While the committee's focus at this hearing is properly on the logistical and security risks of DACA and DAPA, I believe it is useful to address briefly the strong legal underpinnings of those programs. In my opinion, DACA and DAPA were implemented with sound legal footing. The legal arguments supporting this position have been developed in depth in other fora, but it is helpful at the outset of this discussion to recall the programs' legal foundation.

Just as it is throughout law enforcement, prosecutorial discretion is a necessary and long-standing feature of our immigration system. The Supreme Court recently emphasized the breadth of prosecutorial discretion in the immigration context and summarized the myriad considerations that immigration authorities must balance in implementing immigration laws:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.<sup>2</sup>

Congress has also explicitly acknowledged or even required prosecutorial discretion in the immigration context in substantive statutes and in appropriations bills. DHS funding levels contemplate the removal of fewer than 400,000 of the approximately 11 million illegal immigrants in the United States each year, making the exercise of prosecutorial discretion a necessary and inherent feature of our immigration system. The DACA and DAPA programs are appropriate exercises of this prosecutorial discretion, and both initiatives will focus removal resources on the high priority cases that the Secretary has identified in light of Congress's direction and the interests of national security, border integrity, and public safety. In short, the

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<sup>2</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

programs enable DHS to focus on deporting those illegal immigrants who pose the most significant threats to American security.

The DACA and DAPA programs are part of DHS's broader focus on its mission to secure our nation's borders. In recent years, DHS has spent every penny of its budgeted funds involved with apprehending and deporting aliens, and there is no reason to believe that DACA or DAPA will affect this practice. In 2012, for instance, the federal government spent \$17.9 billion on immigration enforcement. This sum is more than the budgets of the FBI, DEA, ATF, Secret Service, and U.S. Marshals Service *combined*. There were more than 577,295 removals and returns in 2014,<sup>3</sup> and the number of people trying to cross our borders illegally is the lowest since the 1970s.<sup>4</sup> DHS is also deporting an increasing number of convicted criminals. These statistics indicate active enforcement—not abdication of legal duty.

DHS's use of the “deferred action” tool under DACA and DAPA is neither new nor unprecedented. Deferred action and similar programs with different nomenclature<sup>5</sup> have been a crucial part of immigration enforcement for more than 50 years. Presidents have granted deferred action or similar categorical discretionary relief in the past. Not only has Congress never moved to quash deferred action, but it has in fact explicitly recognized it by statute.<sup>6</sup> Deferred action has been mentioned in administrative regulations<sup>7</sup> and Supreme Court decisions.<sup>8</sup> Thus, every branch of the federal government has at least acknowledged if not encouraged the use of deferred action.

Finally, DHS's authority to issue work permits to recipients of deferred action is long-standing and clearly established. Since at least the 1980s, the former INS understood that the authority to decide which aliens would receive permission to work fell within the general discretionary authority of the agency.<sup>9</sup> Congress has also authorized the Secretary of Homeland Security to

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<sup>3</sup> DHS Press Release, *DHS Releases End of Year Statistics* (Dec. 19, 2014), available at <http://www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics>.

<sup>4</sup> White House Press Release, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>5</sup> Programs similar to DACA and DAPA include Deferred Enforced Departure, Extended Voluntary Departure, and Family Fairness.

<sup>6</sup> See, e.g., 8 U.S.C. § 1227(d)(2) (“The denial of a request for administrative stay of removal under this subsection shall not preclude the alien from applying for...deferred action.”); 8 U.S.C. § 1154(a)(1)(D)(i)(II, IV) (citing individuals “eligible for deferred action”).

<sup>7</sup> See, e.g., 8 C.F.R. § 109.1(b)(7) (1982) (allowing work permits for deferred action recipients).

<sup>8</sup> *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Lower court decisions have also referenced deferred action. See, e.g., *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987).

