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DEPARTMENT OF HOMELAND SECURITY

THURSDAY, JULY 19, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:13 a.m., in room 2141, Rayburn Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, Lungren, Chabot, Forbes, King, Franks, Gohmert, Poe, Chaffetz, Gowdy, Ross, Adams, Quayle, Amodei, Conyers, Nadler, Scott, Watt, Lofgren, Waters, Pierluisi, and Chu.

Staff Present: (Majority) Richard Hertling, Staff Director and Chief Counsel; Travis Norton, Counsel; Holt Lackey, Counsel; David Lazar, Clerk; (Minority) Perry Apelbaum, Staff Director and Chief Counsel; Danielle Brown, Counsel; David Shahoulian, Counsel; and Tom Jawetz, Counsel.

Mr. SMITH. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this hearing, and especially Secretary Napolitano, and appreciate her giving us the time today.

I will recognize myself for an opening statement, and then the Ranking Member.

Welcome, again, Secretary Napolitano, to today's oversight hearing of the Department of Homeland Security. DHS is responsible for the enforcement of America's immigration laws. But under the current Administration, the department seems instead to work to undermine those laws, and it has actively worked to make sure that many others do not enforce our immigration laws either.

Obama administration officials recently decided to grant amnesty under the guise of "deferred action," and also work authorization, to potentially millions of illegal immigrants. This unprecedented decision ignores the rule of law that is the foundation of our democracy. In exercising its responsibility to see that the laws are faithfully executed, the Executive Branch does have the power of prosecutorial discretion on a case-by-case basis, but this authority cannot be used to systematically dismantle our immigration laws.

More than a century and a half ago, the Supreme Court noted that the President's constitutional power to enforce our laws does not imply that they can forbid their execution. President Obama understood this when he admitted last year that, quote, "There are

laws on the books that Congress has passed" so the Administration cannot "just suspend deportations through executive order."

But President Obama has broken this promise to the American people. This Administration's decision to grant administrative amnesty on a mass scale ignores the rule of law and the separation of powers.

The Administration's amnesty agenda is a win for illegal immigrants, but a loss for Americans. When illegal immigrants are allowed to live and work in the U.S., unemployed American workers have to compete with illegal immigrants for scarce jobs. With 23 million Americans unemployed or underemployed, this amnesty only makes their lives harder.

The Obama administration's amnesty is also a magnet for fraud. Many illegal immigrants will falsely claim that they came to the U.S. as children, and this Administration refuses to take the steps necessary to check whether their claims are true or not.

Time and again, the Department of Homeland Security has gone out of its way to avoid the enforcement of immigration laws. The Department of Homeland Security's policy of non-enforcement will continue to cost innocent Americans their jobs.

As Secretary of Homeland Security, Madam Secretary, you, like all Americans, also must be extremely concerned about the recent disclosure of national secrets. The methods and sources of intelligence we use to protect homeland security must be kept strictly secret. When these secrets leak and become public knowledge, American lives are threatened.

Recent damaging leaks include operational details of the Bin Laden raid, specifics about how we conduct cybersecurity, and information about drone strikes. Because of these leaks, our enemies now know how we will hunt them, which will only make the hunt more difficult.

Homeland security depends on our ability to keep secrets from those who would attack our homeland. When these secrets leak and become public knowledge, our people and our national interests are put in jeopardy. When our enemies know our secrets, American lives are in danger.

The government's ability to keep national security secrets depends on identifying the causes of the recent leaks and putting a stop to them. That is why I have asked to interview senior officials who may have information on how these secrets become public.

The Department of Homeland Security has a responsibility to deter and prevent terrorists from attacking the United States. To do this, we must protect the details of our intelligence-gathering.

That concludes my opening statement. And the gentleman from Michigan, the Ranking Member, is recognized for his.

Mr. CONYERS. Thank you, Mr. Chairman.

And welcome, Madam Secretary.

I want to remind you, I meant to do it off the record, but I want to remind the Chairman that his opinion is his own, but the facts are not, the ones that he controls. And I am keeping a record, I want to announce to him, of all of the things that I think are serious misstatements of fact, which I will be taking either to the floor or publishing otherwise. I think I mentioned this to you before——

Mr. SMITH. I am sure you did.

Mr. CONYERS. So I think you have given me some work to do already.

And I would like to say to all the Members of this Committee, I want this to be a civil hearing in which we exchange views, make criticisms, voice opinions. But I would like it to be done in keeping with the reputation of the House Judiciary Committee, so that we don't get out of control. And I am sure the Chairman will agree with me on that.

I welcome you, Madam Secretary. And I had some issues about some security incidents in Detroit. And I would like not to take up our time talking about them here, but I would be looking forward to it, because Detroit, of course, the Detroit-Windsor Tunnel, is the largest commercial border crossing in North America, and these threats are of concern both to our country and to Canada as well.

Now, the other couple of things that I wanted to commend you on is the fact that we have improved border security. And having listened to some of my colleagues, I thought that the border security on the southern end of our country was in bad shape. But border security is more secure than it has ever been before, I think due to increased border enforcement efforts.

And unauthorized border crossings are at a 40-year low. We haven't seen border apprehension numbers this low since 1972. I commend Homeland Security for that.

And if there are other insights that you would like to share with us today, and we have time, I would like to do it. If not, I would like to get more information from you or your staff.

At the same time, immigration removals have been at an all time high, just short of 400,000 last year. And what is more impressive is the makeup of the numbers.

For the first time ever, persons with criminal convictions made up more than half of those removals, and more than 90 percent met the Administration's enforcement priorities, which includes recent border crossers and repeat violators.

And so even in the critical shortage of funds and personnel, I think that the strategies of your department are effective and are taking hold. The policy in ICE, in consultation with the Civil Rights and Civil Liberties Office, has developed a new policy designed to protect victims of domestic violence and other crimes, and to ensure that they are reported.

The Dream Act, a conservative-created idea, which I support, has been very effective. And young people brought to this country through no fault of their own, and this is popularly accepted among our citizenry, are given, if they go into service and graduate and do a few other things that indicate they want to be good Americans like the rest of us, are given a special way to achieve their dream of citizenship.

And so I thank you for coming back again. And I will put the rest of my statement in the record, and thank the Chairman for his generosity with the time.

Mr. SMITH. Without objection.

Thank you, Mr. Conyers.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Twenty years ago, the Supreme Court decided in *Quill Corp. v. North Dakota* that it was too difficult for a remote seller to comprehend every tax law in every state and locality in which it may sell something. In its view, states needed to simplify their sales tax laws so remote sellers could understand them easily. Otherwise, these complicated sales tax laws burdened interstate commerce.

The Supreme Court decided that without simplification, a remote seller would not have to collect sales taxes in a state in which it does not have a substantial presence, or in its view, a physical presence.

But the court did clearly state that Congress is better suited to determine whether a remote seller must collect and remit sales taxes.

It is past time for Congress to make that determination and we should do so now particularly in light of the many technological advances that have occurred since the Court rendered its decision 20 years ago.

For example, because of these technological advances, smartphones can tag a photo with the date, time, and most relevant, the *precise* location through GPS, where the photo was taken, no matter where it was taken.

Clearly, technology has eliminated the burdens a remote seller would have had in 1992. And technology has made it easier for Congress to act now. Doing so will accomplish several important goals.

By addressing the *Quill* decision, Congress will ensure competitive equity among retailers.

The Internet allows consumers to comparison shop quickly before making a final purchase. Oftentimes, a consumer can walk into a brick and mortar store, check the price of the item, ask the salesperson a few questions, and then take out a smartphone to find a cheaper price online.

The online retail price is generally lower because many Americans do not have to pay any sales tax, which can make a significant difference in the final purchase price, ranging anywhere from 3 to 12% of the price of the item.

This gives out-of-state retailers who operate online a clear advantage. They can charge the same basic pre-tax price as a local retailer for a pair of designer jeans or a video game console, but the price the consumer actually pays is lower because they do not collect a sales tax.

It is obvious why savvy consumers, especially in this cost-conscience environment, would take advantage of such considerable savings.

This also explains why the percentage of online sales and the total amount of online sales continue to increase.

Competitors should compete on things other than sales tax policy. For those arguing for more of a free market, they should support eliminating any competitive advantage based on sales tax policy.

Uncollected sales taxes also have a negative impact on local communities, including retailers, and local and state governments.

Fewer purchases at local retailers translate to fewer local jobs. Main Street retailers, local mom-and-pop stores, and even big-box retailers suffer when they lose customers because they have to collect a sales tax while online retailers do not.

Lower sales at local retailers also translate to lower revenue for local and state governments. Sales taxes constitute a significant state and local revenue source.

For example, the Census Bureau estimates that nearly *one third* of state and local revenues are derived from general sales and use taxes.

With ever increasing online sales, states and local governments anticipate huge revenue losses as a result of uncollected sales and use taxes.

For example, the Michigan Department of Treasury estimates that total revenue lost to e-commerce and mail order purchases will total $872 million during fiscal years 2012 and 2013.

The impact of such lost revenue is reflected in

- forced cutbacks to public education programs, such as sports, after-school enrichment programs, and extracurricular activities,
- delapidated roads and bridges not being repaired, and
- reductions in critical services, such as police and firefighter protection.

Just last week, the State Budget Crisis Task Force, which is led by Paul Volcker and Richard Ravitch, released a report on the plight of states.

In its report, the task force recommended that Congress should grant states the authority to collect sales taxes on online sales. Doing so would help states address their budgetary problems.

Otherwise, states will have to cut services further. Or, replace the erosion of sales taxes by increasing taxes in other areas, something anti-tax advocates would surely oppose.

Fortunately, Congress can ensure a level playing field and address state revenue issues by passing bipartisan supported legislation that would allow states to require remote sellers to collect and remit sales taxes.

H.R. 3179, the "Marketplace Equity Act of 2011," introduced by my colleagues, Representatives Steve Womack and Jackie Speier would grant that much-needed authority.

I introduced similar legislation, H.R. 2701, the "Main Street Fairness Act."

Our colleagues on the other side of the Capitol, Senators Mike Enzi, Dick Durbin, and Lamar Alexander, introduced S. 1832, the "Marketplace Fairness Act."

Although each of the three bills take different approaches, they each would accomplish the same goal: leveling the playing field between retailers and online sellers by granting that essential authority.

Today's hearing focuses on H.R. 3179, a bipartisan bill that would simplify collection rules and increase compliance. As a result, it would ensure fairness and provide a national solution.

This bill would neither impose a national sales tax nor lead to any new taxes. Consumers already owe sales and use taxes on the goods and services they purchase; however, many do not pay it voluntarily.

The business community has worked tirelessly on this issue and supports this bill. Big-box retailers, such as Walmart, Best Buy, and JC Penney, and small businesses, such as Michigan-based Marshall Music and the National Association of College Stores, are urging Congress to act and pass much-needed legislation.

Even giant online retailer Amazon.com, which has benefitted from not having to collect sales taxes in many states, supports Congress acting.

Other supporters of this legislation include at least a dozen governors—both Democratic and Republican—as well as the National Governors Association. In addition, the National Conference of State Legislatures, and the National League of Cities, along with many organizations also urge Congress to pass legislation addressing this issue.

I believe that Congress should pass legislation that promotes economic efficiency and helps our states and local governments maintain financial support for public education, health, and safety.

The Marketplace Equity Act and the other legislative proposals that I mentioned accomplish these goals.

I thank Chairman Smith for holding this very important hearing and I urge the Chairman to markup this bill at the next scheduled markup.

Mr. SMITH. Our witness today is Janet Napolitano, Secretary of the United States Department of Homeland Security.

Sworn in on January 21, 2009, Ms. Napolitano is the third Secretary of DHS. Prior to becoming Secretary, Ms. Napolitano was in her second term as Governor of Arizona. Before becoming Governor, Ms. Napolitano served as attorney general of Arizona and as U.S. Attorney for the District of Arizona.

She is a 1979 graduate of Santa Clara University, where she won a Truman Scholarship and was the university's valedictorian. She received her Juris Doctorate from the University of Virginia School of Law in 1983.

Before entering public office, Ms. Napolitano served as a clerk for Judge Mary M. Schroeder on the U.S. Court of Appeals for the Ninth Circuit and practiced law in Phoenix, Arizona.

Secretary Napolitano, we look forward to your testimony today, and please begin.

TESTIMONY OF THE HONORABLE JANET NAPOLITANO, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY

Ms. NAPOLITANO. Thank you, Chairman Smith and Ranking Member Conyers and Members of the Committee.

I am pleased to join you today to address the homeland security issues that fall within the Committee's jurisdiction.

Just as a parenthetical, this is now my 40th time testifying before either the Senate or the House.

Today, nearly 11 years after the 9/11 attacks, America is stronger and more secure, thanks to the work of the men and women of DHS and our Federal, State, local, tribal, and territorial partners across the homeland security enterprise.

Every day, more than 230,000 DHS employees ensure the safety and security of the American people in jobs that range from law enforcement officers and agents to disaster response coordinators, from those who make sure our waterways stay open to commerce, to those who make sure our skies remain safe. The men and women of DHS are committed to our mission, and I thank each one of them for their service.

Now as I have said many times, homeland security begins with hometown security. As part of our commitment to strengthen hometown security, we have worked to get information, tools, and resources into the hands of State, local, tribal and territorial officials and first responders. And this has led to significant advances.

We have made great progress in improving our domestic capabilities to detect and prevent terrorist attacks against our citizens, our communities, and our critical infrastructure. We have increased our ability to analyze and distribute threat information at all levels.

We have invested in training for local law enforcement and first responders of all types in order to increase expertise and capacity at the local level. And we have supported and sustained preparedness and response capabilities across the country through more than $36 billion in Homeland Security grants since 2002.

As the Committee knows, we also have made substantial advances in securing our Nation's borders and enforcing the immigration laws. And at the same time, we have worked to streamline and facilitate the legal immigration process.

In my time, I would like to discuss our efforts with respect to immigration consistent with the Committee's jurisdiction over this important, indeed, essential, issue for our country.

As Ranking Member Conyers noted, over the past 3 and a half years, this Administration has deployed unprecedented levels of personnel, technology, and resources to protect our Nation's borders. These efforts have achieved significant results, and illegal immigration attempts are at their lowest levels since 1971.

This decrease in apprehensions of those seeking to enter the country illegally, one of the best indicators of illegal immigration attempts, is combined with increases seizures in drugs, weapons, cash, and contraband.

To secure our Nation's Southwest border, we have continued to deploy unprecedented amounts of manpower, resources, and technology, while expanding our relationships and partnerships with

Federal, State, tribal, territorial and local partners, as well as with the Government of Mexico.

Simply put, the Obama administration has undertaken the most serious and sustained action to secure the Southwest border in our Nation's history. This includes increasing the number of Border Patrol agents nationwide from approximately 10,000 in 2004 to more than 21,000 today, with nearly 18,500 boots on the ground and air coverage border-wide along the Southwest border.

We also have worked, and continue to work, to enforce and administer our immigration laws in a cohesive way that is smart, effective, and that maximizes the resources that Congress has given us to do this important job.

Our priorities are to enhance public safety, national security, border security, and the integrity of the immigration system, while respecting the rule of law and staying true to our history as a Nation of immigrants.

We carry out these priorities by focusing our resources on the identification and removal of criminal aliens, repeat immigration violators, recent border entrants, and those who otherwise pose a threat to public safety or national security.

To this end, we have expanded the use and frequency of investigations and programs that track down criminals and other public safety and national security threats on our streets, in our neighborhoods, and in our jails.

These efforts have achieved historic results, including the removal of 216,000 convicted criminals in 2011, the highest number ever. This year, we will remove the highest number of aggregated felons ever.

Furthermore, these efforts are enhanced by our use of prosecutorial discretion, including my June 15 announcement regarding the availability of deferred action for individuals who came to the United States as children.

These policies promote the efficient use of our resources, ensuring that we do not divert them away from the removal of convicted criminals by pursuing the removal of young people who came to this country as children, and who have called no other country home. Implementation of the deferred action process is underway, and we will be ready to accept applications on August 15.

Additionally, we have made numerous improvements to our administration of immigration benefits and services, continuing our tradition as a welcoming Nation to new immigrants, businesses, students, and those seeking refuge and asylum.

In conclusion, this department has come a long way, and in the nearly 11 years since 9/11, to enhance protection of the United States and engage our full range of partners in this shared responsibility.

Together, we have made significant progress to strengthen our borders, enforce our immigration laws, and improve and streamline our immigration processes and systems.

But we are aware of challenges that remain. Threats against our Nation, whether by terrorism or otherwise, continue to exist and to evolve. And DHS must continue to evolve as well.

We continue to be ever-vigilant to protect against threats to our Nation, while promoting the movement of goods and people, and protecting our essential rights and liberties.

I thank the Committee for your attention as we work together to keep the country safe, and I am looking forward to your questions. Thank you.

[The prepared statement of Ms. Napolitano follows:]

Statement for the Record

Secretary Janet Napolitano

U.S. Department of Homeland Security

Before the

United States House of Representatives

Committee on the Judiciary

July 19, 2012

Chairman Smith, Ranking Member Conyers, and Members of the Committee:

I am pleased to join you today, and I thank the Committee for your support of the Department of Homeland Security (DHS) over the past three and a half years and, indeed, since the Department's founding more than nine years ago. I look forward to continuing to work with you to protect the American people as we work to advance our many shared goals.

Today, nearly eleven years after the 9/11 attacks, America is stronger and more secure, thanks to the support of the Congress, the work of the men and women of DHS, and our federal, state, local, tribal, and territorial partners across the homeland security enterprise.

More than 230,000 DHS employees ensure the safety and security of the American people every day, in jobs that range from law enforcement officers and agents to disaster response coordinators, from those who make sure our waterways stay open to commerce to those who make sure our skies remain safe. The men and women of DHS are committed to our mission, and I thank every one of them for their service.

As I have said many times, homeland security begins with hometown security. As part of our commitment to strengthen hometown security, we have worked to get information, tools, and resources into the hands of state, local, tribal, and territorial officials and first responders.

This has led to significant advances. We have made great progress in improving our domestic capabilities to detect and prevent terrorist attacks against our people, our communities, and our critical infrastructure. We have increased our ability to analyze and distribute threat information at all levels. We have invested in training for local law enforcement and first responders of all types in order to increase expertise and capacity at the local level. And we have supported and sustained preparedness and response capabilities across the country through more than $35 billion in homeland security grants since 2002.

