IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH ARPAIO,

Plaintiff,

v.

BARACK OBAMA, ET AL.

Defendants.

Case 1:14-cv-01966

MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR ORAL ARGUMENT THEREON

I. INTRODUCTION

President Barack Obama announced on November 20, 2014, that he, on his own authority, is granting legal status in the United States and the legal right to work in the United States to approximately 4.7 million nationals of other countries who have entered the country illegally or have illegally remained in the United States. This is in addition to the approximately 1.5 million illegal aliens eligible for President Obama's prior June 15, 2012, Deferred Action for Childhood Arrivals (DACA) program. Under these two programs, some whom are eligible may not choose to apply and thus the programs collectively offer a form of amnesty to approximately 6 million illegal aliens.[1]

Simultaneously with making his November 20, 2014 announcement, and before and after, the President has offered to withdraw and cancel these programs if Congress passes the type of

[1] Defendants did not announce a name for the November 20, 2014, programs, but refer to them collective as "Executive Action." Plaintiff attempts to refer to them as "Executive Order Amnesty."

immigration legislation that he favors. Thus, the programs are not grounded in the specialized expertise of government agencies but in the political horse-trading of lobbying Congress.

The Executive Branch under the Administration of President Obama has changed the law of the United States with regard to immigration and the presence of aliens who are working in the country, by giving a speech followed by "guidance" Memoranda being issued by the Secretary of the Department of Homeland Security. It appears that no other department or agency has taken any action or issued any guidance on the subject, including the U.S. Department of Justice or U.S. Department of State; though they may in the future.

The parties are in agreement – or at least the Plaintiff and the Office of Legal Counsel at the U.S. Department of Justice agree – that Defendants' Executive Order Amnesty is unlawful and invalid unless it qualifies as valid prosecutorial discretion. Plaintiff argues it does not qualify and therefore it is legislation or regulation affecting broad categories of approximately 6 million illegal aliens. Defendants recite that they will consider applicants on a case-by-case basis. Plaintiff rejects this claim as phony and disingenuous because there is nothing remaining for a Departmental official to decide, and no standards or criteria to guide any further decision.

The Memoranda establish complex and detailed rules governing broad categories of persons and circumstances. The very nature of the programs is to create a standardized approach which produces exactly the same result in each and every case. There is only one possible outcome which is granted to all whom meet the general criteria. Replacing individual consideration with one sweeping, standardized result is Defendants' goal.

These abuses by the Executive Branch are not limited to the Administration of the current President. The current President justifies these programs largely on the claim that prior Presidents established a practice which the current Defendants now continue. Plaintiff contests

those practices regardless of which Presidential Administration originated them.

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." - Article I, Section 1, U.S. Constitution. "The executive Power shall be vested in a President of the United States of America." Article II, Section 1, U.S. Constitution.

As a result, legislation and national policy are enacted by Congress, not by the President. The President's executive responsibilities are to execute, that is implement, the laws enacted by Congress. In some limited cases, the Congress delegates quasi-legislative authority to the Executive Branch. However, the exercise of delegated authority requires compliance with a variety of restrictions and limitations.

II. REQUEST FOR ORAL ARGUMENT

Plaintiff, by counsel, respectfully requests oral argument upon the motion.

III. STATEMENT OF FACTS

A. Obama Administration's June 15, 2012, Deferred Action for Childhood Arrivals (DACA) Amnesty

By Memorandum dated June 15, 2012, Secretary of Homeland Security Janet Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, a copy of which is attached as Exhibit A, addressed to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). Key features include:

1. The core legal substance of the Memorandum is asserted to be *how* the Department of Homeland Security "should" "enforce" the Nation's immigration laws within the Department's prosecutorial discretion.
2. The Memorandum addresses enforcement against "certain" young people who

were brought to the country as children and "know only this country as home."

3. The Department admits by the Memorandum that the Nation's immigration laws must be enforced in a strong manner.

4. It asserts that "It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."

5. The Deferred Action for Childhood Arrivals (DACA) program created by the Memorandum sets forth five (5) criteria on Page 1 plus one (1) further requirement for a background check on Page 2, which six (6) criteria define broad categories of persons estimated to total 1.5 million illegal aliens.

6. On Page 2, the Memorandum recites that "[R]equests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases."

7. The Memorandum asserts that the Nation's immigration laws are not designed to be blindly enforced without consideration given to the individual circumstances of each case.

Creating key disputes among the parties on the above, the Plaintiff contends that:

1. The reality is that the DACA Memorandum is regulatory rule-making, though in violation of the steps and requirements of the Administrative Procedures Act.
2. The Memorandum's recitation of case-by-case decisions is plainly a fiction.
3. There are no standards by which a subordinate Department official would ever deny a request for DACA relief, and no guiding principle to be followed by a line official of the Department applying the DACA program to any individual person.
4. Therefore, if it is true that a request for DACA relief will be decided on a case-by-

case basis, there is no standard or criteria to guide that exercise of a subordinate official's discretion other than his or her mere whim or personal opinion.

5. The Memorandum and Defendants' DACA program are self-contradictory and cynical. The DACA Memorandum simultaneously purports to set one consistent policy mandating a single approach to prosecutorial discretion throughout the Department. Yet Defendants pretend that decisions are made on a case-by-case basis. Is the prosecutorial discretion exercised by the Secretary or by the ICE or USCIS "line" official dealing with an individual case?
6. DACA is not a deferred action consistent with any past precedent but is a dramatic expansion of and departure from any past examples in both scale and type.
7. Plaintiff rejects the assumptions of the Memorandum that the Nation's immigration laws are "designed" to be modified by the Executive Branch according to the individual circumstances of each case. The Nation's immigration laws mean what they say. The DACA Memorandum assumes that it is the role of the Executive Branch to second-guess the wisdom of Congressional policy.

B. <u>Obama Administration's November 20, 2014 Executive Action Amnesty</u>

On November 20, 2014, President Obama announced significant further changes to the immigration laws, regulations, and practices by the Federal government implementing the nation's immigration laws and regulations. The President's new policies announced in an evening speech to the nation were implemented through a number of orders issued by the Secretary of the Department of Homeland Security issued at President Obama's directive.

A few hours before the President's evening speech, on November 20, 2014, the U.S. Department of Justice released publicly and posted on the Department's website for unrestricted

public viewing, a 33-page legal Memorandum titled *"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"* revealing the legal analysis and advice of the U.S. Department of Justice Office of Legal Counsel (OLC). The legal memorandum is dated November 19, 2014. A copy downloaded from the website is attached as Exhibit B.

The OLC legal memorandum was released by the Obama Administration for the purpose of adding to the public debate about the Defendants' executive action programs and convincing the public and officials of the legality of the program. In fact, the OLC legal memorandum attached as Exhibit B was made a part of the public record in a hearing in the Judiciary Committee of the U.S. House of Representatives on December 2, 2014, on "Executive Action on Immigration" by the Committee's Ranking Member Mr. John Conyers.

Page 3 presents a very useful summary of the overall processes and players involved.

C. MEMORANDUM: "Policies Supporting U.S. High-Skilled Businesses"

On November 20, 2014, Secretary Johnson issued a Memorandum Order titled *"Policies Supporting U.S. High-Skilled Businesses"* to USCIS and ICE, a copy of which downloaded from the Department's website is attached as Exhibit C. In this Memorandum, the Secretary admits that the changes directed require regulatory rule-making under the Administrative Procedures Act. For example, "Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers." Exhibit C at 2. And "More specifically, I direct that Immigration and Customs Enforcement (ICE) and USCIS develop regulations for notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for foreign STEM students and graduates, consistent with law." *Id. at* 3.

D. MEMORANDUM: "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"

In the main document at issue here, on November 20, 2014, Secretary Johnson issued a Memorandum Order titled *"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"* to the USCIS, ICE, Customs and Border Protection (CBP), and Acting Assistant Secretary for Policy Alan D. Bersin, a copy of which downloaded from the Department's website and is attached as Exhibit D. Key features include:

1. This Memorandum - *which is the primary document of the programs in dispute* - acknowledges that the intent and effect is to change current law, stating on Page 1:

   > This memorandum is intended to reflect new policies for the use of deferred action.

2. The Memorandum expands DACA by removing the previous age cap, adjusting the date of entry limit, and lengthening the renewal period to three years.
3. The Memorandum also extends DACA-like deferred action to new categories of persons who are illegal aliens (who arrived illegally or over-stayed as adults) but have a son or a daughter who is a U.S. citizen or lawful permanent resident and who also satisfy six (6) other criteria including passing a background check.
4. One of the factors is that the applicant must "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."
5. The legal substance of the Memorandum is grounded on the assertion that:

   > Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law.

6. This key Memorandum further states:

> Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources-which must continue to be focused on those who represent threats to national security, public safety, and border security.

7. While defining and describing deferred action, the Memorandum admits that there is no lawful authority for the deferred action, but instead it is an "administrative mechanism" whose authority is that it has been engaged in (the Memorandum claims) by other Presidential Administrations in the past.

8. The Defendants admit by the Memorandum that

> As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion.

9. The Defendants admit by the Memorandum that

> Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.

10. In this key Memorandum, the Secretary of Homeland Security instructs that:

> By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

11. USCIS is to begin accepting applications within 180 days of the Memorandum.

12. A fee of $465 is required, which includes the application for work authorization.

Similar to the Plaintiff's dispute with the DACA Memorandum:

1. While one criteria is that an applicant "present no other factors that, in the exercise

of discretion, makes the grant of deferred action inappropriate" this does not provide any meaningful standard other than mere whim or personal preference of the line official. It is not credible that any applicant will ever actually be evaluated on a case-by-case basis or denied application. If a line official did actually deny deferred action status, there are no governing standards or criteria for the line official to follow.

2. Plaintiff contends that deferred action is an *ultra vires* violation of the limited authority delegated to the Executive Branch.

3. Plaintiff further contends that Defendants' programs exceed the boundaries of past uses of deferred action, and are a dramatic expansion of and departure from any past examples in both scale and type.

4. Moreover, the Obama Administration ignores the law's restrictions on the use of delegated authority within criteria established by Congress. The Administration believes that delegated authority is unlimited and is an invitation for the Executive Branch to question the wisdom of Congress' statutory enactments.

E. MEMORANDUM: "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"

In the second most important Memorandum Order for our purposes here, on November 20, 2014, Homeland Security Secretary Jeh Charles Johnson issued a Memorandum Order titled *"Expansion of the Provisional Waiver Program"* to USCIS, ICE and Customs and Border Protection, a copy of which downloaded from the Department's website is attached as Exhibit E. Key features include:

1. The Secretary admits that it is necessary for DHS to amend its 2013 regulation on

Page 2 – that is to engage in regulatory rule-making under the Administrative Procedures Act:

> Today, I direct DHS to amend its 2013 regulation to expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available.

2. The main issue is that relatives are ineligible (inadmissible) because they have violated immigration laws, which acts as a barrier to applying for lawful status. An "inadmissible" alien must return to their home country and wait 3 to 10 years.

3. The Memorandum expands the waiver of inadmissibility for family members of U.S. citizens and lawful permanent residents. In 2013, the DHS issued regulations through the rule-making process to relieve spouses and minor children of the requirement to return to their home country and apply there, as a result of being inadmissible to apply for immigration status. The Memorandum expands the waiver of inadmissibility to more categories of family members.

4. However, the Secretary of Homeland Security admits that the change requires regulatory rule-making under the Administrative Procedures Act to achieve, because they are legislative.

F. <u>MEMORANDUM: "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants."</u>

In a less important (for the purposes of this instant case), yet generally instructive, Memorandum, on November 20, 2014, Homeland Security Secretary Jeh Charles Johnson issued a Memorandum Order titled *"Policies for the Apprehension, Detention and Removal of Undocumented Immigrants"* to USCIS, ICE and Customs and Border Protection, a copy of which was downloaded from the Department's website and is attached as Exhibit F.

This Memorandum sets forth extensive details and discussion about the prioritization of

the Executive Branch's actions with regard to different categories of persons unlawfully present within the United States. The Memorandum extensively discusses the Executive Branch's view of its powers under prosecutorial discretion. The Memorandum is informative as to the overly-expansive concepts of prosecutorial discretion that the Defendants apply throughout this topic.

However, this Memorandum concerns internal prioritization of the Department's work, and does not grant affirmative benefits such as amnesty to certain illegal aliens, which is the essence of the current dispute. Plaintiff disagrees with much of the concepts asserted and the practices adopted by the Memorandum. Nevertheless, the Memorandum, does not directly award benefits to illegal aliens. Still, the Plaintiff's presentation would be incomplete and unfair to the Court if only some of the November 20, 2014 Memoranda were presented.

III. ARGUMENT

A. GOVERNING LAW / STANDARD OF REVIEW

To obtain injunctive relief, Plaintiff need only demonstrate (1) a substantial likelihood of success on the merits; (2) that they are likely to suffer "irreparable injury" if preliminary relief is not granted; (3) that an order would not substantially injure other interested parties; and (4) that the public interest would be furthered by granting the order. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 35 (2d Cir. 2010). These four factors must be viewed as a continuum where greater strength in one factor compensates for less in the other: "If the arguments for one factor are particularly strong, in injunction may issue even if the arguments in other areas are rather weak." *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 739, 747 (D.C. Cir. 1995).

B. NO SUBSTANTIAL INJURY TO DEFENDANTS FROM ISSUANCE OF A PRELIMINARY INJUNCTION AND STATUS QUO OF CURRENT LAW

As a matter of law, Defendants cannot be said to be "burdened" by a requirement to continue to comply with existing law as enacted by Congress. The Defendants have announced that their program is explicitly intended to depart from governing law. However, the status quo is both a set of circumstances that have existed for many years and also the law of the land pursuant to existing statutory law enacted by Congress. There can be no burden recognized by the law from continuing to obey and apply the law as it currently exists. There can be no burden recognized by the law that political leaders desire to adopt new and different policies.

Furthermore, the main asserted purpose of the programs is a fiction, since the Executive Branch is not deporting illegal aliens in any significant numbers, even those convicted of non-immigration related crimes within the United States. The Defendants' programs purpose is to give illegal aliens a certificate that they will not be deported. Either way, with or without a certificate, those illegal aliens are very unlikely to be deported.

President Obama and others recite that the immigration system of the United States is broken. Of course, it is unmistakable that the only thing that is broken about the nation's immigration laws is that the Defendants are determined to break those laws themselves and also reward those nationals of foreign countries who break U.S. law. The Defendants both conspicuously fail to identify any other way in which the immigration laws are broken but also announce unambiguously their desire to reject the immigration laws of the U.S.

In contrast to the substantial irreparable harm facing Plaintiff and the nation, there can be no credible claim of harm to Defendants. The status quo is the existing law of the United States of America as enacted by the Congress and signed into law by various past Presidents. There is no harm to waiting until legal challenges are resolved.

C. THE BALANCE OF HARM AS WELL AS THE PUBLIC INTEREST SUPPORTS THE IMPLEMENTATION OF A PRELIMINARY INJUNCTION

An injunction is warranted because "there is an overriding public interest… in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. V. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). The public has a substantial interest in Defendants following the law. *See, e.g., In re Medicare Reimbursement Litigation*, 414 F.3d 7, 12 (D.C. Cir. 2005) (Additional administrative burden "[would] not outweigh the public's substantial interest in the Secretary's following the law.")

Given Defendants' fundamental refusal to comply with the law, the public interest will be served if this court preliminarily enjoins Defendants from implementing their illegal and unconstitutional actions. In light of the fact that Defendants' programs will dramatically change the status quo, a preliminary injunction to allow for the evaluation of such questions clearly serves the public interest. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) (holding that "there is undoubtedly . . . a public interest in ensuring that the rights secured under the First Amendment . . . are protected"); *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (holding that "issuance of a preliminary injunction would serve the public's interest in maintaining a system of laws" free of constitutional violations). *See also Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002) (holding that the public interest is served by a court order that avoids "serious constitutional risks"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (noting "the general public interest served by agencies' compliance with the law"); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (public interest served by enforcing constitutional requirements).

D. PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF PRELIMINARY RELIEF IS WITHHELD

Allowing the Executive Branch to immediately implement the President's DACA and Executive Amnesty programs will cause irreparable harm, including to those illegal aliens the programs seek to enroll, if the Federal courts later determine the programs to be unlawful.

Sheriff Joe Arpaio's office and deputies, as illustrated in the Exhibits attached to the Complaint, will suffer the loss of resources and funding diverted to handle the flood of increased illegal immigration, the danger to deputies enforcing the law, and an increase in crime in his County. As set forth in his Declaration, attached as Exhibit G, real-world experience has demonstrated this. Those who cross the border without resources, without a job, without a bank account, and without a home in the U.S., who are willing to break the law to achieve their purposes, and who are released from any social stigma in their home communities where they are known are correlated with an increase in crime in Maricopa County, Arizona. This includes when they cross through Arizona.

Citizens of other countries who are present in the United States unlawfully will be asked to pay fees of at least $465 each to the Department of Homeland Security and to change their circumstances in many ways in reliance upon the Defendants' executive action programs. To unravel the changed circumstances later would be an inexcusable unfairness to all concerned, including illegal aliens acting in reliance on and trusting in the Defendants' programs. Fees of $465 and up would have to be refunded to millions of individuals. The work and expenses incurred by the Executive Branch would be wasted by the Federal government on a mass scale.

Courts have consistently held that a colorable constitutional violation gives rise to a showing of irreparable harm. *See Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (a constitutional violation and loss of constitutional protections '"for even minimal periods

of time, unquestionably constitutes irreparable injury'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 53 (D.D.C. 2002) (deprivation of constitutional protection "is an undeniably substantial and irreparable harm").