<sup>9</sup> See Office of Legal Counsel, U.S. Dept. of Justice, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014) at 21 n. 11.

grant work permits,<sup>10</sup> and USCIS has granted such permits to deferred action recipients who demonstrate economic necessity to work.<sup>11</sup> Work authorization has also historically accompanied other temporary grants of relief from deportation.<sup>12</sup> Work authorization to DACA and DAPA recipients thus relies on the same authority that the Executive Branch has exercised for over 30 years. DACA and DAPA provide no special path to citizenship and no special Green Card for those recipients, only temporary permission to be present in this country, with work authorization if the recipients can show economic necessity. As DHS has repeatedly emphasized, a grant of deferred action can be revoked at any time.<sup>13</sup>

## **II. DHS's prioritization under DACA and DAPA is a common sense, effective policy choice.**

As discussed above, our current immigration scheme inevitably requires the prioritization of limited enforcement resources. With current levels of DHS funding, the individuals who will receive deferred action under DACA or DAPA are unlikely to be deported even absent those programs. DACA and DAPA are, in a practical sense, a policy recognition of that reality. DHS's goal has long been to target criminals and national security threats over illegal but otherwise law-abiding immigrants, and DACA and DAPA are a more transparent framework to support that aim.

While DACA and DAPA establish threshold eligibility criteria, the grant of deferred action is an individualized determination based on case-by-case exercise of discretion. Secretary Johnson's memoranda outlining the initiatives set forth broad policy goals but also specifically instruct officers to make case-by-case determinations based on several non-exhaustive factors.<sup>14</sup> And the early DACA statistics suggest that USCIS is exercising precisely the type of individualized

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<sup>10</sup> See 8 U.S.C. § 1324A(h)(3) (defining "unauthorized alien" to exclude aliens "authorized to be so employed by this Act or by the Attorney General" [now the Secretary of Homeland Security]).

<sup>11</sup> See 8 C.F.R. § 274a.12(c)(14).

<sup>12</sup> For example, in the aftermath of Hurricane Katrina, USCIS allowed F-1 visa holders who were displaced from their course of study by the devastation to apply for work authorization. See [http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf).

<sup>13</sup> See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) at 2.

<sup>14</sup> See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) at 5-6; Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) at 5.

decision making contemplated by the memoranda, with more than 38,000 denials through the end of 2014.<sup>15</sup>

DHS's prioritization is also consonant with the long-standing principle that America will gladly absorb talent and ambition from abroad while protecting its security interests. The DACA and DAPA programs will allow immigrants who have been present in our country for years, if not decades, to stop living in the shadows. Law enforcement officers have resoundingly supported this move, which will make immigrants who need help from police more likely to seek it and those who witness crimes more likely to provide information to the police. DACA and DAPA will help to break down walls of distrust between immigrant communities and the police officers who serve them, increasing security for all involved.<sup>16</sup>

The DACA and DAPA programs also represent a financially sound use of limited public resources. According to the Council of Economic Advisors, over the next 10 years these programs will conservatively raise the GDP by 0.4 percent, raise average wages for U.S.-born workers by 0.3 percent, cut federal deficits by \$25 billion, and have no impact on the likelihood of employment for U.S.-born workers.<sup>17</sup> To the contrary, the programs will eliminate the incentive that employers now have to hire unauthorized workers at low wages instead of hiring lawful workers. The Congressional Budget Office has confirmed the fiscal responsibility of DACA and DAPA, concluding recently that a bill to eliminate the programs would increase deficits by \$7.5 billion.<sup>18</sup> And as discussed below, DHS believes that the applicant fees are set at a level that will finance the expansion necessary to adjudicate them.

And while DACA and DAPA are good policy from a governmental efficacy standpoint, they will also have positive effects on those who given deferred action under the programs. DACA and DAPA recipients are not the people that most American citizens want to see deported, and there

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<sup>15</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 23. USCIS rejected a further 43,174 requests because they had a fatal flaw such as failure to submit the required fee or failure to sign the request. See *id.* at ¶¶ 14, 23.

<sup>16</sup> See, e.g., Amici Curiae Brief of Major Cities Chiefs Association, Police Executive Research Forum, and Individual Sheriffs and Police Chiefs in Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. 83-1, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 12, 2015).

<sup>17</sup> At the upper bound, CEA estimates that these programs will raise GDP by 0.9 percent and shrink deficits by \$60 billion over the next ten years. See White House Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).

<sup>18</sup> Congressional Budget Office, Letter Re: Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security (Jan. 29, 2015), available at <https://www.cbo.gov/sites/default/files/cbofiles/attachments/hr240.pdf>.

are real fiscal, human, and societal tolls when an American child is separated from her undocumented mother through deportation proceedings. DACA and DAPA give a measure of safety to the citizen child to alleviate the fear that her undocumented mother will be sent to her country of origin despite the fact that she has lived in the United States for decades. No longer do undocumented but otherwise law-abiding immigrants have to fear that a call to report a crime against them will result in their own deportation. DACA and DAPA bear the mark of good policy not only because they improve our government but also because they enhance public safety, further our values as a Nation, and improve the lives of millions of human beings who, because of their long-standing residency and citizen or permanent resident children, are integrated into the fabric of American society.