As this committee knows, we also have made substantial advances in securing our nation's borders and enforcing the immigration laws. We have deployed unprecedented levels of personnel, technology, and resources to protect our borders. These efforts have achieved significant results, including historic decreases in illegal immigration as measured by total apprehensions, and sizable increases in seizures of illegal drugs, weapons, cash, and contraband.

We also have focused on smart and effective enforcement of immigration laws while streamlining and facilitating the legal immigration process. Our enforcement resources prioritize border security, public safety, national security, and the integrity of the immigration enforcement system. We carry out these priorities by focusing our resources on the identification and removal of criminal aliens, repeat immigration law violators, recent border entrants, and those who otherwise pose a threat to public safety or national security. These efforts have achieved historic results, including the removal of over 216,000 convicted criminals in 2011.

Our efforts to focus resources on public safety, national security and border security are enhanced by our use of prosecutorial discretion on a case-by-case basis, including my June 15 announcement regarding the possibility of deferred action for certain qualifying individuals who

came to the United States as children. These policies promote the efficient use of our resources, ensuring that we do not divert resources away from the removal of convicted criminals by pursuing the removal of young people who came to this country as children and have called no other country home.

We have also made numerous improvements to our administration of immigration benefits and services, ensuring our heritage as a welcoming nation to new immigrants, business people, students, and those seeking refuge and asylum.

In my time today, I would like to discuss our efforts with respect to immigration, consistent with this Committee's jurisdiction over this important – indeed, essential – issue for our country.

Enforcing and Administering our Immigration Laws

DHS has undertaken an historic effort to enforce and administer immigration laws in a cohesive way that is smart, effective, and maximizes the resources that Congress has given us to do this important job. We have worked, and continue to work, to make sure that our resources are applied consistently and in a manner that enhances public safety, national security, border security, and the integrity of the immigration system, while respecting the rule of law and staying true to our history as a nation of immigrants.

Targeting Criminal and Other Priority Aliens

We have established as a top priority the identification and removal of public safety and national security threats. To this end, we have expanded the use and frequency of investigations and programs that track down criminals and other public safety and national security threats on our streets and in our jails.

Overall, in Fiscal Year 2011, U.S. Immigration and Customs Enforcement (ICE) removed 396,906 individuals. Ninety percent of these removals fell within one of ICE's priority categories, including convicted criminal aliens and recent border crossers, and 55 percent, or more than 216,000 of the people removed, were convicted criminal aliens – an 89 percent increase in the removal of criminals from Fiscal Year 2008. This total includes more than 87,000 individuals convicted of homicide, sexual offenses, offenses involving dangerous drugs, and driving under the influence. Of those removed in Fiscal Year 2011 without a criminal conviction, more than two-thirds fell into our other priority categories of recent border crossers or repeat immigration law violators.

These results would not have been possible without Secure Communities, which has proven to be the single most valuable tool in allowing ICE to eliminate the ad hoc approach of the past and focus on criminal aliens and repeat immigration law violators. Through Secure Communities, state and local law enforcement biometric information is passed to ICE after an individual has been arrested and booked for a state or local criminal offense. ICE uses the biometric information to identify criminal and other priority aliens in state prisons and local jails so that ICE can prioritize them for removal. Secure Communities remains an important tool in ICE's

efforts to focus its immigration enforcement resources on individuals within ICE's priorities, particularly those who pose a threat to public safety or national security.

We have expanded Secure Communities' use of this information sharing capability from 14 jurisdictions in 2008 to 3,074 today, including all jurisdictions along the southwest border, and a total of 50 states, with Secure Communities completely activated in 48 of those states as well as the District of Columbia and the four territories. We are on track to deploy the information sharing capability used through Secure Communities to all jurisdictions nationwide by Fiscal Year 2013. Since its inception, more than 149,811 aliens convicted of serious crimes, including aggravated felony offenses like murder, rape and sexual abuse of children, have been removed from the United States after identification through Secure Communities.

Nevertheless, we recognize that there is always room to improve any program, and we are mindful of concerns raised about Secure Communities, especially its use of this federal biometric information sharing capability. We will continue to improve Secure Communities and clarify its goals to state and local law enforcement and the public.

We are also committed to ensuring the Secure Communities program respects civil rights and civil liberties. To that end, ICE is working closely with law enforcement agencies and stakeholders across the country to ensure the program operates in the most effective manner possible, respects community policing efforts critical to public safety, and is aligned with our civil rights priorities.

ICE and the DHS Office for Civil Rights and Civil Liberties (CRCL) have released videos for state and local law enforcement agencies on how Secure Communities works and how it relates to laws governing civil rights and civil liberties, and they plan to release additional videos in the near future. They also are conducting a regular statistical analysis of Secure Communities to identify any signs of potential abuse, and have a complaint investigation protocol governing how individuals or organizations can file civil rights complaints with either ICE or CRCL. We've also taken corrective action against local law enforcement partners who do not comply with our immigration enforcement priorities. We are prepared to take action when we see evidence of civil rights abuses as we did when we removed Maricopa County Sherriff's Office access to Secure Communities technology and terminated their 287(g) agreements.

In addition, in response to the DHS Homeland Security Advisory Council Secure Communities Task Force's report of September 2011, ICE has adopted a new policy regarding individuals arrested for minor traffic offenses. Under this policy, ICE will only consider issuing detainers for individuals arrested solely for minor traffic offenses who have not been previously convicted of other crimes and do not fall within any other ICE priority category, upon actual conviction. Previously, a detainer was issued after the arrest.

Secure Communities' use of IDENT/IAFIS interoperability is not the only tool that has enhanced our focus on convicted criminals. In December 2009, ICE began conducting large-scale operations where ICE works with federal, state, and local law enforcement partners to identify and target at large convicted criminal aliens. Known as "Cross Check" operations, these initiatives are an important tool in ICE's efforts to apprehend and remove convicted criminals and have resulted in the arrest of more than 7,400 criminal aliens. For example, in a single

"Cross Check" enforcement operation conducted over a six-day period in March of 2012, ICE arrested more than 2,800 convicted criminal aliens who were also in the country unlawfully. This operation was the largest of its kind, involving the collaboration of more than 1,900 ICE officers and agents in all 50 states.

Having demonstrated the effectiveness of these initiatives, ICE recently transformed the responsibilities of its Fugitive Operations Teams to focus primarily on enforcement operations that target at-large convicted criminal aliens and immigration fugitives who pose a threat to public safety.

Prosecutorial Discretion

To better enforce the nation's immigration laws, ICE has issued guidance to ensure that those enforcing immigration laws make appropriate use of their discretion they already have in deciding the types of individuals prioritized for removal from the country. President Obama and I have both made clear that this Administration will continue to enforce the laws in a smart and effective manner. These efforts are enhanced by the Department's prosecutorial discretion policies.

DHS began this effort with the issuance of ICE's June, 2010 memorandum detailing the Department's immigration enforcement priorities. Director Morton built upon this memorandum when he issued two prosecutorial discretion memoranda in June 2011. Following the issuance of these memos, to ensure that our resources fully support our mission to protect public safety and ensure border security, DHS began an effort to review incoming cases and existing caseloads before the Department of Justice's Executive Office for Immigration Review to ensure they correspond with our enforcement priorities. This unprecedented collaborative effort has allowed DHS to focus taxpayer resources devoted to immigration enforcement on priority cases over the long term.

Building upon these efforts, on June 15th I announced that young people who were brought to the United States as children and who meet several key criteria will be considered for temporary relief from removal from the country or from being placed in removal proceedings if, after an individualized review, Department personnel determine that deferred an exercise of discretion is appropriate in their case. Those who demonstrate that they meet the criteria may be considered, if the Department personnel determine it is appropriate to exercise their prosecutorial discretion, to have removal actions deferred for a period of two years, subject to renewal. Individuals granted deferred action will also be eligible to request employment authorization.

In order to be considered for deferred action under this policy, individuals must: 1) have come to the United States under the age of sixteen; 2) have continuously resided in the United States for at least five years and have been physically present in the United States on the date of our announcement on June 15; 3) either be currently in school, a graduate of a U.S. high school or a recipient of a Certificate of High School Equivalency, or an honorably discharged veteran of the Armed Forces of the United States; 4) not have been convicted of either a felony offense, a

significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and 5) be younger than 31 as of June 15, 2012.

Individuals must also complete a biographic and biometric background check and not currently in removal proceedings or subject to a final order, must be 15 years or older to be considered for deferred action. Only those individuals who can prove through verifiable documentation that they meet these criteria will be considered for deferred action under this initiative. Individuals will not be eligible if they are not currently in the United States or cannot prove that they have continuously resided within the United States for at least five years.

ICE and USCIS will deploy their considerable fraud prevention resources to guard against fraud in this process – and to take strong action against any individuals who engage in fraud. ICE's Homeland Security Investigations directorate and USCIS's Fraud Detection and National Security directorate will be actively engaged whenever fraud is suspected as part of an individual request to ICE or USCIS for deferred action or employment authorization. An individual who knowingly makes a misrepresentation to ICE or USCIS, or knowingly fails to disclose facts to ICE or USCIS, in an effort to be considered for deferred action or work authorization in this new process will be treated as an immigration enforcement priority to the fullest extent permitted by law, subjecting the individual to criminal prosecution and removal from the United States.

Deferred action does not provide an individual with lawful permanent resident status or any legal status in the United States. It confers no legal immigration status, nor a pathway to citizenship. Only Congress, acting through its legislative authority, can confer these benefits. It remains for the executive branch, however, to set forth policy for the exercise of prosecutorial discretion within the framework of the existing law, which we have done in this instance.

Our nation's immigration laws must be enforced in a strong and sensible manner. But they are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Indeed, as the Supreme Court noted in its recent decision on the Arizona immigration law, "A principal feature of the removal system is the broad discretion exercised by immigration officials."

As the President also noted in his own remarks on this new policy, many young people who will benefit from this policy study in our schools, play in our neighborhoods, and pledge allegiance to our flag. They are Americans in their hearts, in their minds, in every single way – except on paper. Some came to our country – sometimes even as infants – and yet they live under the threat of removal to a country they may know little about, with a language they may not even speak.

This new policy represents the next logical step in our efforts to transform the immigration enforcement system into one that focuses on public safety, border security, and the integrity of the immigration system. It is not only sound law enforcement policy, but it also will result in a more efficient, productive, and fair immigration enforcement system.

It is also the right thing to do. Deferring action in appropriate cases will help us continue to streamline our immigration enforcement system and ensure that our resources are not directed toward pursuing the removal of the lowest priority cases involving productive young people

when we should be focused on the identification and removal of criminal aliens and other enforcement priorities.

Individuals who are eligible for consideration for deferred action pursuant to my memorandum do not represent a risk to public safety or security. Prosecutorial discretion, which is used in so many other areas, is especially warranted and justified here.

Deterring Employment of Aliens Not Authorized to Work

In the worksite category, we also have eliminated high-profile raids that did little to enhance public safety, and instead we are promoting compliance with worksite-related laws through criminal prosecutions of egregious employer violators, Form I-9 inspections, civil fines, and debarment, as well as education and compliance tools.

Since January 2009, ICE has audited more than 8,079 employers suspected of knowingly hiring workers unauthorized to work in the United States, debarred 726 companies and individuals, and imposed more than $87.9 million in financial sanctions.

Employer enrollment in E-Verify, our on-line employee verification system managed by USCIS, has more than doubled since January 2009, with more than 385,000 participating companies representing more than 1.1 million hiring sites. USCIS has continued to promote and strengthen E-Verify, developing a robust customer service and outreach staff to increase public awareness of E-Verify's benefits and inform employers and employees of their rights and responsibilities. In Fiscal Year 2011 alone, USCIS informed tens of millions of people about E-Verify through radio, print, and online ads in English and Spanish, and hundreds of thousands more through live presentations, conference exhibitions, live webinars, and distribution of informational materials.

More than 17 million queries were processed in E-Verify in Fiscal Year 2011, allowing businesses to verify the eligibility of their employees to work in the United States. Last year, we also launched the E-Verify Self Check program, a voluntary, free, fast, and secure online service that allows individuals in the United States to confirm the accuracy of government records related to their employment eligibility status before seeking employment.

Detention Reform

As a part of ongoing detention reform efforts, ICE continues to identify systematic ways to reform and improve medical and mental health care at publicly and privately run detention facilities, including an increase in medical case management and quality management activities, assigning field medical coordinators to each ICE Field Office to provide ongoing case management; simplifying the process for detainees to receive authorized health care treatments; and developing a medical classification system to support detainees with unique medical or mental health needs.

ICE also has issued revised detention standards. The new standards, known as Performance-Based National Detention Standards 2011 (PBNDS 2011), reflect ICE's ongoing effort to tailor

the conditions of immigration detention while maintaining a safe and secure detention environment for staff and detainees.

In developing the revised standards, ICE incorporated the input of many agency employees and stakeholders, including the perspectives of nongovernmental organizations and ICE field offices. PBNDS 2011 is crafted to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, detect and prevent sexual abuse and assault, and increase visitation.

ICE has hired additional detention service managers to increase onsite federal oversight and ensure that facilities are in compliance with its detention standards while increasing announced and unannounced inspections by other staff. CRCL has assisted in training these ICE employees and reviewing the standards they enforce. CRCL has also stepped up oversight of immigration facilities, conducting numerous on-site inspections, and additional reviews specifically relating to medical care.

In recent months, we also have announced that we will be undertaking a rulemaking process to apply the Prison Rape Elimination Act (PREA) to immigration detention facilities, building upon the zero tolerance policy previously adopted for sexual abuse and assault at such facilities. ICE also has begun implementing a new directive on Sexual Abuse and Assault Prevention and Intervention that delineates ICE-wide policy and procedures for reporting, investigating, and tracking incidents of sexual assault and abuse in detention facilities.

This new directive establishes agency-wide policy and procedures for responding to incidents or allegations of sexual abuse or assault of individuals in ICE custody, delineating duties of agency employees for timely reporting, coordinated response and investigation, and effective monitoring of all incidents of sexual abuse or assault, in order to ensure an integrated and comprehensive system of responding to such incidents. The Directive complements the mandates imposed on detention facilities by PBNDS 2011, which establishes the responsibilities of detention facility staff with respect to prevention, response and intervention, reporting, investigation, and tracking of incidents of sexual abuse or assault.

Furthermore, to assist individuals and community organizations in addressing complaints and to inform stakeholders of its policies and initiatives, ICE has created a Public Advocate position. The Public Advocate serves as a point of contact for individuals, including those in immigration proceedings, non-governmental organizations and other community and advocacy groups who have concerns, questions, recommendations or other issues they want to raise regarding ICE programs and policies. The Public Advocate has conducted several community engagement sessions since the office's establishment, and has established regional liaisons in locations across the country.

Finally, ICE has initiated a consolidation effort to move detainees into fewer overall facilities and, where possible, into facilities that are operated directly by ICE. This effort includes the addition of civil detention facilities to its inventory. Last year, ICE opened three such civil

facilities, in Southern California, New Jersey, and outside of San Antonio. The Texas facility opened in March 2012 and is the first newly constructed civil detention facility.

The acquisition of additional detention capacity where it was most needed has enabled ICE to reduce the number of transfers and detain individuals closer to their arrest locations, families, legal service providers, and other community support organizations. Reductions in transfers are most evident in Los Angeles and the Northeast. As of January 2012, transfers of detainees prior to their final order of removal from the Los Angeles area of responsibility (AOR) had virtually stopped, and transfers from the New York City AOR had dropped by more than 80 percent from Fiscal Year 2010. In January 2012, ICE also issued a Transfer Directive that builds on the successful reduction of long-distance transfers, by ensuring that when transfers are necessary, they are prioritized to further minimize the long-distance transfers of detainees with family members, local attorneys, or pending immigration proceedings in the area where they are detained.

ICE will continue building on these ongoing detention reform efforts. Upcoming initiatives include a new Risk Classification Assessment nationwide to improve transparency and uniformity in detention custody and classification decisions and to promote identification of vulnerable populations.

Improving Legal Immigration

Our nation's founding is rooted in immigration and immigrants have contributed to the richness of our culture, the strength of our character, and the advancement of our society. To continue to promote legal immigration to the United States and the process by which we naturalize new American citizens each year, we have worked to reduce inefficiencies in visa programs, streamline the path for entrepreneurs who wish to bring their business and new innovative ideas to America, and improve our systems for providing immigration benefits and services.

In 2011, USCIS held more than 6,000 naturalization ceremonies for approximately 692,000 lawful permanent residents who became U.S. citizens, including more than 10,000 members of the U.S. Armed Forces. USCIS naturalized 11,146 service members in FY10, 10, 334 in FY11, and 5,538 in FY12 (through May). Of those totals, 2,408 were naturalization during basic training in FY11 and 1,904 thus far in FY12 (through June).

To help combat fraud and exploitation of our immigration system, USCIS launched the Unauthorized Practice of Immigration Law (UPIL) initiative, a national, multi-agency campaign that spotlights immigration-services scams and the problems that can arise for immigrants when legal advice or representation is given by people who are not attorneys or accredited representatives. The UPIL initiative began in seven cities in 2011 and has expanded nationwide to include all of USCIS's district offices.

In August 2011, USCIS launched a series of policy, operational, and outreach efforts to support economic growth and stimulate investment and job creation. This initiative includes enhancements to streamline the Immigrant Investor visa program, commonly known as the EB-5

Program, including conducting a top-to-bottom review of EB-5 business processes, hiring economists and business analysts to support EB-5 adjudications, and adopting an enhanced security review for participants in the program.

USCIS also has provided clarification on how foreign-born entrepreneurs may utilize the H-1B nonimmigrant visa category, which allows a U.S. employer to temporarily employ a foreign worker in specialty occupation, and the employment-based second preference (EB-2) immigrant visa classification for workers with exceptional ability in the arts, science or business, or with advanced degrees, and who may also qualify for a national interest waiver.

Building on these efforts, USCIS announced the Entrepreneurs in Residence initiative in October 2011 to ensure that its policies and practices better reflect business realities to harness industry expertise to increase the job creation potential of nonimmigrant high-skilled visa categories. This initiative supports the White House and DHS' efforts to grow the U.S. economy and create American jobs.

Last year USCIS announced the Citizenship Public Education and Awareness Initiative to promote awareness of the rights, responsibilities and importance of U.S. citizenship and the free naturalization preparation resources available to permanent residents and immigrant-serving organizations. This multilingual effort is designed to reach nearly eight million permanent residents eligible to apply for citizenship.