Furthermore, news of the Defendants' programs will serve as an invitation for millions of more trespassers to enter the country. Postponing the start of the Defendants' executive action programs may not entirely cancel that message, but it will reduce the encouragement for others to enter the country without first testing the legality of these programs.

As a result, Plaintiffs will suffer irreparable harm absent a preliminary injunction. Furthermore, without a preliminary injunction, Defendants would inherently have a significantly greater and substantially unfair advantage in this lawsuit, especially during the pendency of this action, thus depriving Plaintiffs of their right to a fair trial. The difficulty or near impossibility of unraveling the programs once started would mean that the Defendants have prevailed regardless of the decision of the Courts. In light of the above, Defendants should be enjoined until such time as the court can address the constitutional and legal issues raised.

E. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

There is a significant likelihood that the Plaintiff will succeed on the merits, at the very least on the grounds that the Defendants are clearly engaged in regulatory rule-making while flouting and ignoring the requirements of the Administrative Procedures Act. The following considerations are offered in support of the Plaintiff's allegations and causes of action:

1. Plaintiff Should be Granted Relief Prayed for in the Complaint

a) Plaintiff is entitled to declaratory relief under his First Cause of Action. The Defendants' 2012 DACA and 2014 Executive Action amnesty programs – including in their sheer scope and fundamentally different nature – usurp the role of Congress

within the architecture and basic design of the U.S. Constitution. *See infra.*

b) Under his Second Cause of Action, Plaintiff is entitled to relief from illegal, unconstitutional, and invalid agency action pursuant to 5 U.S.C. §§ 702 through 706 because the Executive Branch under the Defendants' authority and direction is issuing new regulations within the same scope as existing regulations without going through the detailed rule-making process of the Administrative Procedures Act.

c) Under his Third Cause of Action, Plaintiff is entitled to relief from illegal, unconstitutional, and invalid agency action pursuant to 5 U.S.C. §§ 702 through 706 because the Executive Branch under the Defendants' authority and direction is creating new regulations and/or interpretations and practices in conflict with existing laws and regulations. Plaintiff challenges Executive Branch departure from existing laws and regulations including those practices that begun under prior Presidential administrations. Even where today the Defendants engage in plausible interpretations and applications of the regulations and INA, that treatment is necessarily arbitrary, capricious, arbitrary, an abuse of discretion, unreasonable, and otherwise not in accordance with law because the Executive Branch in years past using its specialized expertise adopted different plausible interpretations and applications of the regulations and INA. Those inconsistent interpretations and applications cannot both be grounded in the agency's specialized expertise or in the facts and circumstances.

d) Under his Fourth Cause of Action, Plaintiff is entitled to declaratory judgment that there is no rational relationship between the stated goals of prioritizing the use of enforcement resources and granting benefits to illegal aliens so as to create a massive magnet attracting more illegal aliens to flood across our Nation's borders. Plaintiff

recognizes that it is very difficult for a government action to fail the legal test of rationality. And yet here the Executive Branch has created a magnet for further illegal immigration that is absolutely in contradiction to their stated goals of prioritizing the use of limited prosecutorial resources. Choosing to not deport all classes of persons unlawfully present with equal priority does not require granting some of them benefits and the right to work in the United States. Part of the difficulty is the Defendants' determination to grant law-breakers a certificate (loosely speaking) that they will not be prosecuted. If a police department chooses to focus on the most dangerous criminals, others do not receive a certificate authorizing them to continue breaking lesser laws. But here, the Defendants want to give a sort of certificate authorizing persons to continue breaking the law as long as they do not meet the highest priority for removal (deportation). *If the Defendants merely focused their efforts where most appropriate, but did not seek to affirmatively grant benefits to other illegal aliens*, there would be no magnet created for additional illegal immigration. The problem of limited resources will grow dramatically worse.

e) Plaintiff is entitled to declaratory relief under his Fifth Cause of Action that the Defendants' programs are not acts of prosecutorial discretion. As a result, Defendants are engaged in legislation and/or regulatory rule-making. This decision leads to the fact that the Defendants' actions are *ultra vires* and illegal.

f) Plaintiff is entitled to declaratory relief under his Sixth Cause of Action. The Defendants' 2012 DACA and 2014 Executive Action amnesty programs are invalid abuses of delegated authority. They violate the non-delegation doctrine (limitations upon when delegated authority is valid) recognized in this Circuit under *American*

Trucking Ass'ns, Inc. v. U.S. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g by* 195 F.3d 4 (D.C. Cir. 1999), *modified by Michigan v. United States EPA*, 213 F.3d 663 (D.C. Cir. 2000) (limiting the scope of *American Trucking*, stating "[w]here the scope increases to immense proportions … the standards must be correspondingly more precise") (citations omitted) *cert. granted sub nom. American Trucking Ass'ns, Inc. v. Browner*, 120 S. Ct. 2193 (2000).

2. Defendants' Actions Modify Existing Regulations and are Legislating

President Obama's DACA and Executive Action Amnesty each modify existing regulations governing within the same scope of persons and circumstances. The fact that Defendants' actions operate within areas already subject to previously-promulgated regulations, underscores that Defendants are legislating and/or rule-making (issuing new regulations) by changing the treatment of these topics within existing regulations.

On Page 2, the OLC Memorandum states that "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." *(Emphasis added).*

Therefore, the Executive Branch admits that Congress has already extensively regulated and occupied the field with regard to immigration and naturalization.

Furthermore, the Executive Branch has officially promulgated extensive regulation pursuant to the Administrative Procedures Act, codified and published at Title 8 of the Code of Federal Regulations. These regulations cover every aspect of the enforcement of immigration enforcement. The Defendants do not claim now to be addressing any gaps in regulation. They admit that these matters are already regulated. But Defendants claim a lack of resources requires

them not to fully enforce the law as written.

3. Defendants are Legislating in Conflict with Constitutional Requirements

The U.S. Supreme Court has explained concerning the immigration laws:

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

(Emphasis added). Galvan v. Press, 347 U.S. 522, 531 (1954) (internal citations omitted, citing *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950).

The U.S. Supreme Court has further explained about the relationship in another case of Executive Branch over-reach in the context of regulating carbon dioxide:

> Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers.

and:

> The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.

Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014); *see also, Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 462 (2002) (Commissioner of Social Security did not have the authority "to develop new guidelines or to assign liability in a manner inconsistent with the statute.").

In *Utility Air Regulatory Group*, The U.S. Supreme Court struck down new EPA regulations regulating certain sources of emissions (primarily relating to greenhouse gases in that case) differently than how those same emission sources had been regulated in the past. The Supreme Court added that under "our system of government, Congress makes laws," while the

President executes them.

The U.S. Supreme Court undertook a fundamental analysis of the Constitutional architecture of the U.S. Constitution in *NRLB v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointments invalid, reasoning from structure of the Constitution) and *INS v. Chadha*, 462 U.S. 919 (1983). The U.S. Supreme Court found in *Chadha* that a departure from the normal legislative process violated the U.S. Constitution because it offended the Constitutional architecture and structure of Congressional enactment and presentment to the President. *See also Kendall v. United States*, 37 U.S. 524 (1838).

Here, the roles are reversed between the Executive Branch and Legislative Branch from *Chadha*, but the Defendants openly admit that their efforts are to subvert the legislative process and the role of Congress, although effectively in a mirror image of *Chadha*. In *Chadha*, Congress sought to encroach on the executive role of the Executive Branch. Here, the Executive Branch seeks to legislate where Congress has chosen not to legislate.

Similarly, the U.S. Supreme Court held in *Train v. City of New York*, 420 U.S. 35 (1975) that "[t]he president cannot frustrate the will of Congress by killing a program through impoundment." That is, the President does not have authority by executive action to not enforce the laws enacted by Congress. In *Train*, the issue concerned the expenditure of funds in appropriated accounts; the motivation was the President disagreeing on policy grounds with Congress.

Similarly, the U.S. Supreme Court held in *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President does not have inherent authority as executive action to take action outside of the laws enacted by Congress, where Congress refuses to act.

"Of course, an agency is not free simply to disregard statutory responsibilities: Congress

may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes. . . " *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). *See also* 18 Comp. Gen. 285, 292 (1938) ("[T]he question with the accounting officers is not the apparent general merit of a proposed expenditure, but whether the Congress, controlling the purse, has by law authorized the expenditure").

Plaintiff maintains that the rationale of these cases mandates that the President must go through the proper legislative process through Congress and "presentment" of a statute to the President for veto or signature and that the role of the President is to take care that the laws be faithfully executed, and not for the President to legislate on his own authority. President Obama's programs are a breath-taking case of chutzpah of first impression beyond what past Presidents would have ever attempted. Yet the rationale of those past cases clearly applies here.

An Executive Branch agency's duty is to comply with the law and the courts' duty is to make sure it does so. "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

> A President sometimes has policy reasons (as distinct from constitutional reasons, cf. infra note 3) for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill. See2 U.S.C. § 683; see also *Train v. City of New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 279, 282 (1971) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.").

In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013)

4. No Legal Authority to Grant Legal Status to Illegal Aliens

"The Congress shall have Power . . . To establish an uniform Rule of Naturalization," Article I, Section 8, of the U.S. Constitution.

There is nothing in the U.S. Constitution which offers any shared authority or role with the Executive Branch with regard to immigration, admission of aliens to the country, or naturalization or citizenship other than the President's duty that he "shall take Care that the Laws be faithfully executed. . . ." Article II, Section 3, of the U.S. Constitution.

Congress must provide some legal category under which an alien may be lawfully present within the United States of America or admitted into the country. The authority to waive inadmissibility does not qualify a national of another country for lawful presence, lawful admission, or benefits. Waiving inadmissibility merely allows an alien to apply for a lawful status – assuming he qualifies for it.

Inadmissibility means that even if they otherwise qualify for a category of lawful presence, a legal barrier has been created. A few simple examples include:

> 8 U.S. Code § 1182 - Inadmissible aliens
> (a)(9) Aliens previously removed
> (A) Certain aliens previously removed
> (i) Arriving aliens
> Any alien who has been ordered removed under section 1225 (b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

and:

> 8 U.S. Code § 1182 - Inadmissible aliens
> (a)(6) Illegal entrants and immigration violators
> * * *

> (C) Misrepresentation
> (i) In general
> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

If the Defendants were merely issuing internal guidance as to which illegal aliens to deport first, there would be no objection. Instead, it is the affirmative grant of benefits that is the objectionable aspect of the Defendants' actions. Defendants are granting amnesty and immunity from prosecution (deportation), authority, and written authorization to continue to break the law, Employment Authorization Cards for the right to work, the opportunity to use work authorization cards to get a State driver's license, the opportunity to use that driver's license to register to vote unlawfully, and the right to receive various other benefits including public assistance.

As a result, the Defendants' programs are legislation, conferring new benefits to broad categories of persons based upon standardized criteria defining broad classes of beneficiaries.

5. <u>Unless Subordinate Officials Can Say "No," No Case-by-Case Review Exists</u>

This Court is empowered to review the Defendants' claim to prosecutorial discretion in the civil enforcement of Congressional enactments. *Adams v. Richardson,* 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) *(en banc).*

In issuing a (modified) injunction, this Circuit rejected claims that agency discretion not to fully enforce laws (in a civil context) was unreviewable by this Circuit:

> Appellants insist that the enforcement of Title VI is committed to agency discretion, and that review of such action is therefore not within the jurisdiction of the courts. But the agency discretion exception to the general rule that agency action is reviewable under the Administrative Procedure Act, 5 U.S.C. Secs. 701-02, is a narrow one, and is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep.No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). The terms

> of Title VI are not so broad as to preclude judicial review. A substantial and authoritative body of case law provides the criteria by which noncompliance can be determined, and the statute indicates with precision the measures available to enforce the Act.

Id. This Circuit distinguished discretion by the Attorney General or by U.S. Attorneys (prosecutors) presumably in a criminal context from enforcement by civil Departments:

> Appellants rely almost entirely on cases in which courts have declined to disturb the exercise of prosecutorial discretion by the Attorney General or by United States Attorneys. *Georgia v. Mitchell*, 146 U.S.App.D.C. 270, 450 F.2d 1317 (1971); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Powell v. Katzenbach*, 123 U.S.App.D.C. 250, 359 F.2d 234 (1965); *Moses v. Katzenbach*, 342 F.2d 931 (D.C.Cir.1965). Those cases do not support a claim to absolute discretion and are, in any event, distinguishable from the case at bar. Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures. The absence of similar specific legislation requiring particular action by the Attorney General was one factor upon which this court relied in *Powell v. Katzenbach*, 123 U.S.App.D.C. 250, 359 F.2d 234, 235 (1965), to uphold the exercise of discretion in that case.

Id. Moreover, this Circuit recognized that widespread <u>*scope*</u> of non-enforcement can be fundamentally different than small-scale exceptions, as (1) adopting a conscious policy in conflict with the Congressional enactment, and (2) an abdication of statutory duty, from case-by-case prosecutorial discretion. As here, the widespread refusal to enforce a law is a fundamentally different thing altogether from prosecutorial discretion:

> More significantly, this suit is not brought to challenge HEW's decisions with regard to a few school districts in the course of a generally effective enforcement program. To the contrary, appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty. We are asked to interpret the statute and determine whether HEW has correctly construed its enforcement obligations.

Id. Moreover, this Circuit recognized the distinction between not enforcing violations as opposed to facilitating on-going violations of the law:

> It is one thing to say the Justice Department lacks the resources

> necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools. The anomaly of this latter assertion fully supports the conclusion that Congress's clear statement of an affirmative enforcement duty should not be discounted.

Id.

The OLC legal Memorandum (Exhibit B) strongly depends on the existence of a genuine, *bona fide*, case-by-case decision-making process to qualify as prosecutorial discretion.

As the Office of Legal Counsel has previously determined, the Executive Branch cannot refuse to enforce laws based on policy differences with Congress or policy "discretion" --

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

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

Therefore, the claim that Department of Homeland Security "line" officials actually dealing with individual illegal aliens may simply disregard the laws passed by Congress on their own discretion requires something vastly higher than simply sprinkling throughout the Memoranda the phrase "case-by-case review" like garlic to repel judicial review. Thus the recitation claiming a case-by-case review is, as a legal term of art, a pretext.

Yet, here, Defendants' Memoranda issued to the DHS actually replace individual decision-making with mass standardization. Indeed, that is the point of the Defendants' programs: to assure 6 million illegal aliens that they will not be deported.

There is no possibility that any illegal alien will be denied the one and only deferred

action status offered on any individualized basis if the broad criteria of the regulatory scheme are satisfied. [2] The millions of persons who meet the regulatory criteria get only one possible result. Those who do not meet the regulatory criteria do not get that result, and receive no change from their current status. There is only one possible outcome for all those who qualify under the criteria, not a range of outcomes. There are no individually-tailored "plea deals."

The Defendants' Memoranda recite that there will be a case-by-case review, but do not provide any topic concerning what the case-by-case review might be *about*. There is no subject matter, no issues to be determined, no rationale for deferred action status to be granted to some and denied to others. Defendants have merely inserted empty buzz words into the Memoranda.

However, if there is a meaningful case-by-case review, then subordinate officials must be free to answer "no." Defendants claim that the reason for their programs is a lack of resources. Therefore, a case-by-case review would authorize subordinate Departmental officials to each make their own personal decisions as to whether they believe resources are adequate to deport any particular individual applicant or not. As a corollary, if the now Republican-controlled Congress increased funding for enforcement, including rapidly by a supplemental appropriation, Departmental officials would be obligated to deport everyone they can until funding is used up.

Contrast this with genuine prosecutorial discretion, where a prosecutor is evaluating whether or not he or she can prove the case against an accused in light of the quality, credibility, and availability of the witnesses and other evidence. *United States v. Armstrong*, 517 U.S. 456,

[2] The Chair of the Judiciary Committee of the U.S. House of Representatives reported in a hearing held on December 2, 2014, that the Department had told the Committee that if an applicant meets the published criteria, the applicant will always, without exception, receive the deferred action status. If that report is not accurate, the Defendants will hopefully clarify that question. *See* "Executive Action on Immigration," House Judiciary Committee, C-SPAN, December 2, 2014, http://www.c-span.org/video/?323021-1/house-judiciary-committee-hearing-executive-action-immigration

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)).

Evaluating whether a case can be proven provides a meaningful set of standards for a prosecutor to follow, guided by her legal training, yet unique to each case. There is an actual reason for a case-by-case decision-making process when the chance of success is at issue.

Here, the topic being decided is that Defendants reject the wisdom and the policy of the laws Congress enacted. The Defendants having already decided on a national basis that they simply disagree with the policies of existing immigration law enacted by Congress, there is nothing further for any "line" (subordinate) Departmental official to decide case-by-case.

However, under the Defendants' programs, could a subordinate Departmental official decide that he or she actually likes the wisdom of current law and will choose to deny deferred action to applicants? We know the answer is no, because ten border patrol agents sued the Secretary to be allowed to do their jobs and enforce the laws in *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013). "Line" officials are not permitted to refuse amnesty.

6. <u>OLC Legal Memorandum Warns of Legal Limitations</u>

The OLC's legal Memorandum mostly assumes certain types of actions by the Defendants – which assumptions are not what the Defendants actually created – and then opines that the hypothesized actions would be legal.

On Page 4, the OLC Memorandum states that: "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."

Plaintiff asserts that President Obama and the other Defendants have fundamentally missed the message of *Youngstown Sheet & Tube Co., supra,* which held the contrary.

On Page 6, the OLC Memorandum states that:

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

On Page 7, the OLC Memorandum states that:

> 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").

On Page 11, the OLC Memorandum states that: "And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any

circumstances." However, in fact, the Defendants' policy does grant approximately 6 million illegal aliens exemption from deportation. Indeed, that it is the purpose of the program, to give the promise and certainty to those illegal aliens that they will not be deported.