### **III. DHS is prepared to implement DACA and DAPA.**

Throughout their history, the U.S. immigration agencies have had to adapt and react to policy shifts and evolving logistical demands. In addition to capacities built and lessons learned from that history, DHS here has a very specific, recent, and similar model on which to build in meeting the new challenges of DACA and DAPA implementation. I believe that the existing DACA program also can serve as a useful model from which the Committee can examine DHS's ability to succeed with new initiatives.

As of the end of 2014, USCIS had received more than 727,000 applications under DACA and had around 50,000 pending cases.<sup>19</sup> Estimates of the number of unauthorized immigrant youth vary, but one recent report puts the number at 1.2 million.<sup>20</sup> Thus, approximately 50-60 percent of eligible youth have applied for DACA relief under the existing program.

DAPA represents a challenge for DHS that is different in number but not in kind from the DACA program. While estimates vary concerning the number of potential DAPA recipients, a reasonable estimate is roughly 3.5 to 4 million.<sup>21</sup> I understand that DHS is prepared for a range of DAPA filing rates that may match that of DACA or be submitted at a different rate.<sup>22</sup> DHS

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<sup>19</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 23. See also USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014 First Quarter*, available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>.

<sup>20</sup> Jeanne Batalova, Sarah Hooker, and Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, Migration Policy Institute, Aug. 2014, at 1.

<sup>21</sup> See, e.g., Migration Policy Institute, Press Release, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program* (Nov. 20, 2014), available at <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

<sup>22</sup> See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.

has met the challenges of the DACA program with alacrity, and I see no reason why this success should not continue with the implementation of DAPA.

DHS is already taking steps to meet the logistical challenges posed by DAPA. DHS has chosen a site in Northern Virginia that will serve as the centralized processing location for DAPA. The agency prudently chose a site that was already leased by the government, was the right size for the project, was already furnished, and could be easily upgraded to meet its IT demands. While a typical acquisition of a space this size would take years and no existing site could accommodate the expansion of necessary personnel, DHS was able to secure the space in a matter of months. I understand that DHS has projected that it will hire approximately 700 permanent employees to process the DAPA and DACA applications, with an additional 200-300 contractors for surge support.

Finally, as with immigration adjudications generally, the law establishes a sensible model for funding the DAPA expansion. USCIS, which will primarily administer the adjudications function of the programs, is fee-funded by statute.<sup>23</sup> I understand that the fees that DACA and DAPA applicants will pay cost several hundred dollars each and are set at a level that will finance this expansion.<sup>24</sup> User fee authority has been a feature of funding immigration benefits since the late 1980s. Each Administration has worked with congressional appropriators over the past decades to carry out this authority in an efficient and effective manner to handle surges in application flow and to time the receipt of applicant fees with expenditures associated with the benefits sought. Congress and this Administration have the tools and experience necessary to make these programs financially sound and self-sustaining. In other words, the DAPA and DACA programs will be self-funding such that they will not cost taxpayers, and indeed will ultimately benefit them through the positive economic effects of DAPA and DACA.

#### **IV. DHS's implementation of DACA and DAPA increases public safety and strengthens our national security.**

In my view, DHS's implementation of DACA and DAPA stand to strengthen—not hinder—our national security interests. DACA and DAPA should not raise any national security issues outside the norm for the agency. DHS is accustomed to screening applicants for security concerns, and this process is a basic requirement for most visa approvals. At the moment, the illegal immigrant population is not subject to any background checks, but in applying for DACA and DAPA they will have to provide names, addresses, fingerprints and other personal history to DHS, which will conduct a robust security check.

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<sup>23</sup> See 8 U.S.C. § 1356(m) (“[F]ees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services...[and] may also be set at a level that will recover any additional costs associated with the administration of the fees collected.”)

<sup>24</sup> See U.S. Citizenship and Immigration Services, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction>.