In September 2011, USCIS also awarded $9 million in Citizenship and Integration Grants to 42 organizations to expand citizenship preparation programs for permanent residents across the country. The President's Fiscal Year 2013 budget request includes $11 million to continue support for USCIS immigrant integration efforts through funding of citizenship and integration program activities including competitive grants to local immigrant-serving organizations to strengthen citizenship preparation programs for permanent residents.

In January, I announced that I intended to propose a regulatory change that would significantly reduce the time that U.S. citizens are separated from their spouses and children as they go through the process of obtaining visas to become legal immigrants to the United States. The proposed rule was published in the *Federal Register* in April. This proposed rule change would minimize the extent to which delays separation of American families by allowing family members, under certain circumstances, to have their waiver applications processed in the United States, and to receive a provisional waiver determination before they leave the United States to complete the immigrant visa process outside the United States at a consular post.

USCIS also has made significant strides in the development of its Electronic Immigration System (ELIS) to begin the agency's transition from a paper-based to an electronic, online organization. This new system allows those seeking immigration benefits and their attorneys or accredited representatives to create an on-line account with USCIS and file their benefit requests electronically. This will provide better and more accurate customer service to those seeking information and benefits. It also will allow USCIS personnel to process cases in a more secure fashion and potentially reduce current processing times for immigration benefit requests.

More than 1,400 people have already created electronic accounts through ELIS and filed their benefit request on-line. Ultimately, this system will allow all applicants to file their immigration benefit requests electronically, culminating with the citizenship and naturalization process.

And to further enhance our nation's economic, scientific and technological competitiveness, I announced the launch of the "Study in the States" initiative, an effort aimed at encouraging the best and the brightest international students from around the world to study in the U.S. by finding new and innovative ways to streamline the international student visa process. As part of the initiative, the Study in the States website provides coordinated information in a comprehensive, user-friendly, and interactive way to prospective and current international students, exchange visitors and their dependents about opportunities to study in the United States and learn about expanded post-graduate opportunities.

In March 2012, I also announced the formation of the Homeland Security Academic Advisory Council, comprised of university presidents and academic leaders who are providing advice and recommendations to me and senior DHS leadership on issues related to student and recent graduate recruitment, international students, academic research, campus and community resiliency, security and preparedness, and faculty exchanges.

Comprehensive Immigration Reform

We have taken important steps over the past three and a half years to enforce immigration laws within the existing framework and consistent with our priorities, but the immigration system needs to be reformed in a comprehensive fashion. We remain committed to working with Congress to seek reforms that make sense, are meaningful, and will help us address the broken system that are in desperate need of updating.

We are not alone in advocating for comprehensive reform. Groups as varied as the U.S. Chamber of Commerce, the Service Employees International Union, the U.S. Conference of Catholic Bishops, the American Healthcare Association, the American Jewish Committee, the National Restaurant Association, the National Association of Evangelicals, and Southern Baptist Convention have all called on Congress to enact comprehensive reform. Indeed, in 2006, a bipartisan group of Western governors, including governors from all the states along the Southwest border, unanimously called upon Congress to enact comprehensive reform. I was proud to join this group when I was Governor of Arizona, and in my experience at the Department, believe the need for comprehensive reform is even more acute now, over six years later.

Over the last two years, we have seen a number of states pass laws that attempt to impose their different states' own immigration enforcement policies, including Arizona's S.B. 1070. The Supreme Court's decision in Arizona v. United States vindicates this Administration's long-held position – states cannot dictate the federal government's immigration enforcement policies or priorities.

We still, however, remain concerned about the practical impact of the remaining provision of the law that requires local law enforcement officials to check the immigration status of individuals

they stop, detain, or arrest whom they reasonably suspect to be in the United States illegally. Although we are encouraged by the Court's suggestion that states' authority in this area is circumscribed, the Court's decision not to strike down Section 2(B) of S.B. 1070 at this time will bear close watching given the potential civil rights implications as that part of the law goes into effect.

The Supreme Court's decision leaves to the Congress the need to act on comprehensive immigration reform because only a nationwide solution will resolve the challenges posed by the current immigration system. We stand ready to work with this Committee and others in Congress to achieve this goal.

Securing and Managing Our Borders

DHS secures the nation's air, land, and sea borders to prevent illegal activity while facilitating lawful travel and trade. The Department's border security and management efforts focus on three interrelated goals: effectively securing U.S. air, land, and sea borders; safeguarding and streamlining lawful trade and travel; and disrupting and, in coordination with other federal agencies, dismantling transnational criminal and terrorist organizations.

Southwest Border

To secure our nation's southwest border, we have continued to deploy unprecedented amounts of manpower, resources, and technology, while expanding partnerships with federal, state, tribal, territorial, and local partners, as well as the Government of Mexico.

Simply put, the Obama Administration has undertaken the most serious and sustained actions to secure the Southwest border in our nation's history. We have increased the number of Border Patrol agents nationwide from approximately 10,000 in 2004 to more than 21,000 today with nearly 18,500 "boots on the ground" along the southwest border. Working in coordination with state and other federal agencies, we have deployed a quarter of all ICE personnel to the southwest border region –the most ever – to dismantle criminal organizations along the border.

This Administration has doubled the number of ICE personnel assigned to Border Enforcement Security Task Forces, which work to dismantle criminal organizations along the border. We have tripled deployments of Border Liaison Officers, who facilitate cooperation between U.S. and Mexican law enforcement authorities on investigations and enforcement operations, including drug trafficking (coordinated with the Drug Enforcement Administration). We also have increased the number of intelligence analysts working along the U.S.-Mexico border.

In addition, we have deployed dual detection canine teams as well as non-intrusive inspection systems, Mobile Surveillance Systems, Remote Video Surveillance Systems, thermal imaging systems, radiation portal monitors, and license plate readers to the Southwest border. These technologies, combined with increased manpower and infrastructure, give our personnel better awareness of the border environment so they can more quickly act to resolve potential threats or illegal activity. We also are screening southbound rail and vehicle traffic looking for the illegal weapons and cash that are helping fuel the cartel violence in Mexico.

We also have completed 651 miles of fencing out of nearly 652 miles identified by Border Patrol field commanders, including 299 miles of vehicle barriers and 352 miles of pedestrian fence.

To enhance cooperation among local, tribal, territorial, state and federal law enforcement agencies, we have provided more than $203 million in Operation Stonegarden funding to southwest border law enforcement agencies over the past four years.

In addition, we co-chair and helped establish the Executive Committee for Southwest Border State and Local Intelligence and Information Sharing, which contains sheriffs, police chiefs, High Intensity Drug Trafficking Areas program directors and fusion center directors from across the Southwest Border, whose goal is to address state and local intelligence needs, reinforce best practices, and to advise local, state or Federal leadership on U.S. southwest border intelligence and information sharing issues within the state and local environment.

Our work along the border has included effective support from our partners at the Department of Defense (DOD). In addition to continuing support from DOD's Joint Task Force-North and the National Guard, in 2010, President Obama authorized the temporary deployment of up to 1,200 National Guard troops to the southwest Border to contribute additional capabilities and capacity to assist law enforcement agencies as a bridge to longer-term deployment of border surveillance technology and equipment that will strengthen our ability to identify and interdict the smuggling of people, drugs, illegal weapons, and money.

Beginning in March 2012, DOD's National Guard support to U.S. Customs and Border Protection (CBP) began to transition from ground support to air support, essentially moving from boots on the ground to boots in the air with state of the art aerial assets equipped with the latest detection and monitoring capabilities.

These aerial assets, which include both rotary and fixed-wing aircraft, supplement the CBP Office of Air and Marine aerial assets and support the Border Patrol's ability to operate in diverse environments, expand our field of vision in places with challenging terrain, and help us establish a greater visible presence from a distance, which increases deterrence. And this year, CBP introduced an extremely effective new aviation surveillance technology on the border in cooperation with the U.S. Army. The new electronic surveillance system is flown on the CBP Predator B unmanned aircraft systems (UASs) deployed on the Southwest border. The system provides DHS with the first broad area, electronic surveillance system, with capabilities that far exceed those of the ground based fixed or mobile systems.

The U.S. Coast Guard also is continuing its integral role in our border enforcement strategy through its maritime operations at the Joint Interagency Task Force (JIATF)-South, the U.S. Southern Command entity that coordinates integrated interagency counter drug operations, the Caribbean Sea, Gulf of Mexico, and the eastern Pacific. In Fiscal Year 2011, the Coast Guard removed nearly 75 metric tons of cocaine, and more than 17 metric tons of marijuana along our maritime borders. CBP Office of Air and Marine P-3 aircraft also have been an integral part of successful counter-narcotic missions operating in the Source and Transit Zones in coordination with JIATF-South.

The results of these comprehensive and coordinated efforts have been striking. Border Patrol apprehensions—a key indicator of illegal immigration—have decreased 53 percent in the last three years and have decreased 80 percent from what they were at their peak. Indeed, illegal immigration attempts have not been this low since 1971. Violent crime in U.S. border communities has also remained flat or fallen over the past decade, and statistics have shown that some of the safest communities in America are along the border. From Fiscal Years 2009 to 2011, DHS also seized 74 percent more currency, 41 percent more drugs, and 159 percent more weapons along the southwest border as compared to Fiscal Years 2006 to 2008.

To further deter individuals from illegally crossing our Southwest border, we also directed ICE to prioritize the apprehension of recent border crossers and repeat immigration violators, and to support and supplement Border Patrol operations. Between Fiscal Years 2009 and 2011, ICE made over 30,936 criminal arrests along the Southwest border, including 19,563 arrests of drug smugglers and 4,151 arrests of human smugglers.

Over the past year we made several announcements that will continue to support this work and expand the collaboration necessary to sustain the progress we have achieved. For example, in July 2011, the Obama Administration released the 2011 National Southwest Border Counternarcotics Strategy, a key component of federal efforts to enhance security along the Southwest border. The strategy outlines federal, state, local, tribal, and international actions to reduce the flow of illicit drugs, cash, and weapons across the border, and highlights the Obama Administration's support for promoting strong border communities by expanding access to drug treatment and supporting programs that break the cycle of drug use, violence, and crime.

The *Declaration on 21st Century Border Management*, issued by President Obama and President Calderon last year signals the U.S. Government's commitment to increase collaboration with Mexico; both to facilitate legitimate trade and travel at the border and to continue combating transnational crime. As part of this effort, we are working closely with our Mexican counterparts on critical infrastructure protection and expansion of trusted traveler and shipper programs. We look forward to building on this progress under the new administration.

In addition to our efforts to strengthen border security, we made great strides in expediting legal trade and travel, working with local leaders to update infrastructure and reduce wait times at our southwest border ports of entry. Along the southwest border, new initiatives have included outbound infrastructure improvements and port hardening, which when completed, will expand our outbound inspection capabilities, enhance port security, and increase officer safety. We also have implemented Active Lane Management, which leverages Ready Lanes, Dedicated Commuter Lanes, and LED signage to dynamically monitor primary vehicle lanes and re-designate lanes as traffic conditions and infrastructure limitations warrant.

These efforts are not only expediting legitimate trade, they are also stopping contraband from entering and leaving the country. In Fiscal Year 2011, DHS interdicted goods representing more than $1.1 billion in Manufacturer's Suggested Retail Price. Further, the value of consumer safety seizures including pharmaceuticals totaled more than $60 million, representing a 41 percent increase over Fiscal Year 2010.

Northern Border

Along the U.S. northern border, we have continued to deploy technology and resources to protect the border, invest in port of entry improvements to enhance security and improve trade and travel, and deepen our already strong partnership with Canada.

For instance, CBP expanded unmanned aerial surveillance coverage along the northern border into eastern Washington, now covering 950 miles of the northern border. In 2011, CBP Office of Air and Marine provided nearly 1,500 hours of unmanned aerial surveillance along the northern Border.

In 2011, CBP opened the Operations Integration Center in Detroit—a multi-agency communications center for DHS, and other federal, state, local, and Canadian law enforcement agencies on the northern border. The Operations Integration Center increases information sharing capabilities leading to seizures of drugs, money, and illegal contraband along the U.S - Canada border within the Detroit Sector. The Department's Science and Technology Directorate is evaluating new surveillance technologies for CBP in Swanton Sector, Vermont that can operate in harsh and remote environments and use renewable energy such as solar and wind power. Sharing surveillance data with Canada to combat illegal border entries is also in progress.

ICE has four Border Enforcement Security Task Force (BEST) units along the northern border. These units, including representatives from the Royal Canadian Mounted Police, Canadian Border Services Agency and numerous other provincial Canadian police departments, enhance coordination of U.S.-Canada joint interdictions and investigations resulting in increased security along the northern border.

We have continued to invest heavily in infrastructure improvements at our ports of entry, including over $400 million in Recovery Act funds to modernize older facilities along our northern border to meet post-9/11 security standards.

Through the *Beyond the Border Action Plan* released by President Obama and Prime Minister Harper in December 2011, we are also enhancing cooperation with Canada through greater information sharing, more coordinated passenger and baggage screening, and integrated law enforcement operations. As part of this action plan, we are working with our U.S. and Canadian partners to develop the next generation of integrated cross-border law enforcement, interoperable radio communications, border wait time measurements, and enhanced air/land/maritime domain awareness, as well as a multitude of initiatives to streamline trusted trader and traveler programs and expedite legitimate travel and trade.

To support the *Beyond the Border Action Plan*, in June we released the DHS Northern Border Strategy, the first unified strategy to guide the department's policies and operations along the U.S.-Canada border. Through this strategy, we will continue to work to improve information sharing and analysis within DHS, as well as with our partners. We will enhance coordination of U.S.-Canada joint interdictions and investigations, deploy technologies to aid joint security efforts along the border, and continue to update infrastructure to facilitate travel and trade. We also look forward to continuing to deepen partnerships with federal, state, local, tribal, private

sector, and Canadian partners that are so critical to the security, resiliency, and management of our northern border.

Conclusion

We have come a long way over the past year, and in the nearly eleven years since 9/11, to enhance protection of the United States and engage our full range of partners in this shared responsibility. Together, we have made significant progress to strengthen our borders, enforce our immigration laws and improve and streamline our immigration processes and systems. But we are aware of the challenges that remain.

Threats against our nation, whether by terrorism or otherwise, continue to exist and evolve. And DHS must continue to evolve as well. We continue to be ever vigilant to protect against threats to our nation while promoting the movement of goods and people and protecting our essential rights and liberties.

I thank the Committee for your continued partnership and guidance as we work together to keep our nation safe. I look forward to your questions.

Mr. SMITH. Thank you, Madam Secretary. I will recognize myself for questions.

And let me go first to the subject I mentioned in my opening statement a minute ago, and that is the subject of the leaks that I feel and so many others feel have endangered our national security and actually put American lives at risk.

As you know, there is bipartisan concern for those leaks. You had the Chairs of the House Intelligence Committee and the Senate Intelligence Committee both saying that the extent of these leaks are broader, deeper, more dangerous than any we have seen in recent years.

Have you had the opportunity to talk to the President and/or his national security advisers about these leaks and how to prevent them in the future?

Ms. NAPOLITANO. Mr. Chairman, I have spoken with the head of the DNI about the leaks. He is leading an investigation, as you know, but I too take these very seriously. They do endanger homeland security.

Mr. SMITH. Okay. And according to media reports, and we are talking about in this case the New York Times and the AP, it was high-level Administration officials who were the source of these leaks. Have you taken any action yourself to try to find out more about how they occurred and why high-level Administration officials were involved?

Ms. NAPOLITANO. No, I have not myself, Mr. Chairman. But others are looking into the source of the leaks.

Mr. SMITH. Well, speaking of the others looking into it, do you favor the appointment of, say, a special counsel to investigate these leaks? And let me say before you answer that, when we had the incident of a single leak during the last Bush administration, that President was willing and did appoint a special outside counsel.

Would you support such an outside counsel being appointed because of these recent leaks?

Ms. NAPOLITANO. Mr. Chairman, there are a number of individuals that are looking into the source of the leaks. I don't know that appointing yet another one would add anything of value.

Mr. SMITH. Well, let me explain why I think it would, very quickly. What the Administration has done is to appoint individuals to investigate itself. And I am not sure how much confidence the American people will have that that is going to be an objective or in-depth investigation where the Administration is, as I say, investigating itself.

It would be far more credible for the Administration to appoint a special counsel, an outside party to get to the bottom of the leaks. So I am disappointed the Administration has not been willing to do that.

Let me go now to the subject of the Administration trying to implement some of the Dream Act provisions without a vote of Congress, but go to the way that is being implemented.

Will individuals who have pending Dream Act applications be eligible for advanced parole? I mentioned this to you earlier, but it is my understanding they would eligible. Do you have any reason to think otherwise?

Ms. NAPOLITANO. This is not an advanced parole program. This is a deferred action, case-by-case——

Mr. SMITH. Right, I know it is not an advanced parole program, but would individuals be eligible to receive that status, who would be considered under these provisions?

Ms. NAPOLITANO. There may be particular individuals, Mr. Chairman, but the program is designed to be a case-by-case analysis only for deferred action.

Mr. SMITH. Okay, but individuals might be considered for advanced parole?

Ms. NAPOLITANO. Again, there are so many individual factors that go into each case that I don't want to make a categorical answer.

Mr. SMITH. I am not saying that all would, but you said that some individuals might be. That is of some concern to me because if they get that status, that is going to enable them to get lawful permanent status, which is the path to citizenship.

So if you go down that road, as I think you may be going, I think we need to be aware of the consequences of those actions.

Ms. NAPOLITANO. Mr. Chairman, if I might respond to that?

Mr. SMITH. Sure.

Ms. NAPOLITANO. The factors that go into this are the factors laid out in my memorandum to our department heads on June 15th. This is clearly a deferred action, case-by-case analysis.

Mr. SMITH. Right.

Ms. NAPOLITANO. There may be factors independent of and separate from——

Mr. SMITH. I know it is case-by-case, but individuals, I think, will be eligible. And that will put them on the path to citizenship.

Next question: Are the parents of individuals, of those who receive Dream Act amnesty, would they be eligible for prosecutorial discretion, the parents of the individuals?

Ms. NAPOLITANO. They will not be eligible for deferment, deferred action, pursuant to my June 15 memorandum. They may independently be subject to an exercise of prosecutorial discretion, should they have a case before ICE——

Mr. SMITH. Okay.

Ms. NAPOLITANO [continuing]. For example.

