

Written Testimony of

**Stephen H. Legomsky**  
**The John S. Lehmann University Professor**  
**Washington University School of Law**  
[ [Legomsky@wulaw.wustl.edu](mailto:Legomsky@wulaw.wustl.edu) ]

Before the

**United States House of Representatives**  
**Committee on the Judiciary**

**February 25, 2015**

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

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

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

---

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

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

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

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

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

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

---

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

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

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

<sup>5</sup> For a powerful criticism of Judge Hanen’s opinion in *Texas 2015*, see Anil Kalhan, *Is Judge Hanen’s Smackdown of Executive Action on Immigration “Narrowly Crafted”?*, Dorf on Law (Feb. 21, 2015), <http://www.dorfonlaw.org/2015/02/is-judge-hanens-smackdown-of-executive.html> (observing that the opinion is chock full of factual exaggerations, false statements of the evidence, selective citation of evidence, and distortions of the government’s legal arguments).

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

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

*1. Prosecutorial Discretion*

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

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

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

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

---

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

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

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

A principal feature of the removal system is the broad discretion exercised by immigration officials. ... *Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.* ...

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

*Id.* at 2499 [emphasis added].

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

---

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

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

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

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

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

*Id.* at 831-32.

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

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

---

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

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

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

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

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

## 2. *Deferred Action*

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

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

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

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

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

---

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

legislation to preclude it or even restrict it.

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

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

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

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

---

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



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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

The judge similarly credited Mr. Palinkas’s unsupported, and wildly inaccurate, assertion of “a 99.5% approval rate for all DACA applications.” *Texas 2015* at 109 n.101, citing Palinkas Doc., para. 8. Yet the detailed data that USCIS had long posted on its public website shows an approval rate of only 95% — a number Judge Hanen casually minimized as coming from “other sources.” *Texas 2015* at 109 n.101. The actual denial rate of 5%, in other words, was approximately 10 times the 0.5% denial rate that Mr. Palinkas had invented. See USCIS website, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf) (through Sept. 30, 2014).<sup>10</sup>

---

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

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

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

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

---

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

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

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

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

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

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

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

---

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

<sup>12</sup> The court also held the plaintiff lacked standing to bring the suit.

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

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

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

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

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

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

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

### 3. *Work Permits*

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

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

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

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



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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **C. Other miscellaneous objections similarly fail.**

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

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

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

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

Because the critics have also attempted to distinguish the actions of previous Presidents, a few observations about those comparisons might be helpful. In the past several decades, almost every President has used his executive powers to grant temporary reprieves from removal, and temporary permission to work, to large, definable classes of undocumented immigrants — for humanitarian, foreign policy, or other legitimate reasons. See, e.g., *Arpaio v. Obama*, above, at 6 (summarizing some of the recent Presidents’ actions); Bridge Project, *Executive Actions Speak Louder than Words*, <http://www.bridgeproject.com/wp/assets/Executive-Action-8.8.14.pdf>; American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_5.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_5.pdf).

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

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

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

INS memo that cites S. Rep. No. 99-131 (99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 343 (1985)). See [http://www.prwatch.org/files/ins\\_family\\_fairness\\_memo\\_oct\\_21\\_1987.pdf](http://www.prwatch.org/files/ins_family_fairness_memo_oct_21_1987.pdf). A Chicago Tribune article adds: “The law said nothing about legalizing children or spouses who came after the start of 1982. *Although Congress considered including them, conservative groups who opposed letting more immigrants into the country derailed the idea.* Moreover, Congress mistakenly assumed that the legalized immigrants would patiently petition the government to let their relatives into the United States” [emphasis added]. Chicago Tribune (Aug. 24, 1990), [http://articles.chicagotribune.com/1990-08-24/news/9003110433\\_1\\_illegal-immigrants-immigrant-families-deport](http://articles.chicagotribune.com/1990-08-24/news/9003110433_1_illegal-immigrants-immigrant-families-deport). The fear was that including the family members could jeopardize passage in the House, where the vote was expected to be extremely close (and in fact was -- the legalization program ended up passing the House by only seven votes). IPC Chronology, above. And on October 7, 1987, the Senate defeated an amendment that would have put the spouses and children on a path to legalization. Two weeks later, the Reagan Administration announced its program for the spouses even as the INS was acknowledging the “clear” intent of Congress to exclude the family members from the IRCA legalization program. *Id.* Thus, even Professor Ting’s representation that Presidents Reagan and Bush *thought* Congress’s omission of the family members was an oversight in the drafting is not true.

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

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



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

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

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

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

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

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

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

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

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

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

## II STANDING

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

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

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

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

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

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

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

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

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

### III

#### THE ADMINISTRATIVE PROCEDURE ACT: NOTICE AND COMMENT RULEMAKING

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

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

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

### A Word on Policy

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

### **Conclusion**

---

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

<sup>15</sup> White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration* (2014), [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf); Elizabeth H. Shuler, Secretary-Treasurer, AFL-CIO, Statement to the U.S. Senate Committee on the Judiciary, *Keeping Families Together: The President’s Executive Action on Immigration and the Need to Pass Comprehensive Reform* (December 10, 2014), <http://www.judiciary.senate.gov/imo/media/doc/12-10-14ShulerTestimony.pdf>, at 2-3.

<sup>16</sup> *Id.*

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

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

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