Concerning the Defendants June 15, 2012, DACA Program, on Page 18, the OLC Memorandum states in footnote 8 that:

> 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.

On Page 24, the OLC Memorandum states that:

> 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 general, the OLC Memorandum relies for the authority for deferred action on the fact that the Congress has not yet acted to stop the practice, despite being aware of deferred action.

7. Admissions By Party Opponent Obama – these Executive Actions are Illegal

Especially for the purposes of a preliminary injunction, the extensive admissions by the party-opponent Defendant Barack Obama (estimated to number at least 22 on separate occasions) that these actions violate Constitutional principles and legal requirements are strong grounds for issuing a preliminary injunction pending further proceedings in this Court:

As an admission against interest by a party-opponent, Defendant Barack Obama admits that he changed the law in this area. During a public, official speech[3] at Copernicus Community Center in Chicago, Illinois, as President, President Barack Obama was interrupted by screams from immigration protesters. Obama told the protesters it "doesn't make sense to yell at me right now," given his immigration action last week. "What you're not paying attention to is, I just took an action to change the law," he said as the crowd applauded.

President Obama has repeatedly admitted and acknowledged that the amnesty he now attempts to issue to illegal aliens is illegal and/or unconstitutional, and he knows it.

> The problem is that, you know, I am the President of the United States. I am not the Emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic.

- President Obama, February 14, 2013, in an internet town hall with young voters called a "Google hangout." Available at: https://www.youtube.com/watch?v=FSV9n-v_0KI

President Obama told the National Council of La Raza on July 25, 2011:

[3] "Obama to immigration hecklers: 'I just took an action to change the law,' Eric Bradner (CNN), Nov. 25, 2014 , KBMT, Channel 12, ABC News, Beaumont, Texas, http://www.12newsnow.com/story/27483218/obama-to-immigration-hecklers-i-just-took-an-action-to-change-the-law See, video, at https://www.youtube.com/watch?v=L8EoAYTRjw4

> I know some people want me to bypass Congress and change the laws on my own. Believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written.

President Obama told a roundtable of Spanish-language news media reporters in September 2011:

> I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true," he said. "We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce.

President Obama answered a heckler during a speech in San Francisco at the Betty Ann Ong Recreation Center in 2013, by saying:

> If, in fact, I could solve all these problems without passing laws in Congress, then I would do so . . . but we're also a nation of laws. That's part of our tradition. So the easy way out is to try to yell and pretend like I can do something by violating our laws, and what I'm proposing is the harder path which is to use our democratic processes to achieve the same goal that you want to achieve.

In an interview on the Telemundo television network with Jose Diaz-Balart on September 17, 2013,[4] President Obama said he was proud of having protected the "Dreamers" — people who came to the United States illegally as young children — from deportation. But he also said that he could not apply that same action to other groups of people.

> Here's the problem that I have, Jose. And I've said this consistently. My job in the Executive Branch is supposed to be to carry out the laws that are passed. Congress has said here is the law when it comes to those who are undocumented. And they've allocated a whole bunch of money for enforcement. And what I have been able to do is to make a legal argument that I think is absolutely right, which is that given the resources we have we can't do everything that Congress has asked us to do. What we can do is then carve out the Dream Act folks, saying young people who've basically grown up here are Americans we should welcome. We're not going to have them operate under a cloud, under a shadow.

[4] NOTICIAS TELEMUNDO, https://www.youtube.com/watch?v=wp68QI_9r1s

> But if we start broadening that, then essentially I'll be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option and I do get a little worried that advocates of immigration reform start losing heart and immediately thinking well, you know, somehow there's an out here. If Congress doesn't act, we'll just have the President sign something and that will take care of. We won't have to worry about it. What I've said is that there is a path to get this done and that's through Congress. And right now everybody should be focused on making sure that that bill that's already passed out of the Senate hits the floor of the House of Representatives.

President Obama said the nation's laws were clear enough "that for me to simply, through executive order, ignore those congressional mandates would not conform with my appropriate role as president." Obama said this at a Town Hall in March of 2011,[5] months before issuing his Deferred Action for Children Arrivals (DACA) to keep children who arrived illegally with their non-citizen parents ("Dreamers") from being deported.

8. Agency Resources Not a Valid Consideration

If the Department does not have sufficient resources to fully enforce the Nation's laws, its remedy is to request those resources, not to create an entirely new and different regulatory scheme, while refusing to enforce that laws on the books.

The U.S. Congress appropriated about $814 million more for ICE than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

The U.S. Congress appropriated nearly $465 million more for USCIS than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

As a result, the Defendants cannot rewrite the immigration laws of the country claiming a lack of resources they never asked for. Clearly, considering that the Congress already

[5] "For Obama, Executive Order on Immigration Would Be a Turnabout", Michael D. Shear, The Washington Post, November 17, 2014, http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html?_r=0

appropriated more than asked for, if the Executive Branch asked for more resources to secure the border and enforce the laws, the Congress would appropriate the resources needed.

As discussed extensively in the OLC legal Memorandum, Exhibit B, and elsewhere, Defendants claim authority primarily on prosecutorial discretion resulting from a supposed lack of resources. However, this factor cannot be entertained as a justification for the Defendants' programs, because the Executive Branch never asked Congress for additional resources.

Yet as the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. *See TVA v. Hill*, 437 U.S. 153, 190 (1978) (doctrine that repeals by implication are disfavored "applies with even greater force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum. . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years"); cf. 1 GAO, Principles of Federal Appropriations Law at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

Federal courts have recognized that Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint").

Each Federal department and agency is required under the Budget and Accounting Act of

1921 (as amended)[6] to forward its projected needs for carrying out its mission to the Office for Management and Budget in the Executive Office of the President. OMB then submits a consolidated budget request for the entire Federal government to the U.S. Congress.

Moreover, the Executive Branch is authorized to impose fines upon employers who knowingly or flagrantly violate immigration law prohibitions on employing illegal aliens. 8 U.S.C. §1324a. Those fees, especially on large employers, would provide additional resources.

However, according to the Inspector General of the Department of Homeland Security, the Obama Administration routinely reduces fines owed by employers violating the law by an average of 40%.[7] ICE reduced the fine owed by one employer from $4.9 million to $1 million.

Budget information submitted to Congress by the U.S. Department of Homeland Security is posted at http://www.dhs.gov/dhs-budget . *See* Declaration, attached as Exhibit H.

As a result, the bases claimed by the Defendants is a disingenuous pretext.

9. Lack of Resources Not Credible Where Department Officials Restrained

Defendants base the legality of their actions almost entirely on the claim that the Executive Branch must prioritize the use of limited resources. However, for many years, the Executive Branch has forbidden border patrol agents and other immigration officials from fully doing their jobs. Border patrol agents actually sued the Secretary of Homeland Security for not allowing them to do their jobs of enforcing the Nation's immigration laws, that is causing the border patrol agents in their view to violate existing law by administrative directive that the agents not follow the law as written. This is a Federal lawsuit in the public records of the

[6] 31 U.S.C. 1101, et seq.; See also, OMB Circular No. A–11 (2014) Section 15: Basic Budget Laws, http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s15.pdf

[7] "Obama eases penalties for businesses hiring illegal immigrants," by Stephan Dinan, The Washington Times, February 25, 2015.

Federal courts of which this Court may take judicial notice.[8]

Where the public court records indicate that the Department has directed its existing personnel not to enforce the laws, to the extent that Departmental employees take the action risky to their careers of suing their bosses in Federal court to be allowed to enforce the immigration laws, the Defendants' mere recitation of a lack of resources to enforce the immigration laws of the United States is unpersuasive and cannot be credited.

It might be noted that the Defendants have merely recited without support their lack of resources, but have not substantiated that claim against overwhelming contrary evidence.

10. <u>Benefits to Parents of DACA Recipients are Not Lawful</u>

At a minimum, it is not lawful for the Defendants to extend deferred action status to parents of nationals of foreign countries who are illegally present but received deferred action themselves under the Deferred Action for Childhood Arrivals (DACA) program.

Defendants purport to expand DACA-like deferred action to illegal aliens who are parents of (a) U.S. citizens, (b) lawful permanent residents, or (c) DACA recipients.

The Office of Legal Counsel (OLC) on behalf of the Defendants makes clear that deferred action status cannot be extended to parents of deferred action status recipients, based on the deferred action status of the child alone.

On Page 2, the OLC Memorandum states that "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." Therefore, the Defendants admit that the

[8] *Crane v. Napolitano,* 920 F. Supp. 2d 724 (N.D. Tex. 2013). The case was dismissed by the trial court for lack of subject matter jurisdiction, on the theory that the Executive Branch was effectively suing itself. The dismissal is on appeal in the Fifth Circuit. That case raises some of the same challenges to DACA as presented here, but those challenges were not decided on the merits.

extension of deferred action to parents of DACA recipients is not lawful.

On Page 32, the OLC Memorandum states that:

> 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.
>
> * * *
>
> 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.
>
> * * *
>
> 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.
>
> * * *
>
> 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.

11. <u>Defendants' New Rules are Arbitrary, Capricious, and Unreasonable</u>

To the extent that the Defendants are changing the interpretation, application, and treatment of this subject matter under existing law and regulations, the departure from past practice renders the Defendants actions now necessarily arbitrary, capricious, and inherently

unreasonable. That is, where the agency's specialized expertise has in the past led to one result. But now the Defendants choose a contrary result, both results cannot be simultaneously justified by the same facts and circumstances as informed by the agency's experience and expertise.

While the Federal courts may defer to the agency's application of the law under certain specific conditions, a dramatic departure from past interpretation and application cannot be a product of the agency's experience and expertise.

What has changed to justify this dramatic departure from past practice? Not the facts, nor the circumstances or the agency's experience. What has changed is President Obama's overtly announced desire to force Congress to change the national policies on immigration and naturalization and to subvert Congress' refusal to do so.

As the U.S. Supreme Court recently illustrated with regard to regulation of greenhouse gases from certain types of sources, a Federal Department "must ground its reasons for action or inaction in the statute." Here, however, the Defendants clearly ground their reasons for acting in politics and lobbying Congress to pass the legislation they desire, not in the statute.

> In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, . . . or otherwise not in accordance with law. 42 U. S. C. §7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA.s actions in the event that it makes such a finding. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843-844 (1984). We hold only that EPA must ground its reasons for action or inaction in the statute.

Massachusetts v. Environmental Protection Agency, 549 U.S. 497(2007).

The U.S. Supreme Court reversed in part because the agency action "was therefore arbitrary, capricious, . . . or otherwise not in accordance with law." Here, for the Department to adopt a different approach than the previously justified under the law, the facts, circumstances,

and agency expertise – when there has been no change of circumstances other than a different President with a different set of policy goals – is by its very nature of a dramatic change in direction Its action "arbitrary, capricious, . . . or otherwise not in accordance with law."

12. <u>Defendants Admit their Goals are Political, Not Prosecutorial Discretion</u>

Another factor demonstrating that the Defendants are legislating by their executive action programs is that the Defendants openly admit their objective for the program is political, that is to make a dramatic change in the Nation's policies on immigration and naturalization. President Obama has made it unmistakably clear in dozens of public statements that he seeks to determine the national policy on immigration and naturalization while the U.S. Constitution explicitly reserves only to the Congress the power to set uniform rules on naturalization.

As demonstrated by the news reports attached collectively as Exhibit I, President Obama has made unmistakably clear in public statements intended to be official pronouncements of his position and policy that:

a) The objective of these programs is to establish a new national policy different from the policies enacted into law by Congress.

b) President Obama is ordering these actions explicitly to circumvent Congress.

c) President Obama is ordering these actions explicitly because Congress did not pass legislation that he favors. That is, Obama is aware that his actions are in conflict with the will of Congress and Obama is acting precisely because his actions are in conflict with the will of Congress.

d) President Obama is offering to withdraw these executive action programs if Congress passes the legislation that Obama wants, including with the content he wants. Thus the Defendants' programs are not grounded in facts, circumstances, or the expertise of the

government but in a desire to coerce the Congress. The fact that Obama offers to withdraw the programs indicate that they are not a sincere determination of appropriate considerations.

13. Divided Congress Unlikely to Act

Meanwhile, it appears that the Republican Party in Congress remains divided and unlikely to act to block or defund the Defendants' executive action programs. *See* "Obama Has Already Won the Immigration Fight," Dana Milbank, The Washington Post, December 2, 2014, attached as Exhibit J, and "The GOP's War on Obama's Executive Action Lasted About 5 Minutes," Sahil Kapur, The Talking Points Memo: DC, December 3, 2014, attached as Exhibit K.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion and enter a preliminary injunction that, during the pendency of this suit, orders Defendants to cease and desist and not initiate the plans for executive action directed by the President. In addition and in so doing, this Court should declare Defendants' actions unconstitutional.

Dated: December 4, 2014

Respectfully submitted,

/s/ Larry Klayman
Larry Klayman, Esq.
Washington, D.C. Bar No. 334581
Freedom Watch, Inc.
2020 Pennsylvania Avenue N.W., Suite 345
Washington, D.C. 20006
(310) 595-0800
leklayman@gmail.com

Attorney for Plaintiff

Exhibit A

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

Exhibit B

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.[1]

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

[1] *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.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] 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

[2] 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.

[3] 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.[4]

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

[4] 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.[5]

[5] 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").[6]

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,

[6] 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 (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.[7]

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

[7] 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.[8]

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.[9] 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

[8] 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.

[9] 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)).[10]

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

[10] 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").[11] Although the INA

[11] 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.[12] 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

[12] 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).[13] 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

[13] 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.[14] Immigration officials have on several

[14] 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.[15] 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.

[15] 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.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Exhibit C

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies Supporting U.S. High-Skilled Businesses and Workers**

I hereby direct the new policies and regulations outlined below. These new policies and regulations will be good for both U.S. businesses and workers by continuing to grow our economy and create jobs. They will support our country's high-skilled businesses and workers by better enabling U.S. businesses to hire and retain highly skilled foreign-born workers while providing these workers with increased flexibility to make natural advancements with their current employers or seek similar opportunities elsewhere. This increased mobility will also ensure a more-level playing field for U.S. workers. Finally, these measures should increase agency efficiencies and save resources.

These new policies and regulations are in addition to efforts that the Department of Homeland Security is implementing to improve the employment-based immigration system. In May, for example, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule to extend work authorization to the spouses of H-1B visa holders who have been approved to receive lawful permanent resident status based on employer-sponsorship. USCIS is about to publish the final rule, which will incentivize employer sponsorship of current temporary workers for lawful permanent residence so they can become Americans over time, while making the United States an even more competitive destination for highly skilled talent. Also, USCIS has been working on guidance to strengthen and improve various employment-based temporary visa programs. I expect that such guidance, consistent with the proposals contained in this memorandum, will be published in a timely manner.

A. Modernizing the Employment-Based Immigrant Visa System

As you know, our employment-based immigration system is afflicted with extremely long waits for immigrant visas, or "green cards," due to relatively low green card numerical limits established by Congress 24 years ago in 1990. The effect of these caps is further compounded by an immigration system that has often failed to issue all of the immigrant visas authorized by Congress for a fiscal year. Hundreds of thousands of such visas have gone unissued in the past despite heavy demand for them.

The resulting backlogs for green cards prevent U.S. employers from attracting and retaining highly skilled workers critical to their businesses. U.S. businesses have historically relied on temporary visas—such as H-1B,[1] L-1B,[2] or O-1[3] visas—to retain individuals with needed skills as they work their way through these backlogs. But as the backlogs for green cards grow longer, it is increasingly the case that temporary visas fail to fill the gap. As a result, the worker's temporary status expires and his or her departure is required. This makes little sense, particularly because the green card petition process for certain categories requires the employer to test the labor market and show the unavailability of other U.S. workers in that position.

To correct this problem, I hereby direct USCIS to take several steps to modernize and improve the immigrant visa process. *First*, USCIS should continue and enhance its work with the Department of State to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas. *Second*, I ask that USCIS work with the Department of State to improve the system for determining when immigrant visas are available to applicants during the fiscal year. The Department of State has agreed to modify its visa bulletin system to more simply and reliably make such determinations, and I expect USCIS to revise its current regulations to reflect and complement these proposed modifications. *Third*, I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers.

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[1] INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 101(a)(15)(H)(i)(b).

[2] INA § 101(a)(15)(L), 8 U.S.C. § 101(a)(15)(L).

[3] INA § 101(a)(15)(O)(i), 8 U.S.C. § 101(a)(15)(O)(i).

B. Reforming "Optional Practical Training" for Foreign Students and Graduates from U.S. Universities

Under long-standing regulations, foreign nationals studying in the United States on non-immigrant F-1 student visas[4] may request twelve additional months of F-1 visa status for "optional practical training" (OPT), which allows them to extend their time in the United States for temporary employment in the relevant field of study. OPT, which may occur before or after graduation, must be approved by the educational institution.

This program provides important benefits to foreign students and the U.S. economy. Foreign students are able to further their full course of study in the United States and gain additional, practical experience in their fields by training in those fields with employers in the United States. In turn, foreign students put into practice the skills and education they gain at U.S. universities to benefit the U.S. economy. By regulations adopted in 2007, students in science, technology, engineering, and mathematics (STEM) fields are eligible for an additional 17 months of OPT, for a total of 29 months. This extension has the added benefit of helping America keep many of its most talented STEM graduates from departing the country and taking their skills overseas.

The OPT program should be evaluated, strengthened, and improved to further enhance American innovation and competitiveness, consistent with current legal authority. More specifically, I direct that Immigration and Customs Enforcement (ICE) and USCIS develop regulations for notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for foreign STEM students and graduates, consistent with law. I am also directing ICE and USCIS to improve the OPT program by requiring stronger ties to degree-granting institutions, which would better ensure that a student's practical training furthers the student's full course of study in the United States. Finally, ICE and USCIS should take steps to ensure that OPT employment is consistent with U.S. labor market protections to safeguard the interests of U.S. workers in related fields.