Mr. SMITH. And last question is this: DHS does not currently plan to require Dream amnesty applicants to provide a certified school transcript. It seems to me that that is the only way to prove that those individuals were in the country and are eligible under some of these provisions. Do you plan to require applicants to provide that certified school transcript or not?

Ms. NAPOLITANO. Mr. Chairman, we are still working through the details on some of that. Our plan is to accept different types of documents and to——

Mr. SMITH. Right.

Ms. NAPOLITANO [continuing]. Enhance our fraud prevention efforts.

Mr. SMITH. How can you still be working through those details when I understand over 1,000 individuals have already been granted status under these provisions?

Ms. NAPOLITANO. We are working through the details of how someone who is applying through CIS, what records they have to produce.

ICE already had several individuals in their removal proceedings and have looked at those.

Mr. SMITH. And is it true about 1,000 individuals have already been approved under the Dream Act?

Ms. NAPOLITANO. About 1,000 have been approved for deferred action, yes.

Mr. SMITH. And we still don't know the details about whether transcripts are going to be required or not?

Ms. NAPOLITANO. Well, school transcripts, residency records, medical records, anything to show residency, age, what have you.

Mr. SMITH. Right.

Ms. NAPOLITANO. And then we will evaluate on a case-by-case basis those documents——

Mr. SMITH. So the certified school transcripts may or may not be required?

Ms. NAPOLITANO. I think that is fair to say.

Mr. SMITH. Okay. Thank you, Madam Secretary.

And the gentleman from Michigan, Mr. Conyers, is recognized for his questions.

Mr. CONYERS. Thank you, Chairman Smith.

Thank you, Secretary Napolitano.

I wanted to start off with these threats at the border crossing in Detroit and Windsor. Is there any comment you can make about that at this point?

Ms. NAPOLITANO. Excuse me, I am sorry?

Mr. CONYERS. About the bomb threats that shut down the Ambassador Bridge in Detroit and Windsor for about 5 hours, and they are of national concern and, of course, in my locality.

Do you have any information you can share with us at this point on that?

Ms. NAPOLITANO. Congressman, let me just say that the FBI has an open and active investigation there. We are providing all assistance necessary. We take this very seriously. And we are also looking, quite frankly, operationally at how long the closures were, to see whether there are ways to more swiftly clear a bridge or a tunnel for the lawful commerce that needs to go back and forth.

Mr. CONYERS. Thank you.

Now, the Chairman of this Committee mentioned amnesty twice only. That was much less than he usually does. But the Dream Act, can you help us clear up this notion of some kind of deferred amnesty being involved in this, please?

Ms. NAPOLITANO. It is not amnesty. What this is, is it is really the development that we have been looking at over the last several years of how do we clear out the backlog of non-priority cases, so that we can focus on criminals, recent border crossers, repeat violators. And this particular group has strong equities for it.

As we went through the case-by-case analysis of the existing backlog, it became clear to me that we needed to do something in addition to that. And that resulted in the conclusion to offer 2-year deferred action, case-by-case analysis, subject to renewal.

Mr. CONYERS. What about the recent Arizona case? The court opinion gave us some strong support for the executive branch to exercise prosecutorial discretion. Do you have any comments that you can share with us about that matter?

Ms. NAPOLITANO. The Supreme Court, I think, validated the fact that the Federal Government ultimately has the discretion in en-

forcing and choosing how to enforce the Nation's immigration laws. And I think their language is very strong.

If you go back through precedent, you have *Reno v. The Arab American Anti-Discrimination League*. You have *Chaney v. Heckler*. And ultimately, you have Article II, Section 3 of the Constitution, reaffirming that the executive has discretion in terms of who to prosecute and who to prioritize resources for. In this case, criminals, recent border violators, and repeat violators.

Mr. CONYERS. Now, our Subcommittee on Crime issued a subpoena for information related to individuals who are arrested, identified by ICE for removal, but never taken into ICE custody. And I have been told you produced nearly 250,000 individuals satisfying the subpoena, and you continue to provide additional information.

How is that coming along? That was a sort of—we don't normally have Subcommittees issuing subpoenas, but, oh well, you know.

Ms. NAPOLITANO. We intend and have been trying to comply with the subpoena and to provide the documents. A lot of the requests are for documents in formats other than how we maintain the documents, which adds an additional level.

I think we just received another request, I want to say in mid-July. We intend to comply with that.

Mr. CONYERS. I have other questions, but I will be submitting them to you and will be putting them in the record.

Thank you, Chairman Smith.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from Wisconsin, Mr. Sensenbrenner, is recognized.

Mr. SENSENBRENNER. Thank you very much.

Madam Secretary, first of all, let me compliment you for trying to soften me up by revealing that you are a Packers fan. I commend you for your very good judgment on that.

Now, one of the biggest problems we have is visa overstays. And I have seen estimates that up to 40 percent of the illegal immigrants in the country enter the country legally and did not leave before their visas expired.

What kind of figures do you have about visa overstays? And what plans do you have to track down those who overstay their visas, as well as whether we should have some type of exit check when people leave the country?

Ms. NAPOLITANO. Let me break that into two parts. On the visa overstays, based on numbers from U.S.-VISIT, we could have has as many as 1.6 million. So last year, I directed that we had to go back, we had to identify those visa overstays, if they were indeed overstays, and evaluate their status and make referrals to ICE.

We found in that evaluation that half of those were not—they actually had left the country, and we just hadn't matched the records appropriately.

A number of others actually weren't overstays. They had changed their status.

But we have made referrals to ICE. We have done background checks on all of them, against law enforcement and national security databases, the whole universe, and we are current now.

With respect to an exit system, we have given the Congress, in May, our plan on how we get to a biometric exit system for the

country. We begin with what we call enhanced biographic, using data that we previously didn't have all in one place that you could easily search. But we have given that plan, and our intent is to move forward.

Interestingly, one of our new projects is with Canada. We are going to match with Canada their entry data for land entry. So even if we don't have a lane or an ability to mark our exit data at the land border, we will take their entry data and put it in our system.

Mr. SENSENBRENNER. Okay. Thank you.

Now that gets me to the story that appeared yesterday in a CNS report that said that the TSA approved flight training for 25 illegal aliens at a Boston area flight school that was owned by another illegal alien, according to a GAO study. The illegal alien flight school attendees included eight who had entered the country illegally and 17 who had overstayed their allowed period of admission to the United States, according to an audit by the GAO.

And the story goes on to say that there were over 25,000 foreign nationals in the FAA airman registry that were not on the TSA AFSP database, and, consequently, had not been vetted. Now, this sounds like a 9/11 deja vu, and I am wondering that the Department of Homeland Security is going to do to make sure that everybody who is in a flight school is properly vetted, if they are a foreign national.

Ms. NAPOLITANO. Yes, I think that report referred to a several year old matter, which obviously is of concern. But we took steps in 2010 to make sure that all foreign students who are in this country applying to fight school are vetted, and that has been in place. And we intend to confirm that.

We have been doing it for 2 years. I think what the GAO said, well, you don't have a written thing that says—we agree you have been doing it, but you need a written MOA. So we are going to put that together.

Mr. SENSENBRENNER. And how long will that take?

Ms. NAPOLITANO. Oh, we will do it very quickly. I think the flight schools, we want to make sure we are very tight there, for obvious reasons.

Mr. SENSENBRENNER. Okay. The story also said that the GAO did not provide the full number of individuals who are not properly vetted. Do you have numbers on how many of these folks were not properly vetted?

Ms. NAPOLITANO. Well, all I can say is that foreign students are vetted, and they have been being vetted for several years. If they apply to the FAA for a license, there is a re-vetting that goes on. And then the FAA database is routinely pinged against our national security and criminal databases.

Mr. SENSENBRENNER. Okay, thank you very much.

I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Sensenbrenner.

The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you.

Madam Secretary, 5 years ago, Congress passed the 9/11 Commission Implementation bill, which mandated that, by this month,

all maritime cargo containers must be scanned before they are loaded onto ships bound for the United States.

When we wrote the law, we recognized that 100 percent scanning would be difficult to achieve overnight, which is why we gave DHS 5 years to comply and allowed for extensions of the deadline in certain cases. We assumed that 100 percent scanning would be phased in, and that the department would make a good-faith effort to try to comply with the law.

Unfortunately, DHS just recently granted itself a 2-year extension for all ports, citing obstacles that, from what we can tell, the department never even tried to overcome. Your letter to Congress explaining the extension repeats a lot of the same objections we heard 5 years ago, which Congress rejected at that time.

You have repeatedly said that you prefer a layered approach in scanning 100 percent of high-risk cargo. I don't think anybody would have a problem with that, as long as the department's efforts don't stop with the high-risk cargo. Checking just the cargo you think is high risk is inadequate. Scanning 100 percent of all cargo should be the ultimate goal.

The department takes a 100 percent scanning approach at airports. If we pat down and scan grandmothers and 4-year-olds, because we must check 100 percent at airports, why shouldn't the same principle hold true for maritime containers, which, as many security experts have noted, could more easily contain nuclear weapons?

That is the law, and that is what you should be working to achieve. I am concerned that DHS simply decided it did not agree with the law and has never made any good faith effort to resolve the potential challenges.

DHS has justified extending the deadline for 100 percent scanning by citing technological and operational barriers. Yet there are port operators and security companies that want to work with the department on implementing the law and that tell us that the department won't even talk to them.

DHS claims the cost of implementing the mandate is $16 billion, but that assumes that the Government would pay to acquire, maintain, and operate the equipment when, in fact, there is nothing in the law that says that cost has to be borne by taxpayers.

The cost per container, and a container contains an average of $66,000 worth of goods, has been estimated at $10 to $20 per container, which is a trivial cost. We all pay a $5 passenger security fee for airline tickets.

So my questions are, why does DHS continue to resist even trying to comply with the law and to achieve the scanning that the law requires? And will you commit to work with us in good faith in moving forward to make progress toward the mandate that Congress passed into law 5 years ago of scanning 100 percent of cargo containers before they are put onto ships bound for American ports?

Ms. NAPOLITANO. Representative, in my view, we have made a good faith effort to comply with the law. We have conducted pilot projects abroad. We have met with commercial carriers. We have met with foreign governments who would have to give us the ability to install things abroad.

There has been extensive research done on this, and it was done by us, and it was done by my predecessor, but we did it independently.

We both came to the same conclusion, that the goal is the right goal. How we get there——

Mr. NADLER. The goal of 100 percent scanning is the right goal?

Ms. NAPOLITANO. The goal of safe delivery of containers into U.S. ports is——

Mr. NADLER. Excuse me. Congress decided that a layered high risk—a layered approach of inspecting only high-risk cargo, and, for that matter, inspecting even all of it once it is here, was not sufficient. That is a decision that Congress made. It is the law. It is not up to the department to change that view.

Ms. NAPOLITANO. Well, Congressman, we have a very extensive program, including not just phased in but the container security initiative, the global supply chain initiative and others.

Mr. NADLER. All of which Congress knew about and decided was not sufficient. And Congress decided, and the President signed into law, a law that says you must implement 100 percent scanning as quickly as practicable within 5 years.

And yet you have decided or the department decided that that is not practical, which is not your decision. That is Congress' decision. And you are making no attempt, and you have made no real attempt, as far as we can tell, to implement the law.

Ms. NAPOLITANO. Well, Congressman, you and I are just going to have to disagree on that. But furthermore, we continue to improve efforts to inspect containers, to have trusted shippers, to have trusted——

Mr. NADLER. But isn't it true that under 4 percent of containers are now inspected before they get here?

Ms. NAPOLITANO. Say that again, please?

Mr. NADLER. Isn't it true, I forget whether it is 2 percent or 4 percent of containers are inspected before they get there?

Ms. NAPOLITANO. It probably depends on the particular port.

Mr. NADLER. But, nationally, it is under 4 percent?

Ms. NAPOLITANO. Again, I can't give you that number.

Mr. NADLER. Well, my information is that it is under 4 percent, and that leaves it 96 percent short.

Mr. SMITH. The gentleman's time has expired. Thank you, Mr. Nadler.

The gentleman from California, Mr. Gallegly, is recognized.

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

And welcome, Madam Secretary.

This is a very important hearing. It is been an issue I have been involved with for 25 years here in the Congress, and it never seems to get any easier.

I would like to make a unanimous consent request that, because of the amount of time that we have here this morning, I know that we have the opportunity to submit questions. My unanimous consent would be that the questions that I submit to the Secretary be responded to, hopefully within a period of 30 days, and that I would have, under unanimous consent, the opportunity to, for the record, have a response to the questions that were asked, that were responded back to by the Secretary.

Mr. SMITH. Without objection.

Mr. WATT. Mr. Chairman, I reserve the right to object.

Mr. SMITH. The gentleman from North Carolina.

Mr. WATT. Can the gentleman explain what he is requesting?

Mr. GALLEGLY. Well, I appreciate the opportunity to respond to my good friend from North Carolina.

I don't intend to ask any trick questions. I am not asking for questions. And, for the record, you will find that the questions will not be something that requires a great deal of research or whatever.

It is really more on policy and trying to understand the policy on some of these issues, and I would like to—sometimes we get responses that really aren't complete. And I would just like to say, in my opinion, I accept or disagree on it, just for the record.

Mr. WATT. Mr. Chairman, I have some serious reservations about what the gentleman is proposing.

First of all, I assume he is proposing a set of rules for himself that does not apply to all other Members. His intentions may be absolutely good, but I don't have the same level of confidence in all of the other Members having the same set of intentions, first of all.

Second, it seems to me that each of us has the opportunity to have dialogue with the Secretary and members of the Administration by calling them, having dialogue with them on their own.

And it seems to me, to set up this procedure, which is inconsistent with the Committee Rules, is something that is unnecessary.

I am happy to listen to the gentleman, but I am trying to keep from objecting, but——

Mr. GALLEGLY. Well, I appreciate the gentleman's comments. And I certainly don't disagree with your statement about the Committee as a whole and me individually. I can completely accept that. I appreciate your kind remarks.

Mr. WATT. I appreciate the gentleman acknowledging what I said.

Mr. GALLEGLY. The issue here is that I don't intend this to be a precedent. This is not a special thing. That is why we have unanimous consent policy here, on the floor, wherever.

And I have never asked for this before. We have a very limited amount of time. There is a tremendous amount on the agenda here. And I would just like to ask some simple, straightforward issues, particularly having to do with criminal immigrants, but not limited to, and have an opportunity to just, for the record, respond to it.

It would be totally consistent with everything that we are doing here, only giving the Secretary an opportunity to have a little time to put these things together. And that is the whole purpose of having this hearing.

Mr. SMITH. We have had a good discussion on this subject.

Does the gentleman from North Carolina object to the unanimous consent request?

Mr. WATT. Let me continue to reserve, first, just to be clear on why I am intending to object, because, I mean, I think all of us are frustrated by the 5-minute rule. We are all frustrated by the short time that the record is kept open for responses from the Administration.

A better route to cover that, from my opinion, Mr. Chairman, would be to extend the time for us to have this kind of back and forth from the shorter period that we have been having it to a longer period, so that people can go back and forth. But I think I am inclined to object to——

Mr. GALLEGLY. Mr. Chairman, may I respond?

I think that everybody on this Committee, particularly those like my good friend Mel Watt, Bobby Scott, and others, over the 25 years, some of us 20 years that we have served on this Committee, as it relates to the amount of time that Members have taken respectively, that the portion that I have taken in relation to my good friend Mr. Watt and others is not even a tiny blip on the radar screen.

Mr. WATT. And for that reason, I am having real trouble objecting to the gentleman, because I know his intentions are good. But I really think we would be setting a bad precedent, if we did this.

And for that reason, I must object, Mr. Chairman.

Mr. SMITH. Okay. The gentleman from California is recognized for 5 minutes to ask questions.

Mr. GALLEGLY. Thank you very much. And while I understand Mr. Watt's objection, I am disappointed. But life will go on.

My questions, however, will probably be a little more complex. After the hearing, I will submit some questions.

Madam Secretary, does the DHS plan to give authorization to all the people who are exempt from the deportation under—the exempt deportation under the executive order of June 15th? And further, approximately how many illegal immigrations as a result of that will receive work permits?

Ms. NAPOLITANO. Clarification, there is no executive order, per se. This is a memorandum from myself, as the Secretary, to the component heads of the Department of Homeland Security, setting out the deferred action program.

The answer is yes, they will be able to apply for work authorization.

Mr. GALLEGLY. Okay, and again, we keep saying we don't want to talk about amnesty or whatever, but at least on a temporary basis this is a de facto amnesty on a temporary basis. My interpretation. We are all entitled to that. If you are allowed to stay when you are here illegally, you get to stay.

Now, how many illegals would be given work permits?

Ms. NAPOLITANO. Well, again, they can apply for work authorization. They are going to have to meet the standards for being eligible for work authorization, but the linkage between deferred action and work authorization application goes back to the 1980's, that is a long-standing——

Mr. GALLEGLY. Whatever the requirements are, is it going to be two or three people or 200,000 or 300,000 people?

You know, we have 300 or 400 people out of work in the country now.*

Ms. NAPOLITANO. Yes, Congressman, and there are—if I might back up a moment, because this was an issue that I thought about

*Mr. Gallegly amended this statement to "13 or 14 million people out of work."

deeply before I wrote my memorandum, because jobs for Americans are very important.

My conclusion was, and we probably differ on this, but my conclusion was there are lots of different ways to stimulate job creation. Some of them are before the Congress now, but we shouldn't balance the American economy on the backs of children who were brought here mostly——

Mr. GALLEGLY. Madam Secretary, with all due respect, because of the time and with the help of my good friend, Mr. Watt, I really would like to have some succinct answers, just out of respect for time.

How many people as a result of this that are illegal in this country will be able to work in this country while we have 14 million Americans citizens that are without work?

Do you have just an approximate number?

Ms. NAPOLITANO. I think, Congressman, I try to keep my answers succinct and I think——

Mr. GALLEGLY. Just a number would be fine.

Ms. NAPOLITANO. I can tell you there is no real estimate. I have seen——

Mr. GALLEGLY. Could be a million?

Ms. NAPOLITANO. We don't know.

Mr. GALLEGLY. Okay, you have answered my question.

Is it true that work site enforcement, we talk about border, border, border, but we don't talk about the 12, 14, 16, 18, 22 million people that are here illegally already in the country. Is it true that work site enforcement is down 70 percent over the past 3 years?

Ms. NAPOLITANO. Well, that answer is partially true. If I might explain, it is down from like 5,000 to 1,500.