I understand that DACA and DAPA applicant fingerprints will be run through numerous law enforcement databases both within and outside DHS that contain information from local, state, and federal law enforcement agencies.<sup>25</sup> I also understand that applicant fingerprints will be run against TECS,<sup>26</sup> which provides information about ongoing investigations and warrants, as well as fraud alerts. A background check will also be run against the unified DHS watchlist.<sup>27</sup>

DHS also has robust anti-fraud measures in place that would be applied to the DACA and DAPA context. I understand that DHS is working with other countries to build a library of exemplar documents with which it can train its adjudicators to recognize fraudulent identity documents from abroad. I further believe that DHS plans to use the Immigrations and Customs Enforcement (ICE) forensics laboratory to verify the authenticity of suspect documents.

DHS has extensive experience in adjudicating each element of the DACA and DAPA applications. DHS has developed the capacity to confirm parent-child relationships through, for instance, the processing of hundreds of thousands of petitions for alien relative (I-130) forms each year. Similarly, DHS (and before it the INS) has made proof of residency determinations for decades. DHS has already applied this expertise to making such determinations in the hundreds of thousands of adjudicated DACA applications. I understand that DHS has processes in place to establish school enrollment and that the agency has received exemplar documents from school districts around the country. Finally, I understand that DHS has implemented the added measure of running birth certificates that it receives through the EVVE, a vital statistics database,<sup>28</sup> a process that DHS intends to continue in adjudicating DAPA applications.

I am also aware that DHS has robust internal processes to ensure that, if a criminal is identified through its adjudication of an application, the appropriate authorities are notified so that criminal prosecution and/or immigration removal proceedings can begin.<sup>29</sup> For this reason, I believe that the DACA and DAPA programs have positive criminal enforcement consequences. Indeed, DHS has already assisted law enforcement in locating criminals who applied for DACA benefits.<sup>30</sup>

**V. DACA and DAPA should not contribute to the number of illegal crossings over the southern border.**

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<sup>25</sup> These databases include IDENT, CJIS, the DOJ print index, and FBI holdings.

<sup>26</sup> See Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing, available at <http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs-sar-update.pdf>.

<sup>27</sup> I further understand that these checks will be run using any aliases or misspellings of the alien's name.

<sup>28</sup> The EVVE database is operated by the National Association for Public Health Statistics and Information Systems and is used by numerous federal agencies to validate birth and death records. See NAPHSIS, *About EVVE*, available at <http://www.naphsis.org/about-evve>.

<sup>29</sup> See Decl of Donald W. Neufeld, Doc. 130-11, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶ 22.

<sup>30</sup> *Id.*

I do not believe that the presence of the DACA and DAPA programs will contribute to the number of illegal crossings at the United States-Mexico border. Applicants for DACA and DAPA must meet strict eligibility requirements. Both programs are only available for aliens who have been residing in the United States since 2010,<sup>31</sup> and, as discussed above, DHS rigorously assesses the evidence presented to verify that the applicant meets the criteria. DHS has redoubled its efforts to secure our southern border by increasing resources deployed there and prioritizing the return of recent border crossers.<sup>32</sup> This has been made possible in part by significant increases in border enforcement funding from Congress, for which there has been bipartisan support in numerous recent Budgets.

Those who have crossed illegally into the United States within the last five years are not eligible for DACA or DAPA, and DHS and the U.S. Department of State have launched an aggressive international campaign designed to dispel any potential misinformation concerning these new programs.<sup>33</sup> Congress and the Administration have the same objective here: avoiding the creation of false expectations about DACA/DAPA eligibility among those who might consider crossing illegally. As long as border enforcement remains at current levels and DACA and DAPA claims are adjudicated with care, the existence of these programs should not increase illegal immigration. Congress can properly exercise its oversight role to ensure that these enforcement and adjudication goals are met, and such actions by Congress should be welcomed by the Administration.

While it is essential to analyze whether DACA drove the uptick in unaccompanied children arriving at the southern border in the summer of 2014, the data do not indicate that it did.<sup>34</sup> Most importantly, the nationalities of the persons arriving in that flow are not consistent with the possibility that the flow was DACA-driven. Three of the top four origin countries for the arriving minors were Honduras, Guatemala, and El Salvador.<sup>35</sup> Crime and violence levels in

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<sup>31</sup> USCIS, *Executive Actions on Immigration*, available at <http://www.uscis.gov/immigrationaction# DACA>.