C. Promoting Research and Development in the United States

To enhance opportunities for foreign inventors, researchers, and founders of start-up enterprises wishing to conduct research and development and create jobs in the United States, I hereby direct USCIS to implement two administrative improvements to our employment-based immigration system:

First, the "national interest waiver" provided in section 203(b)(2)(B) of the *Immigration and Nationality Act* (INA) permits certain non-citizens with advanced

[4] INA § 101(a)(15)(F)(i), 8 U.S.C. § 101(a)(15)(F)(i).

degrees or exceptional ability to seek green cards without employer sponsorship if their admission is in the national interest.[5] This waiver is underutilized and there is limited guidance with respect to its invocation. I hereby direct USCIS to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S economy.

Second, pursuant to the "significant public benefit" parole authority under section 212(d)(5) of the INA,[6] USCIS should propose a program that will permit DHS to grant parole status, on a case-by-case basis, to inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research. Parole in this type of circumstance would allow these individuals to temporarily pursue research and development of promising new ideas and businesses in the United States, rather than abroad. This regulation will include income and resource thresholds to ensure that individuals eligible for parole under this program will not be eligible for federal public benefits or premium tax credits under the Health Insurance Marketplace of the Affordable Care Act.

D. Bringing Greater Consistency to the L-1B Visa Program

The L-1B visa program for "intracompany transferees" is critically important to multinational companies. The program allows such companies to transfer employees who are managerial or executives, or who have "specialized knowledge" of the company's products or processes to the United States from foreign operations. It is thus an essential tool for managing a global workforce as companies choose where to establish new or expanded operations, research centers, or product lines, all of which stand to benefit the U.S. economy. To date, however, vague guidance and inconsistent interpretation of the term "specialized knowledge" in adjudicating L-1B visa petitions has created uncertainty for these companies.

To correct this problem, I hereby direct USCIS to issue a policy memorandum that provides clear, consolidated guidance on the meaning of "specialized knowledge." This memorandum will bring greater coherence and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program.

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[5] INA § 203(b)(2)(B), 8 U.S.C. § 1153(b)(2)(B).

[6] INA § 205(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

E. Increasing Worker Portability

Currently, uncertainty within the employment-based visa system creates unnecessary hardships for many foreign workers who have filed for adjustment of status but are unable to become permanent residents due to a lack of immigrant visas. Current law allows such workers to change jobs without jeopardizing their ability to seek lawful permanent residence, but only if the new job is in a "same or a similar" occupational classification as their old job. Unfortunately, there is uncertainty surrounding what constitutes a "same or similar" job, thus preventing many workers from changing employers, seeking new job opportunities, or even accepting promotions for fear that such action might void their currently approved immigrant visa petitions.

To help eliminate this uncertainty, I hereby direct USCIS to issue a policy memorandum that provides additional agency guidance, bringing needed clarity to employees and their employers with respect to the types of job changes that constitute a "same or similar" job under current law. This guidance should make clear that a worker can, for example, accept a promotion to a supervisory position or otherwise transition to related jobs within his or her field of endeavor. By removing unnecessary restrictions to natural career progression, workers will have increased flexibility and stability, which would also ensure a more level playing field for U.S. workers.

Exhibit D

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **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**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.
- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

Exhibit E

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Expansion of the Provisional Waiver Program**

By this memorandum, I hereby direct U.S. Citizenship and Immigration Services (USCIS) to issue new regulations and policies with respect to the use of the I-601A provisional waiver to all statutorily eligible applicants.

As you know, under current law certain undocumented individuals in this country who are the spouses and children of U.S. citizens and lawful permanent residents, and who are statutorily eligible for immigrant visas, must leave the country and be interviewed at U.S. consulates abroad to obtain those immigrant visas. If these qualifying individuals have been in the United States unlawfully for more than six months and later depart, they are, by virtue of their departure, barred by law from returning for 3 or 10 years.[1] Current law allows some of these individuals (*i.e.*, a spouse, son, or daughter of a U.S. citizen or permanent resident) to seek a waiver of these 3- and 10-year bars if they can demonstrate that absence from the United States as a result of the bar imposes an "extreme hardship" to a U.S. citizen or lawful permanent spouse or parent.[2] But, prior to 2013, the individual could not apply for the waiver until he or she had left the country for a consular interview.

In January 2013, the Department of Homeland Security (DHS) published a regulation establishing a process that allows a subset of statutorily eligible individuals to apply to USCIS for a waiver of the 3- and 10-year bars before departing abroad for consular interviews.[3] This "provisional" waiver provided eligible individuals with some

[1] Immigration and Nationality Act (INA) § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i).

[2] INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

[3] *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, Fed. Reg. 78-2, 551 (Jan. 3, 2013).

level of certainty that they would be able to return after a successful consular interview and would not be subject to lengthy overseas waits while the waiver application was adjudicated.[4] However, the 2013 regulation extended the provisional waiver process only to the spouses and children of U.S. citizens. In 2013 we did not initially extend the provisional waiver to other statutorily eligible individuals—*i.e.,* the spouses and children of lawful permanent residents and the adult children of U.S. citizens and lawful permanent residents—to assess the effectiveness and operational impact of the provisional waiver process. To date, approximately 60,000 individuals have applied for the provisional waiver, a number that, as I understand, is less than was expected.

Today, I direct DHS to amend its 2013 regulation to expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available. The purpose behind today's announcement remains the same as in 2013—family unity.

As a related matter, I hereby direct USCIS to provide additional guidance on the definition of "extreme hardship." As noted above, to be granted a provisional waiver, applicants must demonstrate that their absence from the United States would cause "extreme hardship" to a spouse or parent who is a U.S. citizen or lawful permanent resident. The statute does not define the term, and federal courts have not specifically defined it through case law.[5] It is my assessment that additional guidance about the meaning of the phrase "extreme hardship" would provide broader use of this legally permitted waiver program.

USCIS should clarify the factors that are considered by adjudicators in determining whether the "extreme hardship" standard has been met. Factors that should be considered for further explanation include, but are not limited to: family ties to the United States and the country of removal, conditions in the country of removal, the age of the U.S. citizen or permanent resident spouse or parent, the length of residence in the United States, relevant medical and mental health conditions, financial hardships, and educational hardships. I further direct USCIS to consider criteria by which a presumption of extreme hardship may be determined to exist.[6]

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[4] 8 C.F.R. 212.7 (e)(3).

[5] *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, Fed. Reg. 78-2, 551 (Jan. 3, 2013).

[6] Such a presumption was previously adopted by regulations implementing the 1997 Nicaraguan Adjustment and Central American Relief Act. Pub. L. No. 105–100. 8 C.F.R. 240.64(d).

Exhibit F

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies for the Apprehension, Detention and Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,* March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens,* June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases,* November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,* December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations,* December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;[1] sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal[2] on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

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[1] In evaluating whether the offense is a significant misdemeanor involving ..domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. *See generally,* John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* June 17, 2011.

[2] For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mr. JOE ARPAIO, Elected SHERIFF of Maricopa County, State of Arizona

Plaintiff,

v.

Mr. BARACK HUSSEIN OBAMA, acting as President of the United States of America

and

Mr. JEH CHARLES JOHNSON, acting as Secretary of the U.S. Department of Homeland Security

and

Mr. LEON RODRIQUEZ, acting as Director of the U.S. Citizenship and Immigration Services

Defendants.

Case 1:14-cv-01966

DECLARATION OF SHERIFF JOE ARPAIO,
IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION

Pursuant to 28 U.S.C. §1746, I, Joe Arpaio, hereby declare under penalty of perjury that the following is true and correct:

1) I am over the age of 18 years old and mentally and legally competent to make this affidavit sworn under oath.
2) By this lawsuit, I am seeking to have the President and the other defendants obey the U.S. Constitution, which prevents the Obama Administration's executive order from having been issued in the first place.
3) The unconstitutional act of the President's amnesty by executive order must be enjoined by a court of law on behalf of not just myself, but all of the American

people.

4) If President Obama's amnesty created by the President's executive order, which was announced on November 20, 2014, is allowed to go into effect, my Sheriff's office responsible for Maricopa County, Arizona, and the people of Maricopa County will suffer significant harm.

5) This unconstitutional act by the president will have a serious detrimental impact on my carrying out the duties and responsibilities for which I am charged as sheriff.

6) Specifically, Obama's amnesty program will severely strain our resources, both in manpower and financially, necessary to protect the citizens I was elected to serve.

7) For instance, among the many negative effects of this executive order, will be the increased release of criminal aliens back onto streets of Maricopa County, Arizona, and the rest of the nation.

8) In addition, the flood of illegal aliens into Arizona will cost my Sheriff's office money and resources to handle.

9) Attached to the Complaint in this case are several news releases from my office giving details of the impacts in my jurisdiction. I attach these news releases again as exhibits to this Declaration, and incorporate herein the statements from my office in the attached news releases. I affirm the accuracy of the news releases attached.

10) President Obama's June 15, 2012, amnesty for adults who arrived illegally as children, which Obama has called Deferred Action for Childhood Arrivals (DACA), has already caused an increased flood of illegal aliens into Arizona in 2014.

11) The increased flow of illegal aliens into U.S. border states has been stimulated by the hope of obtaining U.S. citizenship because of President Obama's six (6) years of

promising amnesty to those who make it to the United States.

12) The increased flow of illegal aliens has caused a significant increase in property damage, crime, and burdened resources in Maricopa County, throughout Arizona, and across the border region.

13) Landowners report large-scale trespassing on their land by illegal aliens transiting from the border into the interior of the country, associated with destruction of property, theft, crimes of intimidation, trespassing, and disruption of using their land.

14) The Sheriff's office witnesses and experiences a noticeable increase in crime within my jurisdiction in Maricopa County, Arizona, resulting from illegal aliens crossing our Nation's border and entering and crossing through border States.

15) Within my jurisdiction, my office must respond to all such reports and investigate.

16) My deputies must be out on the streets, risking their lives, to police the County.

17) I performed a survey of those booked into my jails in Arizona.

18) I found out that over 4,000 illegal aliens were in our jails over the last 8 months, arrested for committing crimes in Maricopa County under Arizona law, such as child molestation, burglary, shoplifting, theft, etc.

19) I found that one third of the 4,000 illegal aliens arrested in Maricopa County had already been arrested previously for having committed different crimes earlier within Maricopa County under Arizona law.

20) These are criminals whom I turned over to ICE for deportation, yet they were obviously not deported or were deported and kept returning to the United States.

21) Some had been in Maricopa County 6, 7, 8 times, and sometimes as many as 25 times.

22) Yet they keep coming back. I want to know why they are not being deported?

23) I am aware that the President claims that he must grant amnesty to illegal aliens because of a lack of resources for enforcing the immigration laws.

24) However, from my perspective and experience, the Federal government is simply shifting the burden and the expense to the States and the Counties and County offices such as mine.

25) I am also aware that the President claims he must grant amnesty to some illegal aliens in order to focus deportation efforts on those illegal aliens who have criminal records or are dangerous.

26) However, I know from my experience in law enforcement in Arizona that that argument is disingenuous.

27) The Obama Administration is evidently not deporting dangerous criminals even when I hand them over to Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security.

28) Even when illegal aliens are booked into my jail for committing crimes in Maricopa County under Arizona State law, and my office hands those criminal over to ICE to be deported, the Obama Administration still does not deport those criminals.

29) In many cases, my Sheriff's office has undertaken the work and expended the resources to apprehend these persons for violating Arizona law.

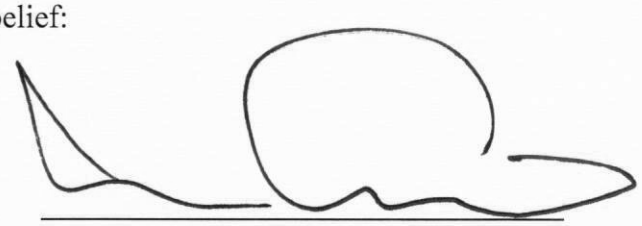
30) Therefore, the problem is not a lack of resources by the Department of Homeland Security, but a lack of desire by the Obama Administration to enforce the law.

31) When you look at the interior of the United States, where ICE is responsible for enforcement, and take the 11 million illegal aliens estimated to be in the country, ICE

has locked up only about 1% of that total.

I hereby swear under oath and penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief:

Dated: December 1, 2014



Mr. JOE ARPAIO, Elected SHERIFF of
Maricopa County, State of Arizona
550 West Jackson Street
Phoenix, Arizona 85003

Exhibit 1

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: November 5, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF ARPAIO MEETS WITH U.S. REPRESENTATIVE SALMON ON POSSIBLE CONGRESSIONAL HEARING ON FEDERAL GOVERNMENT RELEASE OF CRIMINAL ALIENS ONTO AMERICAN STREETS

SHERIFF COMPILES FIGURES TENTH MONTH IN A ROW DOCUMENTING RELEASE OF CRIMINAL ALIENS BACK INTO MARICOPA COUNTY BY IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

(Maricopa County, AZ, November 4, 2014): Sheriff Joe Arpaio of Maricopa County, AZ met with Congressman Matt Salmon (AZ-05) on Monday, November 3, to discuss the possibility of launching a congressional hearing into why Immigration and Customs Enforcement (ICE) keeps releasing illegal aliens charged of crimes back onto the streets of our communities. The Sheriff had previously called for a congressional hearing into this matter.

For the tenth month in a row, Maricopa County Sheriff Joe Arpaio has compiled the disturbing figures that reveal the number of criminal aliens taken by ICE who are arrested again and return to the Maricopa County jail system.

In October 2014, 307 illegal immigrants were arrested by Sheriff's deputies and police officers in Maricopa County and given detainers, or holds by ICE. Of that number, 96 are repeat offenders, having had prior bookings with detainers placed on them, or 31.2% of the total. Among those are two illegal aliens who have been booked into the Sheriff's jails 19 times each, one of which had 11 prior detainers, and, extraordinarily, 4 within the last year. These statistics mirror with rather remarkable consistency what has happened every month of 2014.

During that same month, two California deputy sheriffs were shot and killed by an illegal alien who had previously been incarcerated in Maricopa County jails four times, going back a number of years, and had been deported by ICE twice.

"An individual with this history," Arpaio says, "convicted and deported more than once, should not have been able to get back into this country to commit these murders."

Adding the figures from October onto the numbers already accumulated means that of the 4,172 ICE detainers placed on incoming criminal offenders, 1478, or 35.4%, are repeat offenders.

"We have been compiling and presenting these figures over and over, month after month," says Sheriff Arpaio, "and it seems that no one is paying attention, because of the underlying issues. These policies are contentious and difficult, and it's easier to bury your head in the sand and ignore them. But that's not good enough, not good enough for the public and the public safety, not good enough for national policy.

"Politicians and other officials have to stand up," states Arpaio, "and do their duty, popular or not. The situation is untenable and unacceptable, and that's why, after trying to get a real response from Homeland Security and ICE for months, I contacted Representative Salmon to see what he can do. We met and I will say, without going into specifics at this time, that his response was most encouraging, and I am confident we will be working together to resolve this serious problem before long."

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Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 27, 2014

CONTACT: Sheriff Joe Arpaio

ARPAIO CONCERNED WITH FEDS AFTER TWICE DEPORTED ILLEGAL ALIEN KILLS TWO CALIFORNIA SHERIFF'S DEPUTIES

Suspect Arrested in Maricopa County Four Times

(Maricopa County, AZ) The controversy surrounding an illegal alien who has been charged with killing two California sheriff's deputies and wounding another has taken on fresh urgency as Sheriff Joe Arpaio reveals the details of his prior four arrests by Maricopa County local law enforcement.

Moreover, says the Sheriff, the history surrounding this one illegal alien exposes the inherent dishonesty and ineptitude surrounding the federal government approach to illegal immigration.

For the past 9 months, Sheriff Arpaio, whose jails constitute the third largest system in the country, has been demanding that Immigration and Customs Enforcement (ICE) explain why the agency keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County, located just 30 miles from the border. In pursuit of answers, the Sheriff has written to DHS Secretary Jeh Johnson, the head of ICE, and the DHS Inspector General, never receiving an adequate response.

"I am calling for a congressional hearing," states Arpaio, "to find out why illegal aliens arrested by my deputies and other police officers for often serious crimes are handed over to ICE, only to end up back in my jail, arrested again on more charges. Either ICE is letting these individuals go out the back door, free to commit more crimes, or is the border so open that even though they're being deported they turn around and immediately return?"

The statistics are daunting: For the past 9 months, back to the beginning of 2014, of the approximately 4,000 ICE detainers placing on incoming criminal offenders arrested by local police and Sheriff's deputies in Maricopa County, a stunning 1,382, translating to 38% of the total, were repeat offenders. Nor were these necessarily minor crimes, but encompass the full range of criminal offenses, including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

Now we have the case Marcelo Marquez, known by his alias Luis Bracamonte to the Maricopa County Sheriff's Office (MCSO), which has had him in custody 4 times. Incarcerated for the first time in the county in 1996 for the sale of narcotic drugs and other felonies, he spent 4 months in Arpaio's Tent-City Jail before being released to ICE in 1997. His fate from that point on, whether he was deported or released, is unknown.

In the very next year, 1998, Marquez/Bracamonte was arrested for possession of narcotic drugs and misconduct involving weapons and possession of marijuana. For reasons unknown, he was not held buy ICE but instead released from jail to the streets.