In juxtaposition, we have been able to remove 100,000 more felons from the country than we were before, and the number of I-9 audits, civil sanctions, debarments is up.

Mr. GALLEGLY. Well, if you had increased the number of worksite enforcements, or if you had have left it, instead of reducing it 70 percent, I would assume that that exponentially would even be a better situation.

Ms. NAPOLITANO. Well, even if we had not made any adjustments for our priorities for criminals, border crossers, et cetera, you are still talking about a maximum of 5,000 cases in the past. Better trade off to say go after the employers themselves, through I-9s and other audits, and then go after the criminal.

Mr. GALLEGLY. I couldn't agree with you more about going after employers.

Two quick questions. This is a yes or no. Is it true that ICE agents are now instructed not to detain or remove illegals during a work site enforcement action? Yes or no, please.

Ms. NAPOLITANO. It doesn't permit a yes or no answer. The answer is, it depends.

Mr. GALLEGLY. Okay, you have answered my question.

Getting back to Mr. Sensenbrenner's question having to do with visas and visa overstays, we, I think, accept the fact that a large percentage of people that illegally come to this country, maybe 40 percent, never cross the southern border. In fact, the people that were the perpetrators of 9/11 were visa overstays.

Now, having said that, to date, DHS has established visa security units at 19 locations with a presence in only 15 countries. However, ICE has identified 50 high-risk posts.

Why then does the Administration's proposed budget reduce funding for the visa security program for FY 2012?

Ms. NAPOLITANO. Yes, difficult choices had to be made, given the constraints of the Budget Control Act.

We have other things that we can do to make sure that visa applicants are vetted against our criminal and national security databases. So while it is nice to have visa security program officers in different places, it is not something that is essential to the national security.

Mr. GALLEGLY. Thank you very much.

I see my time has expired, Mr. Chairman.

And I still like you, Mel.

Mr. SMITH. Thank you, Mr. Gallegly.

The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Madam Secretary, if the gentleman from California has follow-up questions with your agencies, do you anticipate any difficulty that he or any other Member might have in getting appropriate responses and clarifications to those follow-up questions?

Ms. NAPOLITANO. We endeavor to do our best to respond and to do so in a timely manner.

Mr. SCOTT. Thank you.

You have talked about the student visas, the student——

Ms. NAPOLITANO. Deferred action.

Mr. SCOTT. Deferred action. August 15th, you indicated would be the application date. When would they expect to get some kind of documentation, and what would that documentation allow them to do?

Ms. NAPOLITANO. We anticipate that we will have guidance by the 1st of August. What we anticipate is, within a short period of after they send in their applications, they will receive an acknowledgement that their application is complete, and is ready to be processed.

They will get a number, and the number will enable them to track their matter as it goes through the adjudicatory process.

Mr. SCOTT. Well, will they be able to get on an airplane?

Ms. NAPOLITANO. Yes.

Mr. SCOTT. With that or with the subsequent documentation?

Ms. NAPOLITANO. They will be input into the system. And the idea then is that deportation or any removal action would be stayed until we complete the adjudicatory process.

Mr. SCOTT. Thank you.

Can you give us the status of your department implementation to PREA, the Prison Rape Elimination Act, and whether or not your regulations will be the same as those in the Department of Justice?

Ms. NAPOLITANO. They will meet PREA standards. They will not be identical because our facilities are different.

But we have already issued new standards for prison rape elimination, including a zero tolerance policy. We are following up very strongly on all allegations that are made, and we are going to be

issuing guidelines or standards that meet the PREA. But they will be different than DOJ, because our facilities are different.

Mr. SCOTT. Following up the comments from the gentleman from New York on port security, I understand that there is technology where the container trucks can drive through a scanner and essentially get scanned while the truck is going 15, 20 or more miles per hour. Is that——

Ms. NAPOLITANO. No, the current truck scanners that we use, say, for example, at the border where we have thousands of trucks cross every day, the trucks that go through, I think it is 3 miles per hour.

Mr. SCOTT. Is there any reason why that can't be universal? Why you can't do 100 percent?

Ms. NAPOLITANO. One hundred percent of what? Trucks or containers or?

Mr. SCOTT. Container trucks leaving a port.

Ms. NAPOLITANO. Representative, I think that requires a longer answer than time permits. I will try to be succinct. We will get you some material on that, but the fact of the matter is that seaborne containers go through a whole different layered process of security that is different than land-borne trucks.

Mr. SCOTT. What portion of containers are scanned in foreign ports before they leave, coming to America?

Ms. NAPOLITANO. It depends on the port, but, again, we use a risk targeting system to identify high-risk cargo.

And high-risk cargo, let me discuss that for a moment, because what it means is that we have a process for certifying trusted shippers, trusted forwarders, others that are moving containers all the time to the United States and doing some random checking there.

And then when we have containers that don't meet those kinds of standards, what we do to make sure that those containers are safe before they enter a U.S. port.

Mr. SCOTT. I guess the final question I have in the few seconds I have left, can you talk about the agency's use of the Federal Prison Industry program?

Ms. NAPOLITANO. We use FPI under contract. I believe we use them here in D.C.

Mr. SCOTT. What do you mean by "use"?

Ms. NAPOLITANO. I believe we have a contract with them. Is there a particular issue that I can help you with?

Mr. SCOTT. Yes, Federal Prison Industry is a program that we want to maximize the use of, because you have prisoners there getting job training, using the Prison Industry program for management purposes, encouraging them to be more likely to get a job when they get out.

A lot of agencies, because of other complications, that Prison Industry program is not being fully utilized, and we wanted to make sure that the Department of Homeland Security was fully using the program, so that we get the best benefit. The utilization, the number of people in prison under the program has been declining over the past few years.

Ms. NAPOLITANO. My understanding is that we are, but I will be happy to verify that for you.

Mr. SMITH. Okay, thank you, Mr. Scott.

The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Madam Secretary, you have made several references to responding to requests from this Committee, including requests in writing in a timely fashion. You last appeared before this Committee on October 26 of last year. And following that hearing, as required by the Rules of the Committee, a number of questions were submitted to the Committee and transmitted to you in a timely fashion, and the answers to those questions rolled in at 11:26 p.m. last night.

Do you regard that 9-month time period to answer questions as being timely?

Ms. NAPOLITANO. Representative, obviously not, although it is before this hearing.

Mr. GOODLATTE. What good is that to us——

Ms. NAPOLITANO. If I can——

Mr. GOODLATTE. 11:26 p.m. last night. That is supposed to help the Members of the Committee prepare for this hearing?

Ms. NAPOLITANO. If I might, Representative. I would need to go back. Sometimes we are asked—we have responded and Committee Members don't, for whatever reason, don't get the response. And as they prepare for hearings, their staff asks us for new copies of that. I would need to look into that.

In addition, I would like to remind the Committee, we try to be timely. But we have well over 100 Committees and Subcommittees that are submitting questions to us.

Mr. GOODLATTE. And your statement today that you answered these in a timely fashion is not rebutted by your failure to answer the questions until 9 months after the last hearing——

Ms. NAPOLITANO. Again——

Mr. GOODLATTE. Just a few hours before this hearing?

Ms. NAPOLITANO. Again, Representative——

Mr. GOODLATTE. Let me go on to a question.

Ms. NAPOLITANO. Well, you made a statement, I think——

Mr. GOODLATTE. No, Madam Secretary.

Ms. NAPOLITANO. Mr. Chairman?

Mr. GOODLATTE. We have asked and——

Ms. NAPOLITANO. Mr. Chairman?

Mr. GOODLATTE [continuing]. Answered that question.

Ms. NAPOLITANO. Mr. Chairman, may I get an opportunity to answer the question?

Mr. GOODLATTE. You have already answered it once.

Mr. CONYERS. Can we have regular order, Chairman?

Mr. GOODLATTE. I would definitely like regular order.

Ms. NAPOLITANO. Representative, I just wanted to clear up—what I said was that we often are in the situation where we are resending answers to questions that were sent well before as staff prepare for hearings. If that didn't happen here——

Mr. GOODLATTE. That is not the case here, Madam Secretary.

Ms. NAPOLITANO. Well, if that is what you want us to look into, I would be happy to look into it.

Mr. GOODLATTE. We want you to answer the questions in a timely manner. That is what we want.

Ms. NAPOLITANO. Fair enough.

Mr. GOODLATTE. In your testimony, you state that homeland security begins with hometown security, and that you have worked to get information, tools, and resources into the hands of State, local, tribal, and territorial officials. How does canceling your 287(g) agreements in Arizona, and refusing to enter into them in my State of Virginia, aid hometown security? When you take that resource away from local law enforcement, can you really claim that you are working to help hometown security?

Ms. NAPOLITANO. Absolutely. The 287(g) agreements that are task force, not in the jails, which are very productive, but the task forces, the ones your refer to, are remarkably unproductive and very expensive.

Of the six of the seven Arizona agreements we had on the task forces, they had produced zero removals in 2 years. The only one that was doing anything was the Department of Public Safety, and we already have a task force with them. They were fine with our cancellation.

It costs us per removal on a 287(g) almost 10 times as much through Secure Communities or through the 287(g) jail model. We are moving to the more efficient models.

Mr. GOODLATTE. I would like to know why it is that you will not utilize local law enforcement to apprehend individuals that are illegally in the United States and then promptly move to remove them from his country? That is not what is happening in Virginia, I can assure you. It is absolutely not what is happening.

Ms. NAPOLITANO. If I might, Representative, one of the things we have done to replace those ineffective 287(g) task forces is the great expansion of Secure Communities in the jails themselves, the program where we refer fingerprints both to the criminal database and to the immigration database.

And you will see that our ability to apprehend and remove criminals from the country has actually gone up dramatically because of that.

Mr. GOODLATTE. Madam Secretary, does this mean, your criticism of 287(g) and your cost analysis, does this mean that you will remove from the Department of Homeland Security's website the section that refers to 287(g) success stories?

Ms. NAPOLITANO. You know there may be some success stories, but when you look at the numbers, they——

Mr. GOODLATTE. Why are you touting them if they are success stories in a program that you think is otherwise flawed?

Ms. NAPOLITANO. I would say I would tell the people who are working the website, take it down.

Mr. GOODLATTE. Yes, you——

Ms. NAPOLITANO. It doesn't work. The program is expensive, and it doesn't work the way Congress intended.

Mr. GOODLATTE. According to the GAO, over time, Federal surveys have consistently found that the Department of Homeland Security employees are less satisfied with their jobs than the government-wide average. Out of 240 components ranked by the Federal Employee Viewpoint Survey throughout the Government, ICE ranked 222; FEMA ranked 231; TSA ranked 232; and a category collectively called "All other components" ranked 224.

You have a serious morale problem that has only gotten worse since you have taken over. I think you would agree that low morale in these positions has the potential to impact how effectively these public servants do their job.

What is the cause of this morale problem? Are there any morale problems due to the policies implemented by this Administration that prevent agents from doing their jobs? And what are you doing to address these serious morale problems?

Ms. NAPOLITANO. Yes, the morale issue is one that I am quite concerned about. We want our employees—good morale, they are effective, they are well trained. We have looked into those numbers.

We have determined that one of the real sources was that our first line or mid-level supervisors were promoted without training on how to actually be a supervisor. That caused a lot of discontent.

There are other reasons as well. I meet regularly now, Representative, with our component heads and have directed them, in turn, to take all action necessary to do what we must to try to bring that morale up.

We also brought in some experts from OPM to help us, and other places. And we have looked at other departments that were able to go from low to high. And techniques or things that they did from a management standpoint, we intend to deploy those as well.

Mr. GOODLATTE. Mr. Chairman, my time is expired. I do have additional questions, which I will submit to the Chairman in writing, and I am sure that he will submit them to you.

And, Madam Secretary, I hope you will answer them in a real timely fashion, not 9 months after we submitted them, like the last time. Thank you.

Ms. NAPOLITANO. I understand your point.

Mr. SMITH. Thank you, Mr. Goodlatte.

Madam Secretary, what do you consider to be timely? Thirty days? Two weeks?

Ms. NAPOLITANO. Some it is 30. Some it is 60. It depends on the question. Some requires multiple departments. Some requires new sorts of information that we haven't collected before.

Mr. SMITH. So 60 at the outset, if multiple departments were to be involved in the response?

Ms. NAPOLITANO. I would commit that we will aim to 60, yes.

Mr. SMITH. And shorter time for——

Ms. NAPOLITANO. And if we have to have more, we will tell you why.

Mr. SMITH. Okay, thank you, Madam Secretary.

The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman.

And I think this last exchange may illustrate the concern that I was expressing about the gentleman from California's unanimous consent request. I was feeling really bad about it until we got into this exchange, and the responses of the Secretary make it clear that putting the Administration or any of these departments in a 30-day straitjacket, as the unanimous consent request would have done, is just not viable, although I fully support the Administration responding to our oversight and responding to legitimate questions that are raised.

I also want to express my gratitude for your cutting back on the 287(g) program. I think it was the least successful, biggest abomination of any program that I have observed in our local communities, to turn local law enforcement away from their primary responsibilities into, many cases, just absolute witch hunts, doing something that is the primary responsibility of the Federal Government.

In fact, it so biased me against ICE, it is hard for me to say something nice about it. So now I have to go and say something nice about it.

Ms. NAPOLITANO. Can I write it down?

Mr. WATT. Yes. Actually, I think the efforts that you have made in the area that Mr. Goodlatte and I are involved in, in the intellectual property area, of dealing with counterfeit goods and things online, I think while there have been some problems, obviously, I think ICE has done a commendable job.

And to acknowledge the fact that there can be successes and failures at the same time, I have already acknowledged some of the failures, but I will just point out the success in North Carolina that led to arrests and charges of trafficking in counterfeit drugs, specifically Cialis and Viagra pills that were circulating that were counterfeit in North Carolina. And ICE did an exceptionally good job.

Now, having said that, without even asking a question, let me say that I also applaud the Administration's decision regarding the young people who are here under the Dream Act category, so to speak. If anybody, regardless of what your position is on immigration, if anybody deserves to be treated as if they were not criminals it is kids who were brought here at 1 month, 2 years, have no connection to the country from which they were brought, had no responsibility for bringing themselves into this country.

Their parents, if you consider them irresponsible or renegades, we certainly shouldn't pass that along to their children. The only place that they know as home has been the United States of America. If anybody deserves the benefit of this policy, it is these young people.

And I don't know how anybody can argue with that. I just hope you get this program implemented and all the rules in place quickly, so that these kids can get into a normal pattern.

They have been educated here. The notion that we would invest all of this money in them and then send them back to a country that they had no connection to just seems to me to be absolute folly. And so I want to publicly applaud the Administration and you, Madam Secretary, for this change in policy.

And I hope that at some point we will get around to setting up some additional rational immigration policies to set up a comprehensive immigration policy in our country, to get them out of this temporary status that you have been able to justify for them.

With that, Mr. Chairman, maybe I will submit some questions and give them 30 to 60 to 90 days to respond also.

And I do want to encourage you to respond to Mr. Goodlatte and my friend from California there, their questions, as timely as you can.

Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Watt.

The gentleman from Ohio, Mr. Chabot, is recognized for his questions.

Mr. CHABOT. I thank the Chairman.

And, Madam Secretary, just a few questions. I am trying to see around Mr. Chaffetz's head here, but it is all right.

I would like to ask about how our Customs and Border Patrol is handling counterfeit products coming into our country. Intellectual property in the United States is responsible for spurring new industry and developing useful technology and creating jobs. And I know we are all focused on how we can get more jobs in this country.

However, many bad actors are replicating trademarked American goods and then shipping them back to the United States for sale here. These fake products have a negative impact on the economy and, in fact, can be dangerous, oftentimes, to the health and safety of the American people.

The Customs and Border Patrol agents, they generally make the first contact when these shipments are coming into the country, and it is critical that your officers are able to communicate valuable information with the rights holders, the actual company here that would be producing legitimate products, not the fake products that are coming in.

Those are the best individuals who are suited to authenticate the products, to make that they are actually real or that they are fake.

And that is why Congressman Poe, Ted Poe from Texas, and I have introduced the Foreign Counterfeit Protection Act, which is H.R. 4216.

And I was wondering, perhaps your staff may have brought that to your attention, or if you are at all familiar with the legislation, and, if so, whether we can count on your support for it.

Ms. NAPOLITANO. Well, I am not directly familiar with the legislation, but I am familiar with the issue, which is when we find counterfeit products, there had been, this is what I have been told, a pre-existing legal opinion that we were barred from telling the actual holder of the trademark about the infringing product.

My understanding is also that that has been revised and changed, so that that barrier no longer exists.

Mr. CHABOT. Yes, and that is the very issue, and it has been improved somewhat. There are still some problems with it. We would like to work with you on that, because, as I said, it is very critical to creating jobs and protecting the rights of the people here that are actually producing the legitimate products.

I was encouraged to see that your agency issued an interim regulation, that is probably what you were referring to, in April, to allow your officers to share information about suspected counterfeits to the trademark owner to help CBP determine if the product is, in fact, counterfeit or not.

However, I am concerned about the interim. it has a 7-day waiting period, whereby importers are given the opportunity to demonstrate that the merchandise does not bear a counterfeit mark. And if the impostor demonstrates this, then there can be no meaningful disclosure to the trademark owner and the product will not be denied entry.

While I understand that your agency came up with this procedure as a way to protect the interests of grey market importers, I am concerned that, thus far, your agency has unwittingly created potentially a giant loophole for the most unscrupulous of counterfeiters. What makes you think that a person willing and able to create, for example, a fake product that looks real will not use the 7-day period to produce phony documents and fake certificates in an attempt to show that the counterfeits are genuine?

And CBP might not be able to seek help from one source who knows for sure whether the product or documents are real and that is the owner of the trademark.

This new procedure, whereby the deference is to the importer and not the trademark holder, invites, I think, potentially, that type of deception creating a loophole, as I indicated, to actually usher counterfeits into the country. So we would certainly appreciate your looking into that.

Ms. NAPOLITANO. Yes, I think that is a very fair point, and I will be happy to not only look at it, but work with you on this problem.

Mr. CHABOT. Okay. And, then, finally, Madam Secretary, I would like to turn now to another recent issue with counterfeits coming across the border.

In the latest attempt to essentially rip off U.S. trademarks, it appears that certain foreign criminals have found a new approach, that of counterfeit coupons. Last week, there was a police raid in Arizona where police confiscated $2 million worth of assets in a home-based business, which was responsible for producing and distributing counterfeit coupons on websites, affecting more than 40 U.S. consumer product manufacturers, including a company based in my district, that is Proctor & Gamble.