<sup>32</sup> See DHS Press Release, *Remarks by Secretary of Homeland Security Jeh Johnson: "Border Security in the 21<sup>st</sup> Century"* – As Delivered (Oct. 9, 2014), available at <http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century>; DHS Presentation, *Border Security in the 21<sup>st</sup> Century*, available at [http://www.dhs.gov/sites/default/files/publications/secretary/14\\_1009\\_s1\\_border\\_slide\\_508.pdf#page=1](http://www.dhs.gov/sites/default/files/publications/secretary/14_1009_s1_border_slide_508.pdf#page=1).

<sup>33</sup> See DHS Press Release, *Departments of State, Homeland Security Launch Executive Action on Immigration: Know the Facts Awareness Campaign* (Jan. 5, 2015), available at <http://www.dhs.gov/news/2015/01/05/departments-state-homeland-security-launch-executive-action-immigration-know-facts>.

<sup>34</sup> See Declaration of Michael Hoefler, *Texas v. United States*, Case No. 1-14-CV-00254 (S.D. Tex. Jan. 30, 2015) at ¶¶ 27-31.

<sup>35</sup> Before 2002, more than 75 percent of unaccompanied minor children came from Mexico; by 2014 that number had dropped to just 25 percent. See Muzaffar Chishti and Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple*

those countries are at a crisis point, and many of the children arriving at our border had already experienced violence or threats.<sup>36</sup> The data suggests that those external factors, rather than mistaken beliefs about potential legal benefits in the United States, drove the increases that we saw.<sup>37</sup> If it were otherwise, one would have expected a far steeper rise in the number of unaccompanied minors from Mexico and from Central American countries other than those with the greatest current levels of social unrest.

Another strong factor suggesting that DACA has not increased illegal immigration is the fact that the number of unauthorized immigrants in the United States has been roughly unchanged since 2009.<sup>38</sup> Even accounting for the recent increase in the number of unaccompanied minors, unauthorized migration is at its lowest point in the past 40 years. Over the past fifteen years and across the Clinton, Bush, and Obama administrations, the number of border patrol agents and technology dedicated to our southern border has reached unprecedented levels.<sup>39</sup> If anything, I believe that the DACA and DAPA programs strengthen our border security by allowing DHS to focus more of its resources on the border rather than on apprehending non-criminal individuals whose extended U.S. residence has tied them already into the fabric of our communities.

## **VI. DACA and DAPA are a net fiscal benefit for our country.**

While my background is in immigration law rather than in the law of public benefits, certain top-line facts about the tax and benefits issues surrounding these immigration programs appear to

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*Solutions*, Migration Policy Institute (June 13, 2014), *available at* <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

<sup>36</sup> *See id.* (“[M]urder, poverty, and youth unemployment rates paint a bleak picture of conditions that children may face in Honduras, Guatemala, and El Salvador in particular. Rising gang violence in some of these countries has become an undeniable factor in many children’s decision to migrate. A recent UN High Commissioner for Refugees (UNHCR) study based on interviews with more than 400 unaccompanied minors found that 48 percent had experienced violence or threats by organized-crime groups, including gangs, or drug cartels, or by state actors in their home countries, and 22 percent reported experiencing abuse at home and violence at the hands of their caretakers.”).

<sup>37</sup> For instance, Honduras has the highest murder rate in the world. CNN, *Which countries have the world’s highest murder rates? Honduras tops the list* (Apr. 11, 2014), *available at* <http://www.cnn.com/2014/04/10/world/un-world-murder-rates/>.

<sup>38</sup> Jeffrey S. Passel, D’Vera Cohn, Jens Manuel Krogstad, and Ana Gonzalez-Barrera, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, Pew Research Center (Sept. 3, 2014).

<sup>39</sup> *See* DHS Press Release, *Remarks by Secretary of Homeland Security Jeh Johnson: “Border Security in the 21<sup>st</sup> Century” – As Delivered* (Oct. 9, 2014), *available at* <http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century>; DHS Presentation, *Border Security in the 21<sup>st</sup> Century*, *available at* [http://www.dhs.gov/sites/default/files/publications/secretary/14\\_1009\\_s1\\_border\\_slide\\_508.pdf#page=1](http://www.dhs.gov/sites/default/files/publications/secretary/14_1009_s1_border_slide_508.pdf#page=1).

allay the most commonly-expressed concerns regarding public assistance to DACA and DAPA recipients. According to the Council of Economic Advisors estimates, the growth in GDP fueled by the DACA and DAPA recipients will reduce the federal deficit by \$25 to \$60 billion over the next ten years.<sup>40</sup> CEA also estimates that wages of American workers will increase by 0.3%. This is because allowing undocumented immigrants to apply for temporary work permits will shrink the underground economy and help ensure that employers are paying all of their workers a fair wage. Unauthorized aliens and some Americans compete today for the same work. If most of these labor market participants are work authorized, there should be upward pressure on the wages paid in these occupations, and this will benefit U.S. workers pursuing those job opportunities.