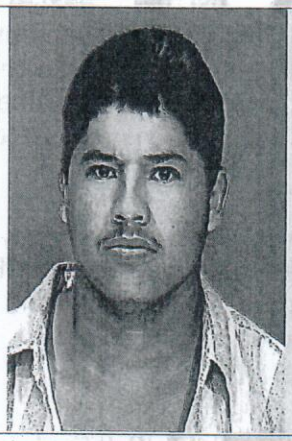
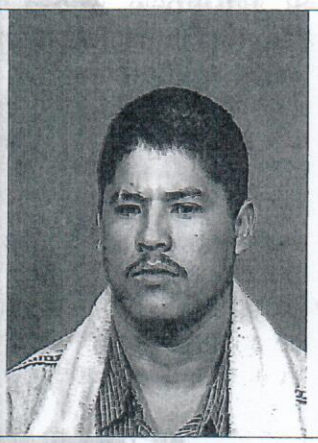
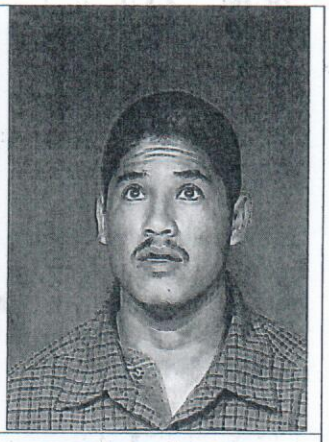
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

What ICE did with him is unknown, but what is certain is that not even 3 months later, on July 26, 2001, he was arrested for failure to appear on drug charges. Marquez/Bracamonte posted bond and was released.

At that point, it appears that Marquez/Bracamonte left Arizona for California or another state, for that is where his history with MCSO ends.

"Now this situation," Arpaio states, "which has always been intolerable, has resulted in tragedy, with 2 sheriff's deputies dead and a third wounded. Now, maybe, I will get the answers I have been calling for month after month. Now, maybe, ICE and the federal government will be called to account for their actions."

MUG SHOTS

Polaroid Picture not Available			
09/27/1996	01/05/1998	05/04/2001	07/26/2001

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 6, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF JOE ARPAIO DEMANDS FEDERAL GOVERNMENT STOP RELEASING CRIMINAL ALIENS IN MARICOPA COUNTY

THE SHERIFF STATES THIS IS A FORM OF "BACKDOOR AMNESTY" BY THE ADMINISTRATION, TO BE FOLLOWED BY OBAMA'S ISSUING BROADER AMNESTY AFTER ELECTION

ARPAIO STANCE IN STARK CONTRAST TO HUNDREDS OF JAILS NATIONWIDE REFUSING TO HOLD ILLEGAL ALIENS FOR ICE

(Maricopa County, AZ) For the ninth month in a row, Maricopa County Sheriff Joe Arpaio is demanding that Immigration and Customs Enforcement (ICE) explain why the agency keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County, located just thirty miles from the border.

The Sheriff's call comes in the face of a growing national refusal by local law enforcement agencies to hold illegal aliens in jail after disposition of their crimes for 48 hours on behalf of ICE. According to published reports, two hundred twenty-five jails from coast to coast have so far adopted this posture.

Sheriff Arpaio could not help but note the irony that as increasing numbers of local law enforcement agencies refuse to work with the federal government, his attempts to do exactly that, including his offer to assist ICE in halting the release of criminal aliens and, beyond that, construct a workable, smart policy to deal with this issue, are ignored. Having served in the Drug Enforcement Administration for over twenty-five years, including stints as the regional director and diplomatic attaché in Mexico, Central and South America, and then as the director in Texas and then Arizona, Arpaio contends he is uniquely qualified to help in this effort.

"The law is being flouted by both the federal government and local law enforcement," states the Sheriff, "for different reasons, to suit their own purposes. That is simply not right. The law needs to be enforced because it is the law and because it is the right thing to do. Deport illegal aliens, and especially criminal aliens, and secure the border so we make sure they don't come

back. Until this is accomplished, I repeat my demand, as I have repeatedly done in letters to the Secretary of Homeland Security Johnson, the DHS Inspector General, and the head of Immigration Control and Enforcement, for an investigation as to how and why these criminal aliens are neither kept in jail nor deported.

Meanwhile, criminal aliens continue to plague the streets of Maricopa County, as demonstrated by the Maricopa County Sheriff's Office, which has compiled figures that show that of the 318 illegal immigrants arrested by local law enforcement in Maricopa County in September 2014, 105, or 33% of the total group, are repeat offenders. This mirrors what has happened every month of this year, when at least one-third of all illegal immigrants arrested by Sheriff's deputies and police officers are repeat offenders. In fact, adding the totals for 2014 together, of the 3,865 ICE detainers placed on incoming criminal offenders, a stunning 1,382, translating to 36% of the whole, were repeat offenders.

The release of criminal aliens back in the community is a form of "backdoor amnesty," says the Sheriff, "to be followed after the November elections by President Obama issuing an executive order granting widespread amnesty to millions of illegal aliens."

Nor are the crimes committed by criminal aliens insignificant. One such individual arrested in September, a verified Mexican Mafia prison gang member with seven prior arrests including aggravated assault with a weapon, arson, riot, and five INS detainers, had also been charged with six counts of murder in 2004. He received a seventeen-year sentence. Now somehow out of prison, he has been arrested again.

That individual is hardly alone in his multiple arrests. This month alone, two different criminal aliens have each had fifteen prior arrests, while two others account for eleven each. Another has fifteen and one more has sixteen, a total topped last month by one individual who had been arrested twenty-five times. Furthermore, as has been noted month after month, the offenses committed by criminal aliens have run the gamut of serious crimes, including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

"The situation is not only intolerable," says Sheriff Arpaio, "but it is also getting worse. The growing conflict between the federal government and local law enforcement over what to do about illegal aliens and criminal aliens is endangering the citizens of the United States. Combine that with the ongoing threat of an open border, through which not only criminals but also terrorists can enter this country, and we have a major problem that demands immediate attention. My office and I stand ready, as always, to help in any way possible to protect the American people and the integrity of our nation."

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
www.mcso.org

550 West Jackson Street
Phoenix, AZ 85003

September 23, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, DC 20258

Dear Secretary Johnson:

Thank you for your response dated September 3, 2014.

I appreciate your offer to meet in Washington, DC. Prior to that meeting I would like to stress, once again, that what I primarily seek is not a procedural review by DHS, but a thorough investigation into a very serious and pressing problem. The situation to which I have referred several times in my letters, to not only you, but also to ICE Principal Deputy Assistant Secretary Winkowski and DHS Inspector General John Roth, in which Immigration and Customs Enforcement keeps releasing illegal aliens who have already been convicted of crimes and then arrested, yet again, by local law enforcement back on the streets of Maricopa County. This policy endangers both law enforcement officers and the public by not keeping such criminal offenders in jail or deporting them and making sure they cannot so readily cross the border again.

As I have previously written, I am ready to deploy the considerable resources of my agency to help in this investigation. I have ICE officers in my jails and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. It should be noted that, in the past, your organization trained and certified 150 of my deputies, giving them the authority to enforce our illegal immigration laws; a partnership that highlighted my commitment to assist the federal government in taking on this most serious issue.

As for me, after serving as the regional director for the U.S. Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as, in Texas and Arizona, and 22 years as the elected sheriff of the third largest Sheriff's Office in the country – located only thirty miles from the border, I understand the difficulties in securing that border, as well as, dealing with the complex issue of illegal immigration. I agree to assist in any way possible in order to resolve these problems.

Sincerely,

Joseph M. Arpaio
Sheriff

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: September 4, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF ARPAIO PETITIONS THE FEDERAL GOVERNMENT TO STOP RELEASING ILLEGAL ALIENS CHARGED WITH CRIMINAL OFFENSES

(Phoenix, AZ,)For the eighth time in as many months, Maricopa County Sheriff Joe Arpaio is pressing his demand in a letter expedited to the Inspector General of Homeland Security that Immigration and Customs Enforcement (ICE) explain why the agency continually releases illegal aliens convicted of crimes back onto the streets of Maricopa County, the most populated Arizona county located just thirty miles from the border. In addition, Arpaio's letter reiterates his intention to renew his call for a congressional investigation if answers and action are not forthcoming.

The Maricopa County Sheriff's Office, headed by Arpaio, has compiled figures showing that of the 379 illegal immigrants arrested by local law enforcement in Maricopa County in August 2014, 128, or 33.7% of the total group, are repeat offenders. This mirrors what has happened every month of this year, when at least one-third of all illegal immigrants arrested by Sheriff's deputies and police officers are repeat offenders. In fact, adding the totals for 2014 together, of the 3,547 ICE detainers placed on incoming criminal offenders, a stunning 1,277, translating to 36% of the whole, were repeat offenders.

These crimes are not insignificant.

In August alone, one illegal alien with 12 prior arrests, including four ICE detainers, was arrested yet again, and this time on attempted murder charges. That crime was hardly unique in its violence or seriousness, for many illegal aliens have been charged with committing every variety of crime including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

And it is not just the severity of the offense but also the number of times many offenders have been arrested.

Again this August, one illegal alien had 25 prior arrests, with nine prior ICE detainers, before being arrested this time. He is hardly alone: Some illegal immigrants have been arrested, not once, not twice, but multiple times, some more than a dozen. In point of fact, the 128 repeat offenders in July account for 214 separate charges.

Arpaio notes that he has no doubt the Department of Homeland Security Secretary Johnson, the head of ICE and the DHS Inspector General, are tired to receiving his letters. Nevertheless, the Sheriff has pledged to not give up and to make certain that appropriate action is taken.

Arpaio, who has worked in Mexico and on the US border for twelve years as the top US Drug Enforcement Administration official, and for the past twenty-two years as the Sheriff of Maricopa County, vows to continue fighting international crime – and that includes keeping the people of Maricopa County safe from the serious criminals that ICE keeps releasing on our streets.

The answer is not complicated, says Arpaio: "Do what the law says by deporting these criminals, and then make sure they don't come back."

Now, notes Arpaio, we face another issue on our border - the potential that terrorists will enter America to attack us.

"Everyone in the world knows the border is open," says Arpaio. "Don't you think the terrorists know it, too?"

In his letter to the Inspector General, the Sheriff offered to help the federal government in any way possible to get these criminals put away or deported, and beyond that, to construct a workable, smart policy to deal with these issues. The Sheriff's Office already has ICE officers working in his jail system, and other ICE agents cross-certified by the Sheriff to act as deputy sheriffs in order to enforce the laws of Maricopa County.

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Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 3, 2014

Joseph M. Arpaio
Sheriff, Maricopa County
550 West Jackson Street
Phoenix, Arizona 85003

Dear Sheriff Arpaio:

Thank you for your June 30 and August 4, 2014 letters.

You are correct that on June 25 I visited the U.S. Customs and Border Protection's Processing Center in Nogales, Arizona. While there I met with Governor Jan Brewer and Nogales Mayor Arturo Garino.

Since taking office, I have been reviewing our existing immigration and border enforcement practices and procedures in order to assess how the Department of Homeland Security can conduct its important enforcement mission more humanely within the confines of the law. As part of that effort, we have been meeting with a range of external stakeholders including Members of Congress, law enforcement, and non-governmental organizations. If you visit Washington, I would be pleased to meet with you to discuss the issues you raise.

Sincerely,

Jeh Charles Johnson

September 3, 2014

Inspector General John Roth
Office of Inspector General/Mail Stop 0305
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Dear Inspector General Roth:

I am writing to you once again in the matter of illegal aliens being summarily released back by Immigration Control and Enforcement (ICE) into my jurisdiction of Maricopa County, Arizona, without undergoing the due process of law, despite so many having had prior criminal records, despite being in this country illegally.

For the eighth month in a row, the facts reveal that of the 379 illegal immigrants arrested by local law enforcement in Maricopa County in August 2014 and given detainers by ICE, no fewer than 128, or 33.7% of the total, are repeat offenders. Furthermore, those 128 repeat offenders account for a total of 214 prior bookings. Over the months their crimes span the range of serious offenses, including aggravated assault with a deadly weapon, armed robbery, kidnapping, molestation of a child, sexual abuse, dangerous drugs, conspiracy and even attempted murder.

In fact, August saw one illegal alien with 12 prior arrests, including 4 ICE detainers, arrested once more on a charge of attempted murder. Another illegal alien, also arrested in August, had already totaled 25 prior arrests, including 9 detainers.

After eight months of looking into this issue and adding up the numbers, the Maricopa County Sheriff's Office has found 2014 that of 3,547 ICE detainers placed on individuals arrested by local law enforcement in Maricopa County and booked into my jails on criminal charges, a stunning 1,277, or 36%, more than one-third, were repeat offenders.

These statistics point to only two contingencies: First, ICE is quietly releasing them rather than detain and either charge them and try them here or deport them to their own countries, and second, that the border is so porous that even for those deported, they quickly return to this country to break more laws. The truth is that both of these situations are happening: ICE is releasing illegal aliens back onto the streets, and the border is open for easy passage.

Putting aside the outrageous flaunting of both the law and ICE's own protocols, I am personally concerned because ICE's actions endanger both my deputy sheriffs and the county's other law enforcement officers who are keeping our streets safe and the public they protect. This situation is hardly a new development, extending far beyond the 8 months covered in this study. My office's investigation shows that

many of these individuals were released, sometimes many times, some more than a dozen, some more than twenty times, going back years. Thus, the problem and the awareness of the problem is not a recent matter, but a long-term issue.

In the course of 2014, I have written to you, to ICE Principal Deputy Assistant Secretary Winkowski and to Homeland Security Secretary Jeh Johnson. Replies, on the rare occasions when they have been forthcoming, are limited to benign, bureaucratic statements, designed to lead nowhere. I want real responses to a very serious problem, and I once more ask that your office conduct an investigation.

As I written over and over, I am ready to deploy the considerable resources of my organization to help in this investigation. I will state once again that I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. As for me, after serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

I look forward to hearing from you.

Thank you.

Exhibit 2

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: August 14, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF JOE ARPAIO DEMANDS DHS INSPECTOR GENERAL INVESTIGATE FEDERAL GOVERNMENT'S ONGOING RELEASE OF ALIEN CRIMINALS IN MARICOPA COUNTY

(Phoenix, AZ) After monthly studies going back seven months, and sending the statistics showing how Immigration and Customs Enforcement (ICE) is releasing illegal aliens convicted of crimes back onto the streets of Maricopa County to DHS Secretary Jeh Johnson in an attempt to get answers, Sheriff Joe Arpaio is now demanding an investigation by the DHS Inspector General.

The seven-month total compiled by the Maricopa County Sheriff's Office reveals that for 2014 thus far, of the 3,168 ICE detainers placed on incoming criminal offenders arrested by local law enforcement, incarcerated in the county jail, and passed to ICE, a stunning 1,149, or 36.3%, were repeat offenders. The crimes committed by these individuals included the range of serious and dangerous crimes, including though not limited to kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, various drug felonies, and more. Some of the immigrants have been arrested multiple times, some more than a dozen.

As Sheriff Arpaio has pointed out to Secretary Johnson in his four letters accompanying the figures, this dismal situation can only exist if ICE is not deporting criminals, as required by law, or if the borders are so open that the deported criminals easily return to the U.S.

Of course, the answer is some combination of the two factors.

"I've been writing to Secretary Johnson, offering my help and asking for answers and receiving nothing but bureaucratic form letters in return," says the Sheriff. "This is more than a serious situation, this is dangerous and intolerable, and I have no choice but to request that the Inspector General for Homeland Security look into the matter. And if I receive the same sort of useless response from the Inspector General as I have received the past seven months," states the Sheriff, "then I will no option but to call for a congressional investigation."

The Department of Homeland Security just admitted that it did wrongly release hundreds of criminal aliens in 2013, blaming congressional budgetary constraints for the reason. In the wake of that admission, politicians have called for changes to ICE's actions.

Regardless, as the Sheriff points out, DHS's explanation does not account as to why the releases persist, what criteria is used to determine which criminals are released, how far back these practices can be traced, and more – and the Sheriff is not satisfied.

The Sheriff's letter sent today to DHS Inspector General John Roth is attached.

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
www.mcso.org

550 West Jackson Street
Phoenix, AZ 85003

August 13, 2014

Inspector General John Roth
Office of Inspector General/Mail Stop 0305
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Dear Inspector General Roth:

Despite the report released today by your office – or, more accurately because of it – I am writing you to insist that your office conduct a more thorough and broad-reaching investigation.

Your report covers the actions of Immigration Customs and Enforcement (ICE) for one year, 2013, and the agency's release of thousands of illegal aliens, including hundreds with criminal records, instead of pursuing prosecution or deportation. The reason given for these transgressions, to cut to the chase, is budgetary.

The Maricopa County Sheriff's Office has conducted our own investigation into the matter for the past seven months, from the beginning of 2014, and has recorded that of 3,168 ICE detainers placed on individuals arrested by local law enforcement in Maricopa County and booked into my jails on criminal charges, a stunning 1,149, or 36.3%, more than one-third, were repeat offenders.

The significance of this cannot be overstated, as ICE has released these people who end up back on the streets of my county, endangering both my deputy sheriffs and police officers who keep those streets safe and the public they protect. And we are not talking about 2013 and those budget constraints, for our seven-month investigation covers 2014. Furthermore, our study shows that these individuals were released, sometimes many times, some more than a dozen, some more than twenty times, going back years. Thus, the problem and the awareness of the problem is not a recent matter, but a long-term issue.

This is far from my first attempt to ask the Department of Homeland Security to take notice. As you will see by the accompanying letters, I have written to Secretary Jeh Johnson four times, (the most recent having been dispatched August 4) each letter accompanied by a new set of statistics that bolster our case. Though ICE Principal Deputy Assistant Secretary Winkowski has sent replies, they have been general, bureaucratic statements and thus nonresponsive in any meaningful way. I want real answers to a very serious issue, and so I request that your office conduct an investigation, in the hope that answers will be forthcoming and I will not have to demand a congressional inquiry.