And I will wrap it up quickly here, because I know I am almost out of time.

The alleged leader of the operation, Robin Ramirez, is accused of bringing in these coupons from overseas in large quantities and selling them on her website for 50 percent of the face value. Police said the scope of this investigation has an economic impact in the hundreds of millions of dollars in losses, and I would just ask you to please look into that matter and make sure your agency is doing everything possible to, again, protect our businesses here so that we can actually create jobs.

Ms. NAPOLITANO. Yes, I am happy to do so.

Mr. CHABOT. Thank you very much.

Mr. SMITH. Thank you, Mr. Chabot.

Does the gentleman from Virginia have a unanimous consent request?

Mr. GOODLATTE. Yes, Mr. Chairman. I would ask that the printout that we have here from the department's website, under the ICE section entitled "287(g) success stories," which has printed out six pages of very, very small print, scores of success stories with regard to the 287(g) program, be made a part of the record.

Mr. SMITH. Without objection.

[The information referred to follows:]

Enforcement & Removal > 287(g) (http://www.ice.gov/287g/)

287(g) Success Stories

The 287(g) program has already resulted in the identification and removal of thousands of convicted criminal aliens from the United States. While many have already been removed, some of the most serious offenders are still completing their criminal sentences and will be taken into ICE custody once due process is completed.

Here are a few 287(g) success stories:

2012

March

LAS VEGAS, Nev. – In March, Las Vegas Metropolitan Police Department 287(g) designated immigration officers encountered a citizen and national of Mexico arrested for the offense of sexual assault and open and gross lewdness. After being interviewed, he was determined to be an alien unlawfully present in the United States. An immigration detainer was issued on the man pursuant to the 287(g) program. Local criminal charges are pending.

LAS VEGAS, Nev. – In March, Las Vegas Metropolitan Police Department 287(g) designated immigration officers encountered a citizen and national of El Salvador who was arrested for possession of a firearm and discharging a firearm into a structure. After being interviewed, he was determined to be an alien unlawfully present in the United States. An immigration detainer was issued on the man pursuant to the 287(g) program. Current criminal charges are pending.

ARIZONA DEPARTMENT OF CORRECTIONS, Ariz. – In March, Arizona Department of Corrections 287(g) designated immigration officers at the Alhambra Intake and Reception Facility encountered a citizen and national of Mexico, who, after being interviewed, was determined to be an alien unlawfully present in the United States without admission. In 2009, the individual was convicted in the Superior Court of Arizona in Maricopa County of possession of marijuana for sale, misconduct involving weapons and child and vulnerable adult abuse. At that time he was sentenced to three years in prison. Record checks revealed that he was previously granted a half time release from prison and removed from the United States in 2010. He was arrested again in March 2012 by the Phoenix Police Department and returned to the custody of the Arizona Department of Corrections to serve the remainder of his sentence. The individual also has a prior conviction for possession of marijuana with intent to sell. A detainer was placed on him and his prior order of removal was reinstated. The case will be presented to the U.S. Attorney's Office to prosecute for re-entry after deportation upon the completion of his current sentence and release to ICE.

February

LAS VEGAS, Nev. – In February, Las Vegas Metropolitan Police Department 287(g) jail enforcement officers encountered a citizen and national of Mexico arrested for battery with a deadly weapon (firearm). After being interviewed, he was found to be an alien unlawfully present in the United States. An immigration detainer was issued.

LAS VEGAS, Nev. – In February, Las Vegas Metropolitan Police Department 287(g) jail enforcement officers encountered a citizen and national of Mexico arrested for trafficking and transporting a controlled substance (methamphetamine). After being interviewed, he was found to be an alien unlawfully present in the United States. An immigration detainer was issued.

ARIZONA DEPARTMENT OF CORRECTIONS, Ariz. – In February, Arizona Department of Corrections 287(g) jail enforcement officers encountered a citizen and national of Mexico, who, after being interviewed, was found to be unlawfully present in the United States. The individual was convicted in the Superior Court of Arizona for possession of marijuana for sale. A query of ICE computer indices revealed that he was previously removed from the United States on four separate occasions since 2010. A detainer was issued and the case was presented to the U.S. Attorney's Office for violations of Title 8 USC, section 1326, re-entry after deportation.

ARIZONA DEPARTMENT OF CORRECTIONS, Ariz. – In February, Arizona Department of Corrections 287(g) jail enforcement officers encountered a citizen and national of Mexico, who, after being interviewed, was found to be unlawfully present in the United States. The individual was previously convicted in the Superior Court of Arizona for a felony drug offense and probation violations. A query of ICE computer indices revealed that he had a previous criminal history dating back to 2006, involving drug- and burglary-related offenses. Further investigation also revealed that the individual had been removed from the United States on four separate occasions. A detainer was issued and the case was presented to the U.S. Attorney's Office for violations of Title 8 USC, Section 1326, re-entry after deportation.

DENVER, Colo. – In February, Colorado State Patrol 287(g) task force officers indicted one foreign national for violations of Title 8 USC, Section 1324, illegal re-entry.

TULSA COUNTY, Okla. – In February, an Oklahoma Highway Patrol Officer stopped a vehicle for a moving violation. The vehicle was occupied by nine individuals, who were all found to be unlawfully present in the United States. Tulsa County Sheriff's Office 287(g) task force officers and ICE Homeland Security Investigations (HSI) Tulsa special agents responded to the scene. In February, the U.S. Attorney's Office for the Northern District of Oklahoma accepted prosecution for one case involving

violations of Title 8, Section 1326, re-entry after deportation. All of the other occupants were processed for removal to Mexico.

January

HALL COUNTY, Ga. – In January, Hall County Sheriff's Office 287(g) jail enforcement officers interviewed a citizen and national of Guatemala following his arrest for disorderly conduct. A query of ICE databases and biometric fingerprint comparisons later determined that the individual was an ICE fugitive. A detainer was placed pending the disposition of the local criminal charges.

HALL COUNTY, Ga. – In January, Hall County Sheriff's Office 287(g) jail enforcement officers interviewed a citizen and national of Mexico following his arrest for trafficking methamphetamine. A query of ICE databases and biometric fingerprint comparisons later determined that the individual had been removed from the United States on three prior occasions. The Mexican national was processed for removal and a detainer was placed pending the disposition of the local criminal charges.

DURHAM COUNTY, N.C. – In January, a Durham Police Department 287(g) task force officer (TFO) received information from the DHS tipline indicating that a citizen and national of Mexico, who had been previously deported from the United States as an aggravated felon, had illegally re-entered the United States. The TFO, with assistance from ICE Homeland Security Investigations special agents in Raleigh, located and arrested the man without incident. A further investigation revealed a previous conviction in the Superior Court of Duplin County for robbery with a dangerous weapon and a record of removal from the United States during September 2010. The case was presented for prosecution in the Eastern District of North Carolina for violations of aggravated felon and reentry after deportation. The defendant is currently in U.S. Marshals custody and awaiting an initial appearance on the pending federal criminal charges.

ARIZONA DEPARTMENT OF CORRECTIONS, Ariz. – In January, Arizona Department of Corrections 287(g) jail enforcement officers encountered a citizen and national of Mexico, who was found to be an alien unlawfully present in the United States. The individual was incarcerated for the following charges: sale of dangerous drugs (methamphetamine), possession of drug paraphernalia, possession of dangerous drugs (methamphetamine), aggravated assault on a peace officer and resisting arrest. A query of ICE computer databases further revealed that the man had a criminal history dating back to 1999, including convictions for assault, false report to law enforcement, failure to show identification, failure to appear, disorderly conduct, and possession of marijuana. This person was also found to have been previously removed from the United States during 2004 and 2005. A detainer was placed pending the disposition of the local criminal charges, and ICE reinstated his prior order of removal.

COLORADO STATE PATROL, Colo. – In January, Colorado State Patrol designated immigration officers arrested six foreign nationals for violations of the Colorado State human smuggling statutes. Five of the six individuals arrested were turned over to local ICE officers and were subsequently placed in removal proceedings.

COLORADO STATE PATROL, Colo. – In January, the Colorado State Patrol 287(g) immigration enforcement unit in Garfield County, Colo., encountered a minivan bearing Arizona registration. The vehicle had been involved in a single car accident - with no injuries - and was occupied by 11 individuals, who were found to be illegally present in the United States. All of the occupants claimed to be citizens and nationals of Mexico. They were subsequently transported to ICE custody for processing. Further investigation revealed that the driver of the vehicle had abandoned the accident and fled the scene on foot prior to law enforcement arriving at the scene. An accident investigation is being conducted by the Colorado State Patrol.

WEBER COUNTY, Utah – In January, Weber County Sheriff's Office 287(g) jail enforcement officers encountered a citizen and national of El Salvador, who was found to be an alien unlawfully present in the United States. This individual was incarcerated for the offense of theft. A query of ICE computer databases revealed that the man was previously removed from the United States on three separate occasions. The case was presented to the U.S. Attorney's Office for charges relating to illegal reentry after deportation. An immigration detainer was placed by 287(g) officers pending the disposition of the local criminal charges.

2011

December

LAS VEGAS, Nev. – In December, Las Vegas Metropolitan Police Department 287(g) jail enforcement officers encountered a citizen and national of Mexico. After conducting an interview, officers identified him as an alien unlawfully present in the United States. An immigration detainer was issued pursuant to the individual's pending criminal charges of robbery with a deadly weapon and kidnapping.

LOS ANGELES, Calif. – In December, Los Angeles County Sheriff's Department jail enforcement officers encountered a citizen and national of Mexico and a lawful permanent resident of the United States, who was being detained on local criminal charges for petty theft. Further investigation revealed an extensive criminal history and prior incarceration for violations including burglary, petty theft, and possession of narcotics/controlled substances.

November

DENVER, Colo. – In November, a Colorado State Police 287(g) task force officer encountered a citizen and national of Mexico. During biometric processing, troopers revealed that the individual had a prior criminal history including a felony conviction for robbery. They also discovered several previous encounters for immigration-related violations. In December, the man was indicted by a federal grand

jury for re-entry after deportation as an aggravated felon. He is currently in custody facing federal prosecution and will be transferred to ICE custody to face removal after his criminal case is completed.

DURHAM, N.C. – In November, HSI Resident Agent in Charge (RAC) in Raleigh, 287(g) TFO officers received information from the Durham Police Department that a citizen and national of Mexico, who had been previously deported as an aggravated felon, was back in the United States and residing in the Durham area. TFO officers, with the assistance of other special agents from HSI RAC Raleigh conducted a knock and talk at the individual's residence. As a result of a consent search, the individual was located and arrested, in addition to three other aliens, two of whom were prior deported aliens. Four firearms were located and seized by TFO officers. The weapons included a .22 Caliber Savage Stevens Westfield pistol, Mossberg shotguns, and a .40 Caliber Smith and Wessen Pistol.

The individual was taken into custody and presented for prosecution for violations of aggravated reentry after deportation and prohibited person in possession of firearms. The individual is currently in custody of the US Marshals Service pending indictment and trial. The three other aliens were processed for removal and detained in ERO custody pending removal from the United States.

SALT LAKE CITY, Utah – In November, 287(g) Designated Immigration Officers at the Las Vegas Metropolitan Police Department encountered a citizen and national of Mexico at the Clark County Detention Center after his arrest for murder with a deadly weapon and attempted murder with a deadly weapon. The individual was determined to be lawfully present in the United States after adjusting his immigration status to a lawful permanent resident in March 2003. He is currently in the custody of the Las Vegas Metropolitan Police Department pending the outcome of the current criminal charge. An immigration detainer was issued on him pursuant to the 287(g) program.

NASHVILLE, Tenn. – In November, 287(g) Designated Immigration Officers at the Davidson County Sheriff's Office encountered a citizen of Mexico, who had previously been removed, subsequent to an arrest by the Metropolitan Nashville Police Department in November 2010 for possession with intent to sell a controlled substance and sale of a controlled substance, to wit: Heroin. His removal order was reinstated. He is currently in ICE custody pending removal from the United States.

FAYETTEVILLE, Ark. – 287(g) Task Force Officers assisted with a multi-agency narcotics investigation, resulting in the indictment and arrest of the three foreign nationals who were involved in the manufacturing, distribution and sale of methamphetamine.

October

DAVIDSON COUNTY, Tenn. – In October, designated immigration officers encountered a citizen of Honduras subsequent to his arrest by the Metropolitan Nashville Police Department for rape of a child and aggravated sexual battery. The individual had been previously ordered removed from the United States in October 2005 and failed to depart. The individual is currently in local custody and will be turned over to ICE upon completion of his pending criminal case.

TULSA, Okla. – In October, designated immigration officers assigned to ICE HSI office in Tulsa assisted a controlled delivery of approximately 42.5 kilos of marijuana hidden in a vehicle. During the course of the control delivery and the subsequent consent search, 2 Mexican citizens and 1 Cuban citizen were arrested on State narcotics violations. Federal charges are also being sought. ICE detainers were issued. All individuals are currently in local custody pending the outcome of the criminal case.

TULSA, Okla. – In October, a task force officer assigned to the ICE HSI office in Tulsa was conducting a bulk cash smuggling operation. The officer received a call for assistance over his law enforcement radio relating to an armed robbery having just occurred at the Walgreens in Catoosa, Okla. The task force officer observed a black Range Rover driving erratically through traffic, and as a result, activated his emergency lights and siren. The task force officer subdued the suspect after a scuffle. The individual was arrested for armed robbery and use of a firearm in the commission of a felony and was also charged with felony eluding a police officer, assault on a police officer and resisting arrest.

LOS ANGELES, Calif. – In October, Designated Immigration Officers at the Los Angeles County Sheriff's Inmate Reception Center encountered a citizen and national of Honduras subsequent to his arrest for assault with a deadly weapon with great bodily injury. He was subsequently convicted for exhibiting a deadly weapon, attempted terrorist threats, and battery. He was identified as being illegal present in the United States. The individual was transferred to ICE custody in November and is pending immigration removal proceedings.

LOS ANGELES, Calif. – In October, designated immigration officers at the Los Angeles County Sheriff's inmate reception center encountered a citizen and national of Bulgaria subsequent to his arrest and conviction for possession and sale of a controlled substance. For this felony conviction, he was sentenced to180 days in jail and three years probation. He was also convicted in April 2011, for unlawful sex with a minor and sentenced to 124 days in jail, and for driving with a suspended license for which he was fined and placed on probation. His immigration history shows he entered the United States as a legal permanent resident in June 1988. He was transferred to ICE custody in October and was served with a notice to appear. His is currently in ICE custody pending removal proceedings.

LOUDOUN COUNTY, Va. – Loudoun County Sheriff's Office 287(g) task force officers encountered a citizen and national of El Salvador in the company of known gang members, subsequent to his arrest on alcohol related charges. Database checks revealed that the male was previously ordered deported by an immigration judge and failed to depart the United States. The male is a self-admitted associate of the criminal street gang Mara Salvatrucha (MS-13). He is currently in ICE custody pending removal from the United States.

HERNDON, Va. – Herndon Police Department 287(g) task force officers encountered a citizen and national of El Salvador subsequent to his arrest for an alcohol related offense. Database checks revealed that his temporary protected status had expired and he was unlawfully present in the United States. He had also previously been granted voluntary removal by the U.S. Border Patrol. A criminal history check revealed convictions for assault and battery, resisting arrest, destroying/injuring a vehicle and 13 misdemeanor convictions for possession of marijuana, trespassing and various alcohol related offenses. The individual was taken into ICE custody and processed for removal.

September

MARICOPA COUNTY, Ariz. – In September, 287(g) designated immigration officers at the Mesa Police Department Detention holding facility encountered a citizen and national of El Salvador, who after being interviewed, was determined to be an alien unlawfully present in the United States. The individual was arrested on charges of failure to show a driver's license or ID. Further investigation revealed that the individual was a fugitive with an outstanding warrant of removal pending since August 2008. A detainer was placed on the individual, and he was later transferred to ICE custody pending removal.

PRINCE WILLIAM COUNTY, Va – In September, Prince William County 287(g) task force officers initiated an investigation into the suspicious death of an elderly male. Prince William County Police 287 (g) task force officers requested assistance from ICE Homeland Security Investigations (HSI) in DC. Together, they were able to identify two possible suspects. In September, information was obtained indicating that one of the suspects had arranged to depart the United States via commercial air. The suspect was arrested by U.S. Customs and Border Protection officers prior to his departure from the United States pursuant to the on-going criminal investigation. The suspect was a naturalized U.S. citizen and is currently in custody on murder charges pending the outcome of his criminal case.

ALABAMA DEPARTMENT OF PUBLIC SAFETY – In September, a citizen of Mexico was transferred to the U.S. Marshals Service subsequent to his arrest in March 2011 for identity theft. The individual had attempted to obtain an Alabama State ID using Puerto Rican birth and school records. Upon further examination, the Alabama Department of Public Safety 287(g) task force officer determined that the individual was not the subject of the Puerto Rican birth record, and that the individual had been previously removed from the United States. Upon completion of his criminal case, his deportation order will be reinstated, and he will be removed from the country.

LOUDOUN COUNTY, Va. – In September, the Loudoun County Sheriff's Office 287(g) task force officers encountered a citizen of El Salvador, who, after his arrest, admitted to being a member of the Mara Salvatrucha street gang. Additional database checks were conducted and it was determined that this individual had previously been ordered removed from the United States. The individual was in possession of fraudulent identification at the time of his arrest. He is currently in ICE custody pending his removal from the United States.

COLLIER COUNTY, Fla – In September, 287 (g) designated immigration officers encountered a Mexican national subsequent to his arrest for driving under the influence. Database checks indicated that the individual had previously been removed from the United States after completing a five year prison sentence for first degree sexual abuse of a minor. The individual will be turned over to ICE upon completion of his current criminal charges to be removed from the United States.

DAVIDSON COUNTY, Tenn. – In September, 287(g) designated immigration officers encountered a citizen of Honduras subsequent to his arrest for driving without a license. Database checks revealed that the individual had been previously removed from the United States after being convicted of unlawful delivery of cocaine in Harris County, Texas. Additional database checks revealed that the individual had two prior removals from the United States. The individual was issued a notice of intent to reinstate his deportation order and is currently in ICE custody. A request for prosecution on charges of illegal re-entry after deportation was forwarded to the U.S. attorney and is pending approval.