Even before DACA, roughly 3.1 million undocumented immigrants were paying into the Social Security fund, contributing approximately \$100 billion into the fund in the past decade.<sup>41</sup> Illegal immigrants also contributed \$13 billion in payroll taxes to Social Security in 2010 with only \$1 billion in benefit payments.<sup>42</sup> One would expect these contribution numbers to rise substantially with the increase in the newly-legal workforce under DACA and DAPA, which would in turn increase the stability of the Social Security fund.<sup>43</sup>

While the Congressional Budget Office found that individuals with DAPA and DACA will be able to collect their earned wages under the Social Security system, it is important to note that Social Security and Medicare are earned benefits funded through workers' payroll taxes, with

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<sup>40</sup> White House Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).

<sup>41</sup> Roy Germano, *Unauthorized Immigrants Paid \$100 Billion Into Social Security Over Last Decade*, Vice News (Aug. 4, 2014), available at <https://news.vice.com/article/unauthorized-immigrants-paid-100-billion-into-social-security-over-last-decade>. See also Marshall Fitz, Philip E. Wolgin, and Patrick Oakford, *Immigrants Are Makers, Not Takers*, Center for American Progress (Jan. 28, 2013), available at <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers/>.

<sup>42</sup> Stephen Goss, Alice Wade, J. Patrick Skirvin, Michael Morris, K. Mark Bye, and Danielle Huston, Social Security Administration Actuarial Note, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, [http://www.ssa.gov/oact/NOTES/pdf\\_notes/note151.pdf](http://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf).

<sup>43</sup> See, e.g., The White House Blog, *CBO Report: Immigration Reform Will Shrink the Deficit and Grow the Economy* (June 18, 2013), available at <http://www.whitehouse.gov/blog/2013/06/18/cbo-report-immigration-reform-will-shrink-deficit-and-grow-economy>.

eligibility based on work history and taxes paid. DACA and DAPA recipients will receive those benefits only after they have worked and paid taxes for 10 years.<sup>44</sup>

Unlike American citizens or legal permanent residents, however, DACA and DAPA recipients will not be eligible to receive most public benefits such as CHIP, SNAP, TANF or health care through the state and federal exchanges.<sup>45</sup> Most importantly, the CBO found that the DAPA and DACA programs result in far greater revenues than spending, and eliminating those programs (as the House DHS spending bill requires) would result in an increase in the deficit of \$7.5 billion.<sup>46</sup>

There are strong reasons to believe that DACA and DAPA will only increase participation in the American tax system, by causing undocumented immigrants (many of whom are already working illegally in the United States) and their employers to pay payroll and income taxes.

## **VII. Conclusion**

In conclusion, I believe that the DHS directives rest on sound legal footing and constitute good policy for our nation, its citizens, and the undocumented immigrants whose lives it will improve. The DACA and DAPA programs will make our country safer, will improve our nation's finances, and will further help us to secure our borders. I thank the Committee for the opportunity to introduce testimony on these issues, and I look forward to answering the Committee's questions.

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<sup>44</sup> National Immigration Law Center, *DACA and DAPA Access to Federal Health and Economic Support Programs* (Dec. 2014), available at <http://allianceforcitizenship.org/wp-content/uploads/2014/12/DAPA-DACA-and-fed-health-economic-supports.pdf>.

<sup>45</sup> National Immigration Law Center, *DACA and DAPA Access to Federal Health and Economic Support Programs* (Dec. 2014), available at <http://allianceforcitizenship.org/wp-content/uploads/2014/12/DAPA-DACA-and-fed-health-economic-supports.pdf>.

<sup>46</sup> Congressional Budget Office, Letter Re: Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security (Jan. 29, 2015), available at <https://www.cbo.gov/sites/default/files/cbofiles/attachments/hr240.pdf>.