As I wrote Secretary Johnson, I am prepared to deploy the considerable resources of my organization to help in this investigation. As you might know, I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. As for me, after serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

I look forward to hearing from you.

Sincerely,

Joseph M. Arpaio
Sheriff

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: August 5, 2014

CONTACT: Sheriff Joe Arpaio

FOR 7TH MONTH IN ROW, SHERIFF JOE ARPAIO DEMANDS FEDS EXPLAIN WHY THEY CONTINUE TO RELEASE ALIEN CRIMINALS IN MARICOPA COUNTY

SHERIFF MAY CALL FOR CONGRESSIONAL INVESTIGATION IF DHS KEEPS STALLING

(Phoenix, AZ, August 5, 2014): For the seventh time in seven months, Maricopa County Sheriff Joe Arpaio is pressing his demand in letters sent to Secretary of Homeland Security Jeh Johnson that Immigration and Customs Enforcement (ICE) explain why the federal government keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County. This time, however, the Sheriff may insist on a congressional investigation if answers and action are not forthcoming.

Figures compiled by the Maricopa County Sheriff's Office show that in July 2014 of the 393 illegal immigrants arrested by local law enforcement in Maricopa County, 139, or 35.3% of the total group, are repeat offenders. This continues the unbroken pattern recorded by the Sheriff's Office since the start of the year. In fact, adding the totals for 2014 together, of the 3,168 ICE detainers placed on incoming criminal offenders, a stunning 1,149, translating to 36.3% of the whole, were repeat offenders.

Furthermore, the crimes committed by these individuals spanned the range of serious and dangerous offenses, including though not limited to kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, various drug felonies, and more. Some illegal immigrants have been arrested multiple times, some more than a dozen. In point of fact, the 139 repeat offenders in July account for an astonishing 500 separate charges.

As the Sheriff has written to Secretary Johnson month after month, the only way this situation can exist is if ICE is not deporting criminals, as the law requires, or if the borders are so porous that the deported criminals virtually immediately return to the U.S. Of course, the answer is some combination of those two factors.

"I have said it before and I will say it again," states Sheriff Arpaio, "this situation is intolerable. It violates federal policy. It knowingly, needlessly places the citizens of Maricopa County in danger. I have written Secretary of Homeland Secretary Jeh Johnson several times always sending him the facts and figures that we have assembled, asking for an explanation. While I have received perfunctory responses from a deputy official, we have not received anything resembling a satisfactory answer.

"The Obama Administration is going to great lengths to ensure the well-being of the young illegal immigrants crossing our borders, and a reasonable case can be made for that on humanitarian grounds. The people of Maricopa County should be worthy of the same concern. Don't we deserve real answers? Don't we deserve real action?"

In addition to asking for a meeting with Secretary Johnson, Sheriff Arpaio has also offered to assist ICE, which has officers working in his jail system and whose agents are cross-certified by the Sheriff to act as deputy sheriffs in order to enforce the laws of Maricopa County, in investigating and resolving these issues.

"I previously served as the regional director for the US Drug Enforcement Administration (DEA), which was part of the U.S. Department of Justice. I served in Mexico, Central and South America, as well as in Texas and Arizona," says the Sheriff. "I know the border, I know the issues, I know the people on both sides of the border. I am ready to help solve the problems this country faces."

In his letter to the Secretary, Arpaio relates the story of one illegal immigrant to personify the horrific reality behind these statistics. Armando Rodriguez was arrested on February 13, 2014 and charged with theft and giving false information to a law enforcement officer. This was not Mr. Rodriguez's first arrest; indeed, he had been previously arrested on two separate occasions, beginning some thirteen years ago – a long time, not incidentally, to be living illegally in this country. In those instances, the charges included a variety of drug and burglary offenses. Thus, by the time of his February 13, 2014 arrest, Mr. Rodriguez, in addition to his

current charges, had already compiled a record worthy of deportation under ICE guidelines. Nonetheless, he was released, for whatever reason, despite being given an ICE detainer. The result was that just five months later, on July 29, 2014, Mr. Rodriguez was arrested yet again and this time his charges were two counts of sexual conduct with a minor, three counts of attempted sexual conduct with a minor, kidnapping, aggravated assault, sexual abuse, molestation of a child, and furnishing obscene material to a child. It is hard to think of more terrible crimes, crimes that in this instance, assuming the charges are proved true, could not have been committed if the federal government had done what it should have done - deported Armando Rodriguez.

Once again, Sheriff Arpaio vows to maintain the pressure on the federal government to not only get answers but also force changes in policy and procedure to protect the people of Maricopa County and the entire United States.

"We're done just sending letters and waiting for a satisfactory response," Arpaio says. "If we don't get real action, not just the usual Washington bureaucratic refrain, may insist that Congress step up and look into the matter. We must solve this problem." (see attached for previous letters sent to Homeland Security Secretary Johnson) ###

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
www.mcso.org

550 West Jackson Street
Phoenix, AZ 85003

August 4, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20258

Dear Secretary Johnson:

Thank you for your organization's recent response, received July 10, 2014, to my letter. While I appreciate the detailing of ICE's enforcement priorities, it would seem that the issues I have raised, and continue to raise, directly impact, to quote your letter "the promotion of national security, border security, public safety, and the integrity of the immigration system." Yet Homeland Security and ICE have consistently pursued policies that contravene those goals. I am speaking in particular of the fact that some one-third of the illegal immigrants arrested by law enforcement in Maricopa County and booked into my jails have already been arrested on a wide range of serious criminal charges – and many of them multiple times.

For the seventh month in a row, the facts show that of the 393 illegal immigrants arrested by local law enforcement in Maricopa County in July 2014, no fewer than 139, or 35.3% of the total, are repeat offenders. Their crimes include a full range of serious offenses – aggravated assault with a deadly weapon, armed robbery, kidnapping, molestation of a child, sexual abuse, dangerous drugs, conspiracy, and more – just as we have seen every month we have looked at the statistics.

Finally, adding the numbers from the past seven months together, 3,168 ICE detainers were placed in incoming criminal offenders, and of those, a stunning 1,149, or 36.3%, more than one-third, were repeat offenders.

Let us use one example alone to exemplify the horrific reality behind these statistics. Armando Rodriguez was arrested on February 13, 2014, and charged with theft and giving false information to a law enforcement officer. This was not Mr. Rodriguez's first arrest; indeed, he had been previously arrested on two separate occasions, beginning some thirteen years ago – a long time, not incidentally, to be living illegally in this country. In those instances, the charges included a variety of drug and burglary offenses. Thus, by the time of his February 13, 2014, arrest, Mr. Rodriguez, in addition to his current charges, had already compiled a record worthy of deportation under ICE guidelines. Nonetheless, he was released, for whatever reason, despite being given an ICE detainer. The result was that just five months later, on July 29, 2014, Mr. Rodriguez was arrested yet again and this time his charges were two counts of sexual conduct with a minor, three counts of attempted sexual conduct with a minor, kidnapping, aggravated assault, sexual abuse, molestation of a child, and furnishing obscene material to a child. It is hard to think of more terrible crimes, crimes that in

this instance, assuming the charges are proved true, could not have been committed if the federal government had done what it should have done - deported Armando Rodriguez.

That case, together with all the statistics, demonstrate what I have said over and over: That when local law enforcement arrests illegal immigrants on criminal charges and turns them over to the federal government, the federal government, in the form of Homeland Security and ICE, either quietly releases them back onto our streets or deports them, the result being they quickly and with obvious ease make their way back to our community.

Both actions are unacceptable. The first, releasing those with immigration detainers from jail without consequences, free to commit new crimes, is an outrage against the people of Maricopa County. The second, allowing those deported to so readily return to this country, is an insult to all Americans.

I am once again requesting a meeting with you to discuss this intolerable situation. I am ready to work with ICE on this matter. As you know, I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County.

I am prepared to put the considerable resources of my organization to use in helping ICE identify, track and re-arrest those criminals released in our county. After serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

After ignoring the growing problem for so long, it is interesting to watch the Administration scramble to handle the thousands upon thousands of children crossing the border. As important as dealing with that issue is, it pales in comparison with the reality that the federal government, sworn to protect us, simply releases illegal immigrants charged with serious crimes to roam free on our streets.

It has been widely reported that President Obama intends to declare some form of summary amnesty for perhaps millions of illegal immigrants sometime after Labor Day. Can the federal government guarantee that many among that enormous number will not be criminals, charged and yet released by that government? Can the government guarantee that those given amnesty will not commit more crimes against American citizens?

All these questions demand answers, and the situation as it now stands cannot be allowed to continue. I am determined to see this through on behalf of the people of Maricopa County.

Sincerely,

Joseph M. Arpaio
Sheriff

Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mr. JOE ARPAIO, Elected SHERIFF of Maricopa County, State of Arizona

Plaintiff,

v.

Mr. BARACK HUSSEIN OBAMA, acting as President of the United States of America

and

Mr. JEH CHARLES JOHNSON, acting as Secretary of the U.S. Department of Homeland Security

and

Mr. LEON RODRIQUEZ, acting as Director of the U.S. Citizenship and Immigration Services

Defendants.

Case 1:14-cv-01966

DECLARATION OF JONATHON MOSELEY, FREEDOM WATCH, IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION

Pursuant to 28 U.S.C. §1746, I, Jonathon Moseley, hereby declare under penalty of perjury that the following is true and correct:

1) I am over the age of 18 years old and mentally and legally competent to make this affidavit sworn under oath.
2) I searched the publicly released budget information for the United States Immigration and Customs Enforcement (ICE) and United States Citizenship and Immigration Services (USCIS) components of the United States Department of Homeland Security, at the websites of the Office of Management and Budget and the Department of Homeland Security.

3) The published budgets and budget requests of the U.S. Department of Homeland Security, technically admissions by a party-opponent, report the following information which was submitted to Congress by the U.S. Department of Homeland Security and now posted on the Department's website at http://www.dhs.gov/dhs-budget.

4) Those segments of the President's budgetary request to Congress applying to ICE and to USCIS for each fiscal year recites the amount of funding requested by the Department for ICE and USCIS and the amount actually appropriated by Congress in the prior fiscal year.

5) The U.S. Congress appropriated about $814 million more for ICE than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

6) The U.S. Congress appropriated nearly $465 million more for USCIS than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

Immigration and Customs Enforcement (ICE)

2006	Budget Request:	$4,364,270,000	Congress Appropriated	$3,879,443,000
2007	Budget Request:	$4,696,932,000	Congress Appropriated	$4,726,641,000
2008	Budget Request:	$5,014,500,000	Congress Appropriated	$5,576,080,000
2009	Budget Request:	$5,676,085,000	Congress Appropriated	$5,948,210,000
2010	Budget Request:	$5,762,800,000	Congress Appropriated	$5,741,752,000
2011	Budget Request:	$5,835,187,000	Congress Appropriated	$5,748,339,000
2012	Budget Request:	$5,822,576,000	Congress Appropriated	$5,862,453,000
2013	Budget Request:	$5,644,061,000	Congress Appropriated	$5,879,064,000
2014	Budget Request:	$5,341,722,000	Congress Appropriated	$5,610,663,000

U.S. Citizenship and Immigration Services (USCIS)

2006	Budget Request:	$1,854,000,000	Congress Appropriated	$1,887,850,000
2007	Budget Request:	$1,985,990,000	Congress Appropriated	$1,985,990,000
2008	Budget Request:	$2,568,872,000	Congress Appropriated	$2,619,173,000
2009	Budget Request:	$2,689,726,000	Congress Appropriated	$2,690,926,000
2010	Budget Request:	$2,867,232,000	Congress Appropriated	$2,859,997,000
2011	Budget Request:	$2,812,357,000	Congress Appropriated	$3,029,829,000
2012	Budget Request:	$2,906,865,000	Congress Appropriated	$3,078,465,000
2013	Budget Request:	$3,005,383,000	Congress Appropriated	$3,005,383.000
2014	Budget Request:	$3,219,466,000	Congress Appropriated	$3,217,236,000

7) I am engaged as an independent contractor performing occasional legal services part-time for the Plaintiff Freedom Watch, Inc.

8) I am familiar with the budgetary information and historical tables published by the Office of Management and Budget, a part of the Executive Office of the President, including as posted on the website of OMB.

9) I earned a Bachelors of Science in Business Administration with a major in Finance from the University of Florida in Gainesville, Florida.

10) I studied an additional year of post-graduate accounting at the University of Florida.

11) I worked from 1987 through 1992 as a management analyst in the United States Department of Education (USED).

12) While working at USED, I became directly familiar as part of my work with the budget of the United States and the budgeting process for the Federal Departments.

13) In fact, I was "hired" to work at OMB on the basis of being detailed from USED to

OMB while remaining on the USED payroll, but the use of a Full Time Equivalent (FTE) slot to detail me to OMB was not approved by the Office of Management.

14) While working in the Executive Office of the Office of Bilingual Education and Minority Languages Affairs (OBEMLA), I prepared the budget requests for OBEMLA to the United States Congress to be forwarded through OMB, including the briefing books to prepare the Director of OBEMLA, Alica Coro, to testify in support of the budget request in Congress, under the delegation and direction of the Executive Officer of OBEMLA.

15) I left the U.S. Department of Education in 1992 to attend George Mason University School of Law in Arlington, Virginia.

16) As a result, I am directly familiar from my professional work with the budgetary process for Federal Departments, the budget requests prepared and submitted to Congress, and the historical budgetary tables and reports of the U.S. Government.

I hereby swear under oath and penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief:

Jonathon Moseley, Esq.

Dated: December 1, 2014

Freedom Watch, Inc.
2020 Pennsylvania Ave. NW, Suite 345
Washington, DC 20006
Tel: (310) 595-0800

204 South Main Avenue #3
Lake Placid, Florida 33852
Cell: (703) 656-1230
Fax: (703) 783-0449
Contact@JonMoseley.com

Exhibit I

The White House

Office of the Press Secretary

For Immediate Release June 30, 2014

Remarks by the President on Border Security and Immigration Reform

Rose Garden

3:04 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. One year ago this month, senators of both parties — with support from the business, labor, law enforcement, faith communities — came together to pass a commonsense immigration bill.

Independent experts said that bill would strengthen our borders, grow our economy, shrink our deficits. As we speak, there are enough Republicans and Democrats in the House to pass an immigration bill today. I would sign it into law today, and Washington would solve a problem in a bipartisan way.

But for more than a year, Republicans in the House of Representatives have refused to allow an up-or-down vote on that Senate bill or any legislation to fix our broken immigration system. And I held off on pressuring them for a long time to give Speaker Boehner the space he needed to get his fellow Republicans on board.

Meanwhile, here's what a year of obstruction has meant. It has meant fewer resources to strengthen our borders. It's meant more businesses free to game the system by hiring undocumented workers, which punishes businesses that play by the rules, and drives down wages for hardworking Americans. It's meant lost talent when the best and brightest from around the world come to study here but are forced to leave and then compete against our businesses and our workers. It's meant no chance for 11 million immigrants to come out of the shadows and earn their citizenship if they pay a penalty and pass a background check, pay their fair share of taxes, learn English, and go to the back of the line. It's meant the heartbreak of separated families.

That's what this obstruction has meant over the past year. That's what the Senate bill would fix if the House allowed it to go to a vote.

Our country and our economy would be stronger today if House Republicans had allowed a simple yes-or-no vote on this bill or, for that matter, any bill. They'd be following the will of the majority of the American people who support reform. Instead, they've proven again and again that they're unwilling to stand up to the tea party in order to do what's best for the country. And the worst part about it is a bunch of them know better.

We now have an actual humanitarian crisis on the border that only underscores the need to drop the politics and fix our immigration system once and for all. In recent weeks, we've seen a surge of unaccompanied children arrive at the border, brought here and to other countries by smugglers and traffickers.

The journey is unbelievably dangerous for these kids. The children who are fortunate enough to survive it will be taken care of while they go through the legal process, but in most cases that process will lead to them being sent back home. I've sent a clear message to parents in these countries not to put their kids through this. I recently sent Vice President Biden to meet with Central American leaders and find ways to address the root causes of this crisis. Secretary Kerry will also be meeting with those leaders again tomorrow. With our international partners, we're taking new steps to go after the dangerous smugglers who are putting thousands of children's lives at risk.

Today, I sent a letter to congressional leaders asking that they work with me to address the urgent humanitarian challenge on the border, and support the immigration and Border Patrol agents who already apprehend and deport hundreds of thousands of undocumented immigrants every year. And understand, by the way, for the most part,

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this is not a situation where these children are slipping through. They're being apprehended. But the problem is, is that our system is so broken, so unclear that folks don't know what the rules are.

Now, understand –- there are a number of Republicans who have been willing to work with us to pass real, commonsense immigration reform, and I want to thank them for their efforts. There are a number of Republican leaders in the Senate who did excellent work and deserve our thanks. And less visibly, there have been folks in the House who have been trying to work to get this done. And quietly, because it doesn't always help me to praise them, I've expressed to them how much I appreciate the efforts that they've made.

I believe Speaker Boehner when he says he wants to pass an immigration bill. I think he genuinely wants to get something done. But last week, he informed me that Republicans will continue to block a vote on immigration reform at least for the remainder of this year. Some in the House Republican Caucus are using the situation with unaccompanied children as their newest excuse to do nothing. Now, I want everybody to think about that. Their argument seems to be that because the system is broken, we shouldn't make an effort to fix it. It makes no sense. It's not on the level. It's just politics, plain and simple.