MARICOPA COUNTY, Ariz. – In September, City of Mesa Police Department 287(g) designated immigration officers at the Mesa Police Department Detention Holding Facility encountered a citizen and national of Mexico, who after being interviewed, was determined to be unlawfully present in the United States without admission. The individual was arrested for the criminal offenses of making threats against law enforcement and promoting a criminal syndicate. The individual has a criminal history which includes convictions for marijuana possession, failure to show driver's license or ID, possession of drug paraphernalia and driving under the influence. He has used several aliases and is a documented gang member. Record checks revealed that the individual was previously removed from the United States on two occasions. A detainer was placed on the individual, and he was booked into the Maricopa County Jail for his current criminal charges. Upon release to ICE, the individual's case will be presented to the U.S. Attorney's Office for prosecution on felony charges of illegally re-entering the United States after deportation. His prior order of removal is being reinstated.

CLARK COUNTY, Nev. – In September, Las Vegas Metropolitan Police Department 287(g) designated immigration officers encountered a citizen and national of Mexico at the Clark County Detention Center after he was arrested for second degree attempted murder with a deadly weapon. The individual stated that he entered the United States illegally and has no authorization to reside here. He is currently in custody of the Las Vegas Metropolitan Police Department pending the outcome of the current criminal charge. An immigration detainer was placed on the individual pursuant to the 287(g) program.

August

COLLIER COUNTY, Fla. – In August, the Collier County Sheriff's Office encountered a citizen and national from Mexico following his arrest for trafficking cocaine. The arrest occurred after law enforcement purchased 1,360.9 grams of cocaine with a street value of $39,950. Collier jail enforcement officers determined that he was illegally present in the United States. They placed an immigration detainer on him. Upon completion of his criminal case, he will be transferred into ICE custody pending removal proceedings.

LOUDOUN COUNTY, Va. – Loudoun County Sheriff's Office task force officers encountered a citizen and national of Honduras at the Virginia Office of Probation and Parole. Database checks indicated that the individual has felony convictions and failed to depart the United States after he was granted a voluntary departure. The individual had ties to MS-13 and admitted to collecting money from gang members and then sending the money to support gang members in El Salvador. The individual was taken into ICE custody and processed for removal.

DAVIDSON COUNTY, Tenn. – In August, the Davidson County Sheriff's Office interviewed four individuals including three citizens and nationals of Honduras and a citizen and national of Mexico following their arrest for an attempted home invasion and aggravated robbery. Two of the individuals

were shot by the elderly homeowner. All were found to be unlawfully present in the United States. Additionally, one individual was determined to have been previously removed from the United States and illegally re-entered the country. Another individual was identified as an ICE fugitive. All individuals will be transferred to ICE custody upon completion of their current case.

MARICOPA COUNTY, Ariz. – In August, Maricopa County Sheriff's Office 287(g) jail enforcement officers at the Lower Buckeye Jail encountered a citizen and national of Mexico who was determined to be unlawfully present in the United States. The individual was charged with resisting arrest and providing a false report to law enforcement. The individual's criminal history dates back to 1999 and includes convictions for misconduct involving weapons and illegal entry after deportation. The individual has three prior removals and has one conviction for re-entry after deportation, which he was sentenced to 10 months in prison. The individual is currently in ICE custody pending his transfer to the United States Marshal's Office for criminal prosecution.

WHITFIELD COUNTY, Ga. – In August, Whitfield County Sheriff's Office 287(g) task force officers identified a citizen and national of Mexico who had been granted lawful permanent residence status in the United States. This individual was previously arrested and charged with tattooing persons under 18 without the consent of a legal guardian. While in custody, information was obtained identifying a criminal conviction in Las Vegas, Nev., for conspiracy to commit theft. The individual is also known to be a gang leader. The individual was released prior to the receipt of the conviction documents. Upon receiving the conviction documents, Whitfield 287(g) task force officers notified the ICE Atlanta Fugitive Operations Unit, who located him and placed him into ICE custody.

July

CLARK COUNTY, Nev. – In July, the Las Vegas Metropolitan Police Department jail enforcement officers encountered a citizen and national of Colombia after he was arrested on charges of forgery and burglary. A systems check revealed that the individual has three prior removals from the United States. In December 2010, he was convicted of illegal re-entry after deportation and sentenced to 30 months in prison.

On Aug. 4, the ICE Liaison Fugitive Division was notified of a possible INTERPOL warrant. System checks revealed the individual had four positive INTERPOL warrants related to major con artist activities issued from the following countries: Berne, Switzerland; London, U.K.; Dublin, Ireland; and Ottawa, Canada.

Washington INTERPOL contacted the other INTERPOL offices to determine if there was an interest to extradite him. Responses are still pending.

He is detained on criminal charges at the Clark County Detention Center in Las Vegas under the highest security level.

GWINNETT COUNTY, Ga. – In July, the Gwinnett County Sheriff's Office jail enforcement officers interviewed a citizen and national of Mexico following her arrest for misdemeanor theft by shoplifting. Criminal records checks indicated that the individual was convicted in the 184th District Court of Harris County, Texas, for the offense of murder by omission, for which she was sentenced to five years in prison. The individual had been formally removed from the United States after being released from prison in 1994.

TULSA COUNTY, Okla. – In July, a citizen and national of Mexico, illegally in the United States, attempted an armed robbery of a convenience store in Owasso, Okla. The subject attempted this robbery with a .22-caliber rifle made in the Philippines. The attempt failed when the subject was confronted by an off-duty police officer who was fueling his vehicle at the store. A confrontation ensued, and the police officer fired bullets in self-defense. The subject, also a documented Sureño West Side Criminal Street Gang member, arrived at the convenience store in a stolen vehicle when he attempted the robbery. At that time, the individual had an active federal warrant for his arrest.

The Homeland Security Investigations (HSI) Field Office in Tulsa, Okla., initiated an investigation after learning about the armed robbery. After checking ICE indices, they learned that the subject was a previously deported aggravated felon. The U.S. Attorney's Office accepted federal prosecution on this case.

A Tulsa County Sheriff's deputy assigned to the Tulsa 287(g) Task Force investigated this case. This is an HSI-led investigation with assistance provided by the Owasso Police Department.

June

HARRIS COUNTY, Texas – In June, designated Harris County Sheriff's Office (HCSO) 287(g) jail enforcement officers (JEOs) encountered a female citizen and national of Nicaragua and a female citizen and national of Guatemala at the Harris County Jail. They were arrested for causing serious bodily injury to a child in connection with the death of a 4-year-old Houston girl. The 287(g) HCSO JEOs placed a detainer on the Guatemalan national because she did not have lawful status in the United States. The 287(g) JEOs will monitor the case against the Nicaraguan female because she has only been granted temporary immigration status. If convicted, the JEOs will place a detainer on the Nicaraguan woman and initiate removal proceedings.

COLLIER COUNTY, Fla. – In June, designated 287(g) Collier County Sheriff's Office (CCSO) JEOs encountered a citizen and national of Mexico at the Collier County Jail after he was arrested for sexual battery of a 6-year-old girl. The designated 287(g) JEOs placed a detainer him, and he was processed for removal.

SALT LAKE COUNTY, Utah – In June, designated 287(g) Las Vegas Metropolitan Police Department JEOs encountered a citizen and national of Mexico at the Clark County Detention Center after he was arrested for lewdness with a minor. The victim was under 14-years-old. The Mexican national stated that he entered the United States illegally and has no authorization to reside in the country. The male is currently in custody of the Las Vegas Metropolitan Police Department pending the outcome of the current criminal charge. Designated 287(g) JEOs placed an immigration detainer on the individual.

YAVAPAI COUNTY, Ariz. – In June, designated 287(g) Yavapai County Sheriff's Office JEOs from the Camp Verde Jail encountered a citizen and national of Mexico who was present in the United States illegally. The male was arrested for assault, domestic violence, criminal damage and disorderly conduct. The Mexican national also had a criminal history dating back to 1997, which included convictions for illegally re-entering the United States after having been removed. In addition, he was removed from the United States on six prior occasions since 2000. The 287(g) JEOs placed a detainer on the individual, and he was turned over to ICE. The U.S. Attorney's Office is federally prosecuting the case. The individual is charged with re-entry after deportation by an aggravated felon.

May

WASHINGTON COUNTY, Ark. – In May, the Rogers Police Department 287(g) task force, Springdale Police Department 287(g) task force, and the Washington County 287(g) task force assisted the ICE Homeland Security Investigations (HSI), Resident Agent in Charge in Fayetteville, Ark. and the Drug Enforcement Administration (DEA) with dismantling the Arturo Gimena- Peraza Drug Organization under "Operation Cold Turkey." As of May 30, this joint task force indicted 27 individuals in violation of methamphetamine distribution. This investigation resulted in the criminal conviction of 20 individuals and the administrative removal of 44 illegal aliens.

CLARK COUNTY, Nev. – In May, 287(g) jail enforcement officers (JEO)s at the Las Vegas Metropolitan Police Department encountered a citizen and national of Mexico at the Clark County Detention Center after he was arrested for four counts of sexual assault on a victim under 14 years of age. The male stated that he entered the U.S. illegally and has no authorization to reside in the United States and is currently in custody of the Las Vegas Metropolitan Police Department. The male is pending the outcome of the current criminal charge at this time. An immigration detainer was issued on the Mexican national pursuant to the 287(g) program.

DAVIDSON COUNTY, Tenn. – In May, 287(g) designated JEOs at the Davidson County Sheriff's Office (DCSO) encountered a citizen of Mexico, who was arrested by the Metropolitan Nashville Police Department for two counts of possession with intent to deliver a controlled substance. At the time of his arrest, he claimed to be a United States citizen. The JEOs were notified by Secure Communities interoperability that the male had a previous history with ICE and a further investigation was initiated by the DCSO 287(g) officers. Records searches revealed that the male was previously removed from the United States in 1993, 1996, and 2002 subsequent to alien smuggling investigations. In 1996, the male was convicted of aiding and abetting and illegal entry at Del Rio, TX. In 2007, the male was also convicted of three counts of theft in Milford, OH and unauthorized use of a motor vehicle in Davidson County, Tenn. The male is currently in custody of the Davidson County Sheriff's Office with a detainer placed by the JEOs.

LOS ANGELES COUNTY, Calif. – In May, designated 287(g) JEOs at the Los Angeles County Jail encountered a citizen and national of Mexico, who was arrested and convicted for driving with a suspended license and was sentenced to 13 days in jail. The Mexican national admitted to entering the United States without being inspected and had a prior criminal conviction for possession of a controlled substance for sale and was sentenced to two years in prison. A detainer was placed by the JEO and he is now pending removal proceedings.

TULSA COUNTY, Okla. – In May, 287(g) designated immigration officers at Tulsa County Sheriff's Office encountered a male subject who was arrested for rape in the first degree. The subject was previously deported in December 2007 and is currently in Tulsa County Jail in Tulsa, Okla., with an immigration detainer.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentlewoman from California, Ms. Lofgren, is recognized.

Ms. LOFGREN. Thank you, Mr. Chairman. Before asking any questions, I would like to ask unanimous consent to put some material in the record.

Some have questioned the Secretary's legal authority to set immigration enforcement priorities and exercise prosecutorial discretion on a case-by-case basis. And so I would like to enter into the record the Supreme Court's recent decision that explains immigration officials have broad discretion, including whether it makes sense to pursue removal at all; a memorandum by the Congressional Research Service analyzing the Secretary's memorandum; a May 28, 2012, letter from 100 law professors to our President addressing the executive's authority to grant administrative relief; a November 4, 1999, bipartisan letter establishing prosecutorial discretion as well-established and well-grounded in case law; and a November 17, 2000, memorandum by then INS Commissioner Doris Meissner laying out the authority for exercising prosecutorial discretion.

Mr. SMITH. Okay, without objection.*

Ms. LOFGREN. I would also ask unanimous consent to put in the record statements from the faith community, including the Evangelical Immigration Table, the U.S. Catholic Conference of Bishops, the Evangelical Lutheran Church in America, and the Hebrew Immigrant Aid Society, in support of the President's Dream Act announcement.

Mr. SMITH. Okay, without objection.**

Ms. LOFGREN. As well as letters from labor leaders in support of the President's Dream Act announcement.

Mr. SMITH. Okay, without objection.***

Mr. SMITH. The gentlewoman is recognized for 5 minutes for questions.

Ms. LOFGREN. Thank you, Mr. Chairman.

I am mindful that we are joined today in this hearing by Eliel Acosta, who was brought to the United States, by her parents to the United States, when she was 3 years old; Hareth Andrade, who was only 8 when he was brought to the United States; Excy Cuardado, who was only 3 when he was brought to the United States; Karen Vallejos, who was just 5 years old when she brought to the United States.

These are wonderful young people who have achieved great things in their education. Every time I go to speak to a school, whether it is people getting their Ph.D. in Physics or whether it is a law school or whether it is a high school, some young person will come up and say, "I am a Dream Act kid."

And of all of the people who deserve our consideration, it is these young people. So I would like to thank you, Secretary Napolitano, for the action that you have taken to allow these young people I think of as de facto Americans—I mean, this is their country, but the papers aren't in order—for taking the step that you did that

*The submissions referred to are inserted in the Appendix. See pages 80 to 209.
**The submissions referred to are inserted in the Appendix. See pages 210 to 228.
***The submissions referred to are inserted in the Appendix. See pages 229 to 245.

will allow them to live normal lives until we get our act together here in Congress. Thank you very much for that.

Ms. NAPOLITANO. Thank you, Representative.

Ms. LOFGREN. I would like to note that, in the process of getting our act together, the House did, in fact, pass the Dream Act in December of 2010, and it got 55 "yes" votes in the Senate. But because of their crazy rules, we couldn't get 60 votes to pass it.

So, hopefully, we will have an opportunity, once again, to pass that Dream Act, and also to reform the law top-to-bottom. It does need reform in so many different ways.

I have a concern that I would like to raise about the implementation of the applications, and it is not about your department, it is about people who would prey on young people.

Every time there is announcement, there are unscrupulous people who will go and try and charge people, notary publics who will say you need to pay us this or that, and I am hopeful that the department will take some steps.

I mean, there is no reason why a de facto American who is an 18-year-old kid on the honor roll needs to go pay some fee to a lawyer or to a notary public or anybody else to get this application underway.

Have you thought about some efforts we might make to make sure that unscrupulous people don't take advantage in this situation?

Ms. NAPOLITANO. Representative, yes, and the whole issue of, say, notarios fraud, which has been a perennial problem in immigration, we are trying to address it in a couple of ways: outreach, working with different faith-based and advocacy groups, and with student groups and others. The application itself is available online. It will be based on existing application forms. There will be a fee associated with the application, as I think all of us understand.

Ms. LOFGREN. That is fine.

Ms. NAPOLITANO. But we are going to do that, and then I am going to reach out to the Justice Department themselves to see if, through the U.S. Attorneys' Office, they can help us in this regard.

Ms. LOFGREN. I am glad to hear that, and I think it is something that Members themselves can help on in their own communities.

Now, I wanted to talk a little bit about the history of the Dream Act, because, for many years, we worked together on this. And I will never forget the late Paul Gillmor, who was a very conservative man. There are many things we didn't agree on.

But he called me and described a young man in his little town in Ohio who was the valedictorian of the high school. He was the quarterback on the football team. And he went to go get a document, and it was only then that he was told that he wasn't born in the United States.

He said, "Well, I will straighten this out. I will go down to the Government, and have the Government straighten this out." So he went down the day before Christmas, and they put him in handcuffs, and the little town was outraged.

And Congressman Gillmor understood. He did a private bill, but he also understood this issue in a way what was visceral. And that

conservative Republican put his name on the Dream Act as a cosponsor.

So I am hopeful that as we move forward, we can get the kind of consensus that we once had on this issue, and that we are able to do the right thing, not only for these young people, but for our country, because they are a part of a rich future for our country.

Thank you, Madam Secretary.

Mr. SMITH. Okay. Thank you, Ms. Lofgren.

The gentleman from Virginia, Mr. Forbes, is recognized.

Mr. FORBES. Thank you, Mr. Chairman.

Madam Secretary, thank you for being here. And I think we all know that there are two issues here. One is whether the substance of what is being done is appropriate. And the second one is that, at least up until a short period of time ago, many of us felt we were still a Nation of laws. And we want to make sure that we do what we do in a legal manner.

I know it is always dangerous to put too much credence in the words that our elected officials say, but I want to come back to something the Chairman said earlier, because this is what the President said.

He said, with respect to the notion that I can just suspend deportation through executive order, that is just not the case, because there are laws on the books that Congress has passed. And went on and said, there are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system, that, for me, through simply an executive order, to ignore those mandates would not conform with my appropriate role as President.

That he said on March 28, 2011.

Now my first question for you, so that we can understand, to your knowledge, were there any laws that changed between March 28, 2011, and today that would change what the President said?

Ms. NAPOLITANO. No.

Mr. FORBES. Do you feel that the President was inaccurate at what he stated on March 28, 2011?

Ms. NAPOLITANO. Well, I think, Representative, I think it is important to understand what actually occurred here.

Mr. FORBES. No, I am just asking what the President stated on March 28, 2011, regarding an executive order. Was he correct in that statement on that date?

Ms. LOFGREN. Would the gentleman yield?

Mr. FORBES. I will when I finish my time.

Ms. NAPOLITANO. As a general matter, yes.

Mr. FORBES. So as a general matter, he was correct? No laws have changed since that time.

Now, I notice that you said that the memorandum that you issued was not an executive order, per se. I don't know. I am just harking back to my old law school days and kind of the bible that we had was Black's Law Dictionary.

And I look at executive order and the definition there. It says, "An order issued by or on behalf of the President, regarding a constitutional provision, law or treaty."

Was this memorandum that you issued issued on behalf of the President or under the authority of the President?

Ms. NAPOLITANO. It was under my authority as the Secretary, setting the priorities for the enforcement of the Nation's immigration laws in an effort to deal not only with these compelling cases, but the continued effort to clear the backlog to deal with the more serious——

Mr. FORBES. Is it your opinion, Madam Secretary, that the authority that you issued this under as your authority has greater authority than the President of the United States?

Ms. NAPOLITANO. I think, as Representative Lofgren has put in the record, there is a lot of authority going far back about the ability of a prosecutor to set priorities.

Mr. FORBES. That is not my question, though, in all due respect. And I appreciate prosecutorial discretion when prosecutors are able to do that on a case-by-case basis.