Now, there are others in the Republican Caucus in the House who are arguing that they can't act because they're mad at me about using my executive authority too broadly. This also makes no sense. I don't prefer taking administrative action. I'd rather see permanent fixes to the issue we face. Certainly that's true on immigration. I've made that clear multiple times. I would love nothing more than bipartisan legislation to pass the House, the Senate, land on my desk so I can sign it. That's true about immigration, that's true about the minimum wage, it's true about equal pay. There are a whole bunch of things where I would greatly prefer Congress actually do something. I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. And in this situation, the failure of House Republicans to pass a darn bill is bad for our security, it's bad for our economy, and it's bad for our future.

So while I will continue to push House Republicans to drop the excuses and act –- and I hope their constituents will too — America cannot wait forever for them to act. And that's why, today, I'm beginning a new effort to fix as much of our immigration system as I can on my own, without Congress. As a first step, I'm directing the Secretary of Homeland Security and the Attorney General to move available and appropriate resources from our interior to the border. Protecting public safety and deporting dangerous criminals has been and will remain the top priority, but we are going to refocus our efforts where we can to make sure we do what it takes to keep our border secure.

I have also directed Secretary Johnson and Attorney General Holder to identify additional actions my administration can take on our own, within my existing legal authorities, to do what Congress refuses to do and fix as much of our immigration system as we can. If Congress will not do their job, at least we can do ours. I expect their recommendations before the end of summer and I intend to adopt those recommendations without further delay.

Of course, even with aggressive steps on my part, administrative action alone will not adequately address the problem. The reforms that will do the most to strengthen our businesses, our workers, and our entire economy will still require an act of Congress. And I repeat: These are reforms that already enjoy the wide support of the American people. It's very rare where you get labor, business, evangelicals, law enforcement all agreeing on what needs to be done. And at some point, that should be enough. Normally, that is enough. The point of public service is to solve public problems. And those of us who have the privilege to serve have a responsibility to do everything in our power to keep Americans safe and to keep the doors of opportunity open.

And if we do, then one year from now, not only would our economy and our security be stronger, but maybe the best and the brightest from around the world who come study here would stay and create jobs here. Maybe companies that play by the rules will no longer be undercut by companies that don't. Maybe more families who've been living here for years, whose children are often U.S. citizens, who are our neighbors and our friends, whose children are our kids' friends and go to school with them, and play on ball teams with them, maybe those families would get to stay together. But much of this only happens if Americans continue to push Congress to get this done.

So I've told Speaker Boehner that even as I take those steps that I can within my existing legal authorities to make the immigration system work better, I'm going to continue to reach out to House Republicans in the hope that they deliver a more permanent solution with a comprehensive bill. Maybe it will be after the midterms, when they're less worried about politics. Maybe it will be next year. Whenever it is, they will find me a willing partner. I have been consistent in saying that I am prepared to work with them even on a bill that I don't consider perfect. And the Senate bill was a good example of the capacity to compromise and get this done. The only thing I can't do is stand by and do nothing while waiting for them to get their act together.

And I want to repeat what I said earlier. If House Republicans are really concerned about me taking too many executive actions, the best solution to that is passing bills. Pass a bill; solve a problem. Don't just say no on something that everybody agrees needs to be done. Because if we pass a bill, that will supplant whatever I've done administratively. We'll have a structure there that works, and it will be permanent. And people can make plans and businesses can make plans based on the law. And there will be clarity both here inside this country and outside it.

Let me just close by saying Friday is the Fourth of July. It's the day we celebrate our independence and all the things that make this country so great. And each year, Michelle and I host a few hundred servicemembers and wounded warriors and their families right here on the lawn for a barbecue and fireworks on the Mall.

And some of the servicemembers coming this year are unique because they signed up to serve, to sacrifice, potentially to give their lives for the security of this country even though they weren't yet Americans. That's how

much they love this country. They were prepared to fight and die for an America they did not yet fully belong to. I think they've earned their stripes in more ways than one. And that's why on Friday morning we're going to naturalize them in a ceremony right here at the White House. This Independence Day will be their first day as American citizens.

One of the things we celebrate on Friday –- one of the things that make this country great –- is that we are a nation of immigrants. Our people come from every corner of the globe. That's what makes us special. That's what makes us unique. And throughout our history, we've come here in wave after wave from everywhere understanding that there was something about this place where the whole was greater than the sum of its parts; that all the different cultures and ideas and energy would come together and create something new.

We won this country's freedom together. We built this country together. We defended this country together. It makes us special. It makes us strong. It makes us Americans. That's worth celebrating. And that's what I want not just House Republicans but all of us as Americans to remember.

Thanks very much.

END
3:21 P.M. EDT

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DECEMBER 2, 2014

His Own Words: Obama Said He Doesn't Have Authority For Executive Amnesty 22 Times

Katie Pavlich

11/19/2014 12:00:00 PM - Katie Pavlich

According to a report in POLITICO, President Obama is expected to make good on his executive amnesty threat on Friday during an event in Las Vegas, despite saying repeatedly over the years that he does not have the authority to change immigration laws from the Oval Office.

House Speaker John Boehner, who warned the President shortly after the 2014 midterm elections that acting alone on immigration would "poison the well," has taken notice of Obama's past statements. After some research, his office found President Obama directly claimed ***22 times*** he couldn't take executive action on immigration because he doesn't have the authority.

Over the weekend President Obama was questioned during an overseas trip about his change in position with executive action looming and tried to argue his position on the extent of his authority to change immigration law hasn't changed at all.

"Actually, my position hasn't changed. When I was talking to the advocates, their interest was in me, through executive action, duplicating the legislation that was stalled in Congress," Obama told reporters.

When Obama says he was speaking with "advocates," he's referring to radio interviews on programs with open-border hosts, at La Raza events and during a number of interviews conducted by Univision and Telemundo. Here are a few examples:

October 2010: Obama on Immigration Reform "I am Not a King"

> "My cabinet has been working very hard on trying to get it done, but ultimately, I think somebody said the other day, I am president, I am not king," Obama told Univision in October 2010, when asked why he had yet to achieve comprehensive immigration reform.

March 2011: Remarks by the President Univision Townhall

> "America is a nation of laws, which means I, as the President, am obligated to enforce the law. I don't have a choice about that. That's part of my job. But I can advocate for changes in

> the law so that we have a country that is both respectful of the law but also continues to be a great nation of immigrants. ... With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed .... [W]e've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. And then the judiciary has to interpret the laws. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President."

> "I swore an oath to uphold the laws on the books .... Now, I know some people want me to bypass Congress and change the laws on my own. Believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."

January 2013: Pres. Obama Defends Deportation Record: 'I'm Not A King'

> "I'm not a king. My job as the head of the executive branch ultimately is to carry out the law," Obama told Telemundo. "When it comes to enforcement of our immigration laws, we've got some discretion. We can prioritize what we do. But we can't simply ignore the law."

February 2013: Obama: 'I Am Not a Dictator'

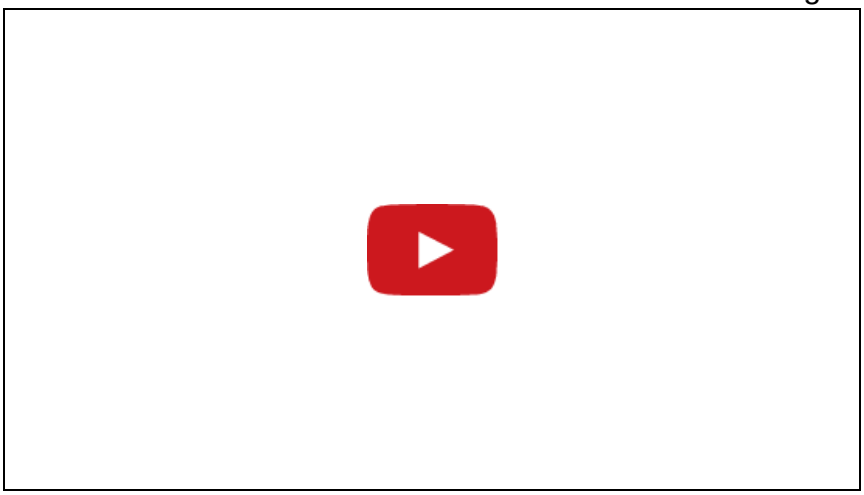
> "I can't do these things just by myself." He reiterated that sentiment in a February 2013 interview with Telemundo. "I'm not a king," he said.

FactCheck.org, *The New York Times*, and *The Washington Post* aren't buying Obama's argument and make it clear the President has in fact changed his position.

> This is a flagrant untruth: "In fact, most of the questions that were posed to the president over the past several years were about the very thing that he is expected to announce within a matter of days," reported The New York Times. "[T]he questions actually specifically addressed the sorts of actions that he is contemplating now," The Washington Post's Fact Checker agreed, awarding President Obama the rare "Upside-Down Pinocchio," which signifies "a major-league flip-flop." Even FactCheck.org piled on.

Obama's argument that his "position hasn't changed" and that "when I was talking to the advocates, their interest was in me, through executive action, duplicating the legislation that was stalled in Congress," falls far short of explaining away his statement about a lack of authority. Not to mention, regardless of whether legislation is stalled in Congress, the President still doesn't have the authority to rewrite or issue an executive order mirroring pending legislation.

Yesterday ABC's Jon Karl asked White House Press Secretary Josh Earnest if President Obama still doesn't view himself as the "emperor" of the United States as he refuses to work with Congress on illegal immigration reform. From MRC:



> "Does the President still stand by what he said last year when he said, 'I am not the emperor of the United States; my job is to execute laws that are passed.' Is that still operative?" asked Jonathan Karl, reporter for ABC, during Tuesday's White House press briefing.
>
> "Absolutely," replied White House Press Secretary Josh Earnest.
>
> "Not a king either?" asked Karl, to audience chuckles.
>
> "That's right," said Earnest flatly.

There are a few explanations for President Obama moving forward to change illegal immigration law despite his own statements and objections from Congress and even liberal attorneys like Jonathan Turley. The first is that the President is an ideologue with nothing to lose politically at this point. Obama isn't up for re-election, he only has two years left and Democrats just lost in huge numbers at every level of government across the country. There's no longer anything to save. Obama is interested in his legacy with the Left, not with the country as a whole. Second, the President is interested in fighting with Republicans, not working with them, and his latest move on illegal immigration proves it. The President is essentially daring Republicans to look at ways to address executive action and is hoping to get impeachment on the table in order to suck up all of the media oxygen and hysteria for the remainder of his term. Further, Obama knows if Republicans choose to address his executive action through the courts, he'll be out of office before the legal fight is over. Obama doesn't have much, if anything to lose and has made it clear he doesn't care much about the constitutionality of what he's about to do, despite claiming his coming action doesn't fall within his constitutional authority over the past six years.

Conn has your rundown on what Republicans will do after Obama goes through with executive action on Friday.

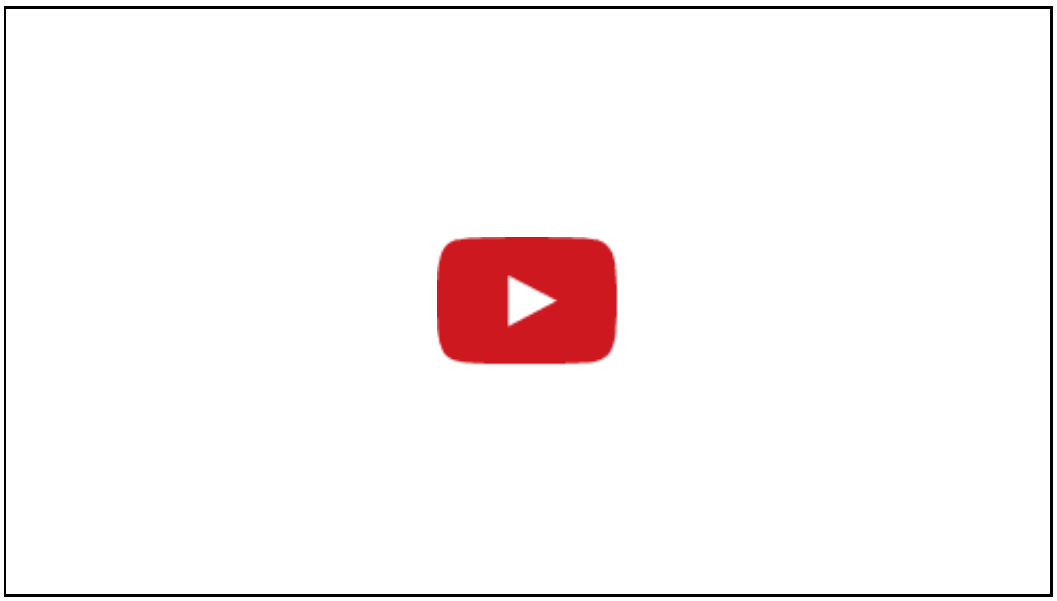
I'll leave you with this:

> Yikes RT @mmurraypolitics: Tease from our new NBC/WSJ poll: 48% oppose Obama taking executive action on immigration, while 38% support it
>
> — Noah Rothman (@NoahCRothman) November 19, 2014

BEN SHAPIRO'S TRUTH REVOLT

Obama Admits He 'Changed Law' With Executive Order

11.26.2014 | **News** (http://www.truthrevolt.org/news) | **O'Connor** (http://www.truthrevolt.org/author/larry-oconnor)



President Barack Obama was shouted at by hecklers Tuesday during a speech designed to rally support for his executive action granting amnesty for some individuals who entered and/or remained in the country illegally.

Obama turned and responded to the hecklers (who were advocating even *more* amnesty) by saying, "What you're not paying attention to is the fact that I just took an action to change the law."

This is an interesting, and potentially damning, admission against interest for the former law professor.

In his recent interviews defending his Executive Order Obama has insisted that he was merely advising departments responsible for enforcing immigration laws to utilize "prosecutorial discretion" when applying the law under certain

circumstances. But he has insisted (correctly) that only Congress can "change a law."

In fact, over the years President Obama has continually insisted that he can't change the law. Speaker (http://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law#sthash.RroR3chq.dpuf) John Boehner's office offers the detailed account of 22 instances when publicly said so:

1. “I take the Constitution very seriously. The biggest problems that we’re facing right now have to do with [the president] trying to bring more and more power into the executive branch and not go through Congress at all. And that’s what I intend to reverse when I’m President of the United States of America.” (3/31/08)
2. “We’ve got a government designed by the Founders so that there’d be checks and balances. You don’t want a president who’s too powerful or a Congress that’s too powerful or a court that’s too powerful. Everybody’s got their own role. Congress’s job is to pass legislation. The president can veto it or he can sign it. … I believe in the Constitution and I will obey the Constitution of the United States. We're not going to use signing statements as a way of doing an end-run around Congress.” (5/19/08)
3. “Comprehensive reform, that's how we're going to solve this problem. … Anybody who tells you it's going to be easy or that I can wave a magic wand and make it happen hasn't been paying attention to how this town works.” (5/5/10)
4. “[T]here are those in the immigrants’ rights community who have argued passionately that we should simply provide those who are [here] illegally with legal status, or at least ignore the laws on the books and put an end to deportation until we have better laws. ... I believe such an indiscriminate approach would be both unwise and unfair. It would suggest to those thinking about coming here illegally that there will be no repercussions for such a decision. And this could lead to a surge in more illegal immigration. And it would also ignore the millions of people around the world who are waiting in line to come here legally. Ultimately, our nation, like all nations, has the right and obligation to control its borders and set laws for residency and citizenship. And no matter how decent they are, no matter their reasons, the 11 million who broke these laws should be held accountable.” (7/1/10)
5. “I do have an obligation to make sure that I am following some of the rules. I can't simply ignore laws that are out there. I've got to work to make sure that they are changed.” (10/14/10)
6. “I am president, I am not king. I can't do these things just by myself. We have a system of government that requires the Congress to work with the Executive Branch to make it happen. I'm committed to making it happen, but I've got to have some partners to do it. … The main thing we have to do to stop deportations is to change the laws. … [T]he most important thing that we can

do is to change the law because the way the system works – again, I just want to repeat, I'm president, I'm not king. If Congress has laws on the books that says that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. But there's a limit to the discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself. So the most important thing that we can do is focus on changing the underlying laws." (10/25/10)

7. "America is a nation of laws, which means I, as the President, am obligated to enforce the law. I don't have a choice about that. That's part of my job. But I can advocate for changes in the law so that we have a country that is both respectful of the law but also continues to be a great nation of immigrants. … With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed …. [W]e've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. And then the judiciary has to interpret the laws. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President." (3/28/11)
8. "I can't solve this problem by myself. … [W]e're going to have to have bipartisan support in order to make it happen. … I can't do it by myself. We're going to have to change the laws in Congress, but I'm confident we can make it happen." (4/20/11)
9. "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one." (4/29/11)
10. "Sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that's not how a democracy works. What we really need to do is to keep up the fight to pass genuine, comprehensive reform. That is the ultimate solution to this problem. That's what I'm committed to doing." (5/10/11)
11. "I swore an oath to uphold the laws on the books …. Now, I know some people want me to bypass Congress and change the laws on my own. Believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written." (7/25/11)
12. "So what we've tried to do is within the constraints of the laws on the books, we've tried to be as fair, humane, just as we can, recognizing, though, that the laws themselves need to be changed. … The most important thing for your

viewers and listeners and readers to understand is that in order to change our laws, we've got to get it through the House of Representatives, which is currently controlled by Republicans, and we've got to get 60 votes in the Senate. … Administratively, we can't ignore the law. … I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true. … We live in a democracy. You have to pass bills through the legislature, and then I can sign it. And if all the attention is focused away from the legislative process, then that is going to lead to a constant dead-end. We have to recognize how the system works, and then apply pressure to those places where votes can be gotten and, ultimately, we can get this thing solved." (9/28/11)

13. In June 2012, President Obama unilaterally granted deferred action for childhood arrivals (DACA), allowing "eligible individuals who do not present a risk to national security or public safety … to request temporary relief from deportation proceedings and apply for work authorization." He then argued that he had already done everything he could legally do on his own: "Now, what I've always said is, as the head of the executive branch, there's a limit to what I can do. Part of the reason that deportations went up was Congress put a whole lot of money into it, and when you have a lot of resources and a lot more agents involved, then there are going to be higher numbers. What we've said is, let's make sure that you're not misdirecting those resources. But we're still going to, ultimately, have to change the laws in order to avoid some of the heartbreaking stories that you see coming up occasionally. And that's why this continues to be a top priority of mine. … And we will continue to make sure that how we enforce is done as fairly and justly as possible. But until we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we're going to continue to be bound by the law. … And so part of the challenge as President is constantly saying, 'what authorities do I have?'" (9/20/12)
14. "We are a nation of immigrants. … But we're also a nation of laws. So what I've said is, we need to fix a broken immigration system. And I've done everything that I can on my own[.]" (10/16/12)
15. "I'm not a king. I am the head of the executive branch of government. I'm required to follow the law. And that's what we've done. But what I've also said is, let's make sure that we're applying the law in a way that takes into account people's humanity. That's the reason that we moved forward on deferred action. Within the confines of the law we said, we have some discretion in terms of how we apply this law." (1/30/13)
16. "I'm not a king. You know, my job as the head of the executive branch

ultimately is to carry out the law. And, you know, when it comes to enforcement of our immigration laws, we've got some discretion. We can prioritize what we do. But we can't simply ignore the law. When it comes to the dreamers, we were able to identify that group and say, 'These folks are generally not a risk. They're not involved in crime. … And so let's prioritize our enforcement resources.' But to sort through all the possible cases of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform. To make sure that once and for all, in a way that is, you know, ratified by Congress, we can say that there is a pathway to citizenship for people who are staying out of trouble, who are trying to do the right thing, who've put down roots here. … My job is to carry out the law. And so Congress gives us a whole bunch of resources. They give us an order that we've got to go out there and enforce the laws that are on the books. … If this was an issue that I could do unilaterally I would have done it a long time ago. … The way our system works is Congress has to pass legislation. I then get an opportunity to sign it and implement it." (1/30/13)

17. "This is something I've struggled with throughout my presidency. The problem is that I'm the president of the United States, I'm not the emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic. ... [W]e've kind of stretched our administrative flexibility as much as we can[.]" (2/14/13)
18. "I think that it is very important for us to recognize that the way to solve this problem has to be legislative. I can do some things and have done some things that make a difference in the lives of people by determining how our enforcement should focus. … And we've been able to provide help through deferred action for young people …. But this is a problem that needs to be fixed legislatively." (7/16/13)
19. "My job in the executive branch is supposed to be to carry out the laws that are passed. Congress has said 'here is the law' when it comes to those who are undocumented, and they've allocated a whole bunch of money for enforcement. And, what I have been able to do is to make a legal argument that I think is absolutely right, which is that given the resources that we have, we can't do everything that Congress has asked us to do. What we can do is then carve out the DREAM Act folks, saying young people who have basically grown up here are Americans that we should welcome. … But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option. … What I've said is there is a there's a path to get this done, and that's through Congress." (9/17/13)
20. "[I]f, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use

our democratic processes to achieve the same goal that you want to achieve. … It is not simply a matter of us just saying we're going to violate the law. That's not our tradition. The great thing about this country is we have this wonderful process of democracy, and sometimes it is messy, and sometimes it is hard, but ultimately, justice and truth win out." (11/25/13)

21. "I am the Champion-in-Chief of comprehensive immigration reform. But what I've said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do. What I've done is to use my prosecutorial discretion, because you can't enforce the laws across the board for 11 or 12 million people, there aren't the resources there. What we've said is focus on folks who are engaged in criminal activity, focus on people who are engaged in gang activity. Do not focus on young people, who we're calling DREAMers …. That already stretched my administrative capacity very far. But I was confident that that was the right thing to do. But at a certain point the reason that these deportations are taking place is, Congress said, 'you have to enforce these laws.' They fund the hiring of officials at the department that's charged with enforcing. And I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books. That's why it's so important for us to get comprehensive immigration reform done this year." (3/6/14)
22. "I think that I never have a green light [to push the limits of executive power]. I'm bound by the Constitution; I'm bound by separation of powers. There are some things we can't do. Congress has the power of the purse, for example. … Congress has to pass a budget and authorize spending. So I don't have a green light. … My preference in all these instances is to work with Congress, because not only can Congress do more, but it's going to be longer-lasting." (8/6/14)

Issues Illegal Immigration (http://www.truthrevolt.org/issues/illegal-immigration)
Immigration (http://www.truthrevolt.org/issues/immigration)

People Barack Obama (http://www.truthrevolt.org/people/barack-obama)

the weekly Standard
www.weeklystandard.com

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Obama Admits: 'I Just Took an Action to Change the Law'

Calls it a "fact."

Daniel Halper

November 25, 2014 7:42 PM

The White House has argued that President Obama's executive amnesty order last week was made well within the existing law. But in remarks in Chicago tonight, President Obama went off script and admitted that in fact he unilaterally made changes to the law.

President Obama made the admission after getting heckled for several minutes by immigration protesters.

Watch here:

"All right, OK. OK. I understand," Obama told the protesters after letting them go on for some time. "Listen. Hold on, hold on, hold on. Young lady, young lady, don't just -- don't just start -- don't just start yelling, young ladies. Sir, why don't you sit down, too?

"Listen, you know -- here. Can I just say this, all right? I've listened to you. I heard you. I heard you. I heard you. All

right? Now I have been respectful, I let you holler. All right? So let me just -- nobody is removing you. I have heard you, but you have got to listen to me, too. All right? And I understand you may disagree, I understand you may disagree. But we have got to be able to talk honestly about these issues, all right?

"Now, you're absolutely right that there have been significant numbers of deportations. That's true. **But what you are not paying attention to is the fact that I just took an action to change the law**."

The United States Constitution says the legislative power is held by Congress, not by the president.

Source URL: http://www.weeklystandard.com/blogs/obama-admits-i-just-took-action-change-law_820167.html

Exhibit J

Thursday, December 4 2014

Opinions

Obama has already won the immigration fight

Republicans from the House of Representatives spoke out Tuesday ahead of a vote this week to go on record as disapproving President Obama's executive actions on illegal immigration. (AP)

By Dana Milbank Opinion writer December 2

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Among the many ways Republican members of Congress are contemplating to punish President Obama for his executive actions on immigration is a proposal of elegant

simplicity: They would refuse to invite him to the Capitol to give his State of the Union address.

Yes, that should do the job. And if this doesn't force Obama to back down from his executive orders, Republican lawmakers can escalate by unfriending him on Facebook and unfollowing him on Twitter. If even this fails, they can take the extreme step of having their Christmas cards from the Obamas returned to sender. Surely, the president then would have no choice but to relent.

Dana Milbank writes about political theater in the nation's capital. He joined the Post as a political reporter in 2000.
View Archive

The State of the Union dis-invitation, in other words, would be precisely as effective as all the other ideas Republicans are contemplating, which is to say entirely ineffective. There will be more spluttering and stomping and shouting about Obama's illegal and unconstitutional activities, but pay no attention. In the immigration stare-down, Republicans have already blinked. Unwilling to squander their new majority and public support by risking a government shutdown, they are quickly falling in line behind symbolic protests.

My Post colleague Robert Costa has heard Republican lawmakers floating no fewer than nine possible responses, from the frivolous (the State of the Union snub) to the outrageous (impeachment). But all signs indicate Republicans have abandoned attempts to defund Obama's executive actions under the threat of a shutdown — at least for now. Instead, they plan to keep the government running through Sept. 30, probably allowing immigration-

related spending to lapse earlier next year. This would be paired with a symbolic vote blocking Obama's executive actions.

Even the author of that token bill, Rep. Ted Yoho (R-Fla.), admits it would be useless unless the still-Democratic Senate passes it and Obama signs it. Why would either do that?

"Well, you brought up a great point," Yoho acknowledged as he emerged from a meeting with Republican colleagues in the Capitol basement Tuesday. "It can be a symbolic message . . . I'm relying on you to get this message out to the American people so that it is not a lame-duck message."

Message delivered, congressman. But it won't help.

Rep. Steve King (R-Iowa), perhaps the most outspoken immigration hard-liner in the House, left the meeting criticizing his colleagues for going soft. "We need to shut off the funding to this president's lawless act, nothing else, but I don't know if there's enough will in that room to defend the Constitution yet," he said.

And how many share this view? “I think that there’s a majority that agree with me but there’s not yet a majority that are ready to fight.”

If the will to fight is not there now, when Republicans’ anger about immigration is fresh, it’s not clear why they think they’d have better luck threatening a shutdown next year. That may be why Heritage Action, a powerful conservative group, issued a statement while House Republicans met Tuesday declaring: “The fight is now, not next year. Americans expect real action, not a show vote.”

John Boehner was unpersuaded. After his caucus meeting, which ran a half-hour over schedule, the House speaker acknowledged to reporters that his members “understand that it’s going to be difficult to take meaningful action as long as we’ve got Democratic control of the Senate.”

ABC News’s Jeff Zeleny asked him if he was, as Heritage claimed, holding a “show vote.”

“Frankly, we have limited options and limited abilities to deal with it directly,” Boehner conceded.

“Is a shutdown off the table?” NBC’s Luke Russert called after Boehner as he left. The speaker didn’t reply — but the answer was obvious, as rank-and-file Republicans, even faithful conservatives, left the meeting almost uniformly disavowing interest in a shutdown.

That leaves symbolic protest.

Michael McCaul (R-Tex.), chairman of the House Homeland Security Committee, hauled in Homeland Security Secretary Jeh Johnson Tuesday for a tongue-lashing about the executive orders. "Unprecedented executive power-grab," McCaul fumed. "The president has deliberately and willfully broken the trust that is needed between our branches of government." The chairman demanded that Johnson reconcile the actions with Obama's previous statements indicating such orders would be illegal.

Johnson was calm and mild in his response. "I do not believe that what we have done is inconsistent," he said. "We spent a lot of time with lawyers."

Republican members of the panel continued to rail against the policy (Utah's Jason Chaffetz played a gotcha video of Obama, to which the secretary replied, "very nice") but Johnson declined to be drawn into an argument. He didn't have to: Obama had already won.

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Read more about this topic:

The Post's View: On immigration, the GOP should make the next move

Dana Milbank: Obama's big immigration mistake

Charles Krauthammer: Republicans must seize the day

Exhibit K

In it, but not of it. TPM DC

The GOP's War On Obama's Executive Action Lasted About 5 Minutes

AP Photo / Susan Walsh

By Sahil Kapur Published December 3, 2014, 6:00 AM EST 85870 views

Five months ago, conservative were so livid over President Barack Obama's upcoming "executive amnesty" that incoming House Majority Whip Steve Scalise (R-LA) couldn't bring himself to rule out impeaching the president as punishment.

Now, even firebrand Rep. Steve King (R-IA) and Sen. Jeff Sessions (R-AL), Obama's chief immigration foes, have ruled that out. GOP leaders were never seriously considering the idea, but they've successfully tamped down any talk of it.

What's more, Republicans may be on the brink of avoiding a government shutdown fight, at least until March, and effectively permitting the executive actions by "Emperor Obama," as Speaker John Boehner's (R-OH) office has dubbed him, with no pushback other than a symbolic vote of disapproval.

Republicans don't have the votes for this watered down plan yet, and it could still collapse. But it has significant GOP support, a sign that the fury has calmed quite a bit.

How did things change so much?

Many Republicans gradually realized that they have no realistic chance of stopping Obama, at least while they control only one chamber of Congress before January, and have heeded calls from leadership to put off the fight until they take over the Senate and expand their House majority in January.

"You need to utilize every political means that you can in the environment that you're in. We have limited capabilities now politically, with one house of government," freshman Rep. Robert Pittenger (R-NC) said.

"We're not going to take that bait," Rep. Dennis Ross (R-FL) said of a potential shutdown. "We learned from what happened last time. We also learned that no matter what we do until we get a dance partner in the Senate ... we've got to be realistic. And shutting down the government is not a realistic alternative at this juncture."

And for all their fighting words, many Republican members never had much of an appetite for another government shutdown in less than two years.

"Almost no members want to get back into what happened last year," Rep. Devin Nunes (R-CA), a vocal GOP critic of the 2013 shutdown, told TPM. "If you find some, let me know. They're an endangered species."

Even if Congress manages to pass the "CRonmibus" bill to keep the government running while funding the Department of Homeland Security only through March, Boehner is raising expectations for a major fight early next year that could spin out of his control, much as the 2013 battle over Obamacare did. The conservatives who were talked out of a fight this time may feel the need to wage one early next year when they have a larger presence in Congress.

"This is a serious breach of our Constitution, it's a serious threat to our system of governing," Boehner told reporters. "And frankly, we have limited options, limited ability to deal with it directly."

The chief advocates demanding that Republicans act to thwart Obama now, not later, at the risk of a shutdown are King, Sessions, the tea party group Heritage Action (which called the Boehner plan "a blank check for amnesty") and RedState editor Erick Erickson (who called on Boehner to "[p]ut up or shut up").

"Symbolic protest votes are a move that lacks the testicular fortitude of real conviction," Erickson wrote.

Republican leaders also privately worry that an all-out brawl against an immigration policy that Hispanic voters strongly support could damage their party's hopes in the 2016 presidential election.

With House Minority Leader Nancy Pelosi (D-CA) staunchly opposed to the CRomnibus, Boehner may not be able to rely on many Democratic votes to help pass the proposal. If it passes the House, Senate Majority Leader Harry Reid (D-NV) signaled that the upper chamber will take it up. (But he said he won't allow a vote on the House measure to disapprove of Obama's moves.)

The deadline to fund the government is Dec. 11. Boehner's plan is not yet a done deal, but if he pulls it off it will be a sign of restraint by a party whose third-ranking House leader, Scalise, just weeks ago called Obama a "go-it-alone president hell-bent on forcing his radical agenda via subterfuge."

About The Author

Sahil Kapur Follow @sahilkapur

Sahil Kapur is TPM's senior congressional reporter and Supreme Court correspondent. His articles have been published in the Huffington Post, The Guardian and The New Republic. Email him at sahil@talkingpointsmemo.com and follow him on Twitter at @sahilkapur.



Exhibit L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mr. JOE ARPAIO, Elected SHERIFF of Maricopa County, State of Arizona

Plaintiff,

v.

Mr. BARACK HUSSEIN OBAMA, acting as President of the United States of America

and

Mr. JEH CHARLES JOHNSON, acting as Secretary of the U.S. Department of Homeland Security

and

Mr. LEON RODRIQUEZ, acting as Director of the U.S. Citizenship and Immigration Services

Defendants.

Case 1:14-cv-01966

DECLARATION OF JONATHON MOSELEY, FREEDOM WATCH, IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION AUTHENTICATION OF DEFENDANTS' DOCUMENTS

Pursuant to 28 U.S.C. §1746, I, Jonathon Moseley, hereby declare under penalty of perjury that the following is true and correct:

1) I am over the age of 18 years old and mentally and legally competent to make this affidavit sworn under oath.
2) On November 20, 2014, starting at 8 PM Eastern Standard Time, I watched over the television news networks as President Barack Obama announced his new "Executive Action" program of granting deferred action status (essentially amnesty to a limited extent) to illegal aliens in the United States.

3) Simultaneously with President Obama's speech, the U.S. Department of Homeland Security (DHS) posted an announcement page to correspond with the President's speech on the Department of Homeland Security's public internet website. This page was and is aimed at the general public, news media, and others, and publicly viewable without restriction.

4) The announcement page is http://www.dhs.gov/immigration-action titled "Fixing Our Broken Immigration System Through Executive Action - Key Facts"

5) At that DHS announcement page, DHS has posted publicly, for public viewing without restriction, links for the general public to download and view the key documents relating to the Defendants' new "Executive Action" programs on immigration.

6) From the Department of Homeland Security website, I downloaded the documents which are attached to the Plaintiff's Motion for Preliminary Injunction as Exhibit A and Exhibits C through F.

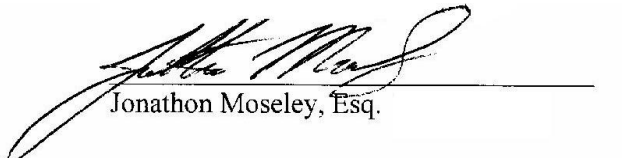
7) Also on November 20, 2014, the U.S. Department of Justice, Office of Legal Counsel, posted the legal memorandum, publicly and without restriction for public viewing, a copy of which is attached as Exhibit B. I downloaded from the U.S. Department of Justice website the document that is attached as Exhibit B to this Motion for Preliminary Injunction.

8) On December 2, 2014, the same Office of Legal Counsel (OLC) legal memorandum was introduced into the record as evidence in a hearing in the Judiciary Committee of the U.S. House of Representatives by Ranking Member Congressman John Conyers. *See* "Executive Action on Immigration," House Judiciary Committee, C-SPAN, December 2, 2014, http://www.c-span.org/video/?323021-1/house-judiciary-committee-hearing-

executive-action-immigration

9) The OLC memorandum attached as Exhibit B was made available to the public intentionally and knowingly, as presented on the DoJ's website, as legal justification in support of the Defendants' "Executive Action" programs to grant deferred action status (amnesty) to millions of illegal aliens in the country.

I hereby swear under oath and penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief:



Jonathon Moseley, Esq.

Dated: December 4, 2014

Freedom Watch, Inc.
2020 Pennsylvania Ave. NW, Suite 345
Washington, DC 20006
Tel: (310) 595-0800

204 South Main Avenue #3
Lake Placid, Florida 33852
Cell: (703) 656-1230
Fax: (703) 783-0449
Contact@JonMoseley.com