My question is a very simple one: Do you feel that you have greater authority than the President of the United States on this matter?

Ms. NAPOLITANO. Well, this is a case-by-case determination. This is a case-by-case determination designed very carefully to be seated clearly within prosecutorial discretion precedents. It is not——

Mr. FORBES. Madam Secretary, the President announced this policy from the Rose Garden. And I know you are saying that this was issued by you. But it was the President that announced the policy as President of the United States.

Black's Law Dictionary says very clearly, if an order is issued by or on behalf of the President regarding a constitutional provision, law, or treaty.

Are you saying this was issued not in conjunction with the President of the United States? You didn't have consultation with him about issuing this?

Ms. NAPOLITANO. This decision came from the Department of Homeland Security. The President, obviously, approved of the decision, which is what he announced at the Rose Garden. But the decision had already been announced that morning by myself.

Mr. FORBES. But the President announced the policy. The President is the one who appointed you, is that not correct?

Ms. NAPOLITANO. That is true.

Mr. FORBES. And you take your authority directly from the President and the appointment he made; is that not correct?

Ms. NAPOLITANO. And the Constitution and laws of the United States, that is true.

Mr. FORBES. And you hold a constitutionally directed office. Can you tell me what part of Article 2 endows your authority?

Ms. NAPOLITANO. I would go to Section 3, which is the obligation to carry out the laws faithfully, to execute the laws.

Mr. FORBES. And once again, it is, as I understand it, the President of the United States, you don't dispute the fact that he was correct when he said he didn't have authority as President of the United States to issue an order to do what you have now issued as Secretary of Homeland Security, but you feel that you have that authority and that capability to do.

Ms. NAPOLITANO. We are well-seated in the law; that is correct, Representative.

Mr. FORBES. And again, do you concede that the President did not have the authority to issue the order that you issued; correct?

Ms. NAPOLITANO. That is not what I said. I said an executive order from the President was not involved.

Mr. FORBES. But the President didn't have authority—could not have issued an executive order, according to what you said and what the President said, correct?

Ms. NAPOLITANO. Could he have waved a magic wand and by huge category just said, everybody is home-free? No. Can a prosecutor's office say, on a case-by-case basis, we are going to defer action? Yes.

Mr. FORBES. Could he have issued an——

Ms. NAPOLITANO. Yes.

Mr. FORBES. Executive order to do what you did?

Ms. NAPOLITANO. Yes.

Mr. FORBES. Mr. Chairman, thank you.

Mr. SMITH. Thank you, Mr. Forbes.

The gentlewoman from California, Ms. Waters, is recognized.

Ms. WATERS. Thank you very much,

I yield to Ms. Lofgren 30 seconds.

Ms. LOFGREN. Thank you.

I just wanted to—the President's statement has been quoted, but only partially, because the rest of the statement is: Now what we can do is prioritize enforcement since there are limited enforcement resources and say we are not going to go chasing after this young man or anybody else who has been acting responsibly and would otherwise qualify for legal status if the Dream Act passed.

So I think that rest of the statement is important.

I thank the gentlelady for yielding.

Ms. WATERS. Thank you very much.

Reclaiming my time, first, Madam Secretary, I am pleased that you are here. And I want to congratulate you. I don't care who did deferred action, whether it was you or the President. I am just pleased that it was done. It is the right thing to do. It is the fair thing to do. And I happily got on the telephone and called many of my friends to tell them, who were feeling so at risk having been brought to this country at a very early age and then finding that they could not participate fully.

So again, thank you, thank you, thank you.

Now, having said that, I want to ask you about the H-1B visa program. We have a GAO report entitled, "Reforms Are Needed to Minimize the Risks and Costs of Current Program." You know, there is conflict in opinions, I guess even in the President's jobs panels about this program.

But I am concerned about what is said in this report. For example, and I am going to read directly from it: Restricted agency oversight and statutory changes weaken protections for U.S. workers. Elements of the H-1B program that could serve as worker protections such as requirement to pay prevailing wages, the visas temporary status, and the cap itself, are weakened by several factors. First, program oversight is fragmented and restricted.

It goes on to talk secondly about the H-1B program lacks a legal provision for holding employers accountable to program requirements when they obtain H-1B workers through a staffing company.

And it describes these staffing companies.

And thirdly, statutory changes made to the H-1B program have, in combination and in effect, increased the pool of H-1B workers beyond the cap and lowered the bar for eligibility.

Here is my concern. You know, I know that we try sometimes to have all things all ways in this country when we are trying to help people and companies, et cetera. We have an employment program in America. We have some serious education problems.

We are told by those who try to protect the program and expand the program that we have occupations that are desperately needed to do some of the jobs that are needed, perhaps in Silicon Valley and some other places. And they have to look to importation of workers to do that.

But also, some of us maintain that many of these companies have the kind of campuses that should include more training, more development. And we want our education system to put more people in the STEM pipeline and all of that.

So, with these kind of concerns, what can you do to ensure that the oversight that is needed is done? And those of us here at this level of Government making public policy, we have to weigh in on whether or not we want to continue to support, expand, or what have you.

But what role do you play in this oversight?

Ms. NAPOLITANO. Representative, I think I am not personally familiar with that GAO report, but I will follow up, and we will follow up with you on what we have done in response and pursuant to the recommendations in it.

Ms. WATERS. Thank you very much. I look forward to it.

I yield back the balance of my time.

Mr. SMITH. Thank you, Ms. Waters.

The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman.

And thank you, Madam Secretary, for your testimony here today. A number of curiosities have arisen, listening to your responses. And one of them is, did you have discussions with President Obama with regard to the policy within the June 15 memorandum prior to the issuing that decision?

Ms. NAPOLITANO. I did not.

Mr. KING. Or with members of the White House that would have direct access to the President?

Ms. NAPOLITANO. I informed the White House prior to the release of the memorandum that that was my intent to do so. But the internal meetings that we worked on and how we developed the program started in early May.

Mr. KING. Does that mean that your staff had communications with White House staff with regard to this, and you had a sense that the President supported this decision?

Ms. NAPOLITANO. Yes, they raised no objection to my intent to prioritize cases in the fashion that we have.

Mr. KING. Were you surprised when you issued the memorandum that the President had a press conference scheduled within hours?

Ms. NAPOLITANO. No.

Mr. KING. That was coordinated with the DHS and the White House?

Ms. NAPOLITANO. I don't think it was coordinated, but it is a major announcement as to how we are prioritizing immigration enforcement, and it is appropriate for the President to speak to it.

Mr. KING. And you pointed out Article II, Section 3 in the Constitution, and thought I had that memorized, and I looked it up, and I think I did. "He shall take care that the laws be faithfully executed." I believe that is the section you are referring to when you assert your responsibility under the Constitution.

Ms. NAPOLITANO. That is one of them, yes. A primary one, yes.

Mr. KING. And if Congress is going to direct—Congress writes the laws, the President has been clear on that. I think you agree with the statement the President made, even though it is uncomfortable to see that contradiction today.

But if Congress is to write a law that directs the executive branch to take care that the laws be faithfully executed, how would we write that bill if we wanted those laws enforced that you have decided now will not be.

Next question will be behind this one.

Ms. NAPOLITANO. Well, I can't speculate as how you would write that, but I would simply say, based on my history as a prosecutor, there are lots of laws on the books within the framework of which prosecutors make——

Mr. KING. We understand prosecutorial discretion here. There have been many discussions on it. When I look through the reference to prosecutorial discretion on the June 15 memo, I see it mentioned four times in here.

I see the individual basis mentioned six or seven times. It looks like almost as if this is written anticipating the constitutional objection that I assure you I will bring.

There is a separation of powers. And the executive branch cannot legislate by executive order, by memorandum. I accept Mr. Forbes' definition of executive order. But we cannot allow the Article II executive branch legislate by executive order, we must stand and assert this legislative authority that we have.

And as I read this memorandum, you say in it, only the Congress acting through its legislative authority can confer these rights. But yet you have directed the director of USCIS to issue work permits for people who fit within four classes.

This isn't an individual directive. It establishes four classes within it. And it directs USCIS to issue a work permit that does not exist.

And our visas and work permits are creations of Congress, not the executive branch.

And I would ask you, will you rescind this before we have to take this to court?

Ms. NAPOLITANO. Representative, I will not rescind it. It is right on the law. It is the right policy. It fits within our prosecutorial priorities. And although it came out of the Department of Homeland Security, let me say that President is foursquare behind it, embraces this policy as the right thing to do.

Mr. KING. The President, foursquare in front of the Constitution, challenged it by myself and many Members of this Congress, we have to assert this authority. The Founding Fathers envisioned that each branch of Government would carefully protect the au-

thority vested within this Constitution. And when you cross those lines and those bounds, and there is a whole list of things that have been done by this President, this one is the most clear.

I accepted the prosecutorial discretion when it dealt with individuals. I do not when it deals with groups of people that are created by a memorandum. And I do not when it deals with a work permit that is ordered to be issued that doesn't exist in the United States Code. And that is the province of Congress.

So I thank you for being here today, but we will see each other down the line in litigation.

Mr. SMITH. Thank you, Mr. King.

The gentleman from Puerto Rico, Mr. Pierluisi.

Mr. PIERLUISI. Thank you, Mr. Chairman.

Welcome, Madam Secretary. Before I address the topic that I would like to discuss, let me welcome the young Hispanics who are here with us this morning.

And let me tell you, what you have seen, you have seen Secretary Napolitano standing firm on the deferred action policy that the Federal Government is about to implement. That means that your dreams are very much alive.

And now, Secretary, as you probably expected, I want to raise the same issue with you this morning that we discussed the last time you appeared before the Committee, namely the drug-fueled public safety crisis in Puerto Rico.

First, I want to express my profound gratitude to you and your team for traveling to Puerto Rico last week in order to investigate the situation first hand and to meet with Governor Fortuno and myself. I think our meetings were positive and productive, and I hope you agree.

On Tuesday, I wrote you a letter, following up on your visit. In addition to thanking you for your visit, I noted that your presence in Puerto Rico underscored the Federal Government's commitment to working with local law enforcement to enhance and expand our efforts to combat drug trafficking and related violence on the island.

I said that I was heartened to hear you declare that Puerto Rico's public safety crisis has your full attention. And that our motto moving forward will be, let's fix this.

I also expressed agreement with your statement that the definition of success should be significant and sustained reduction in the number of homicides committed on the island.

I think we all recognize the need to act with a sense of urgency in light of the severity of the situation. In my letter, I strongly endorsed your plan to promptly develop a law enforcement strategy specifically tailored for Puerto Rico and the neighboring U.S. Virgin Islands.

I believe this strategy will ensure that our efforts are as well coordinated and effective as possible and will help to identify gaps in the current approach that can be filled.

I respectfully ask that this strategy be coordinated with the Department of Justice since DOJ personnel are working side by side with your men and women on the front lines of this fight.

Finally, I note that any meaningful strategy will require a reasonable allocation of personnel and resources, whether on a tem-

porary or an enduring basis. In the 5-year period between 2007 and 2011, the number of homicides nationwide fell by 20 percent. Yet in that same period, the number of murders in Puerto Rico rose by over 55 percent.

Nevertheless, the Federal law enforcement footprint on the island has not evolved in the face of these profoundly changed circumstances.

It is my fervent hope that the forthcoming law enforcement strategy will be action-oriented, and will recognize that an enhanced Federal response is required, if we are to be successful in this shared endeavor.

So, Madam Secretary, I just want to give you the opportunity to tell me and my fellow Members of this Committee in broad terms how you envision moving forward on this issue.

And I thank you again.

Ms. NAPOLITANO. Well, thank you, Representative.

Yes, I went to Puerto Rico, because I am troubled by a number of things in terms of the crime situation there, but the homicide rate being twice that of Mexico is a real eye opener.

And so on my return, I have already met internally with our staff. We have appointed an internal person to help coordinate. We will reach out to DOJ and, in particular, to the U.S. Attorney in Puerto Rico, who is very familiar with the local situation.

So I think it is going to take all of us working together to get a handle on this and get that crime rate down, but that is what our intent is.

Mr. PIERLUISI. Thank you so much. I yield back.

Mr. SMITH. Thank you, Mr. Pierluisi.

The gentleman from Texas, Mr. Gohmert, is recognized.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank you, Madam Secretary, for being here.

When you were here before, back in October, we discussed Mr. Elibiary, and the week before he had been online using the secret security clearance that you had given him when you placed him on the Homeland Security Advisory Council. And he had used that to access the State and local intelligence community of interest classified material database and downloaded material. And we had information that he had shopped that, trying to claim Texas was Islamaphobes because they were concerned about radical Islamists.

But since that time, you told me personally at that time that you were going to look into it. You weren't going to appoint somebody, you, yourself, were going to look into it.

So what did you find out?

Ms. NAPOLITANO. I found out that the statements that have been made in that regard are false. They are misleading and objectionable. And I think they are wrong.

Mr. GOHMERT. Okay, then, madam, you need to know that you have people who are lying in your department, because Texas Department of Public Safety has been told the investigation was done. He did access the classified information with his own private computer. He did download the documents that we knew he did. And the one thing they could not confirm, because they didn't talk to the reporter or the people that he shopped the story to, they couldn't confirm that he shopped the story.

But are you saying before this Congress, right now, that as Secretary of Homeland Security, that it is a lie that Mohamed Elibiary downloaded material from a classified website using the secret security clearance you gave him? Are you saying that is a lie?

Ms. NAPOLITANO. I am saying that isn't accurate. That is correct.

Mr. GOHMERT. All right, what is inaccurate about that?

Ms. NAPOLITANO. A number of things.

First of all, we have several people on the Homeland Security Advisory Committee who aren't Muslim. They have been helping law enforcement for a long time. Mr. Elibiary himself was recognized by the FBI for his——

Mr. GOHMERT. I didn't say anything about that. So if you could confine your answer to what I said and what you find misleading in it.

Ms. NAPOLITANO. Well, one of the things I find misleading is that he somehow downloaded classified documents.

Mr. GOHMERT. So you are saying that the State and local intelligence community of interest database is not classified?

Ms. NAPOLITANO. I am saying that he, as far as I know, did not download classified documents, and I——

Mr. GOHMERT. Now one of the games that gets played sometimes by people who come up here and testify is that they have somebody not provide them adequate information so that they can come in here and say, so far as I know, not to my knowledge, that kind of thing, and they obscure the truth.

Has Elibiary's status on the Homeland Security Advisory Council changed?

Ms. NAPOLITANO. No.

Mr. GOHMERT. It did not bother you that he accessed information?

Ms. NAPOLITANO. He accessed some information. What bothers me, quite frankly, are the allegations that are made against anyone who happens to be Muslim.

Mr. GOHMERT. Well, the allegations are not because he is Muslim. You follow me around the world. You see me hugging Muslims around the world, because the ones I hug are our friends.

And this Administration seems to have a hard time recognizing members of terrorist groups who are allowed into the White House. You are aware of that happening, aren't you?

Ms. NAPOLITANO. Absolutely not.

Mr. GOHMERT. So, all right. The evidence speaks for itself. Obviously, you are kept in the dark on a lot of these things.

Ms. NAPOLITANO. Representative——

Mr. GOHMERT. Are you aware of what the Freedom and Justice Party is in Egypt?

Ms. NAPOLITANO. Representative——

Mr. GOHMERT. Are you aware of what the Freedom and Justice Party is in Egypt?

Mr. CONYERS. Mr. Chairman, could we have regular order?

Mr. GOHMERT. It is a simple question. It does not afford an interruption.

Is she aware of what the Freedom and Justice Party is in Egypt?

Mr. SMITH. Would the Secretary respond to the question?

Ms. NAPOLITANO. Yes.

Mr. GOHMERT. Are you aware that Mr. Elibiary's foundation that has had their charter pulled because they failed to provide the information that the Government requires to keep their 501(c)(3) status? Are you aware that that was, before the 501(c)(3) status was pulled, called the Freedom and Justice Foundation?

Ms. NAPOLITANO. Representative, I am not going to get into a debate about some of the——

Mr. GOHMERT. I am asking you if you know simple fact.

Ms. NAPOLITANO. I would like to—I would like to——

Mr. GOHMERT. You say you are not going to get into debate. I don't want to debate. This is a question and answer.

Are you aware of that being the name of his foundation that has now had the 501(c)(3) status pulled?

Ms. NAPOLITANO. The insinuation that I——

Mr. GOHMERT. Could you answer the question? There is no insinuation.

Mr. CONYERS. Mr. Chairman, can we have regular order?

Mr. SMITH. I will allow the witness to answer the question, yes.

Mr. GOHMERT. Please, answer just the question.

Ms. NAPOLITANO. Representative, with all respect, I believe you are insinuating that I and members of my staff——

Mr. GOHMERT. I am not insinuating anything. I am asking a direct question.

Ms. NAPOLITANO. Well, Mr. Chairman——

Mr. GOHMERT. You are not answering the question——

Mr. CONYERS. Mr. Chairman——

Mr. GOHMERT. The question is very simple. Were you aware of his Freedom and Justice Foundation——

Mr. SMITH. Let me say to the gentleman from Texas, I don't think that he is going to get a different answer.

Mr. GOHMERT. Then I would ask the assistance of the Chairman to direct the witness to answer the question as asked.

It is very simple. It is yes or no. Was she aware, or was she not?

Mr. SMITH. We will give the witness an opportunity to give a final answer, yes.

Ms. NAPOLITANO. Mr. Chairman, I would just like to say for this Committee, which is a——

Mr. GOHMERT. That does not sound like a yes or no. It is non-responsive.

Mr. CONYERS. Mr. Chairman, regular order.

Mr. GOHMERT. It will not be given on my time.

Mr. SMITH. Madam Secretary, if you will——

Mr. GOHMERT. An answer that is non-responsive.

Mr. SMITH. Okay, the answer may be non-responsive.

Madam Secretary, do you have anything to add?

Ms. NAPOLITANO. Mr. Chairman, I didn't know this was a court with rules of evidence. I was hoping I could explain my answer.

Mr. SMITH. Do you want to proceed to do just that?

Ms. NAPOLITANO. Thank you, Mr. Chairman.

Mr. GOHMERT. Mr. Chairman, my question was a yes or no——

Mr. CONYERS. Mr. Chairman, regular order.

Mr. GOHMERT. Anything but a yes or no answer is——

Mr. SMITH. We will allow the witness to answer the question.

Mr. GOHMERT. And the reason there are rules of evidence is so witnesses just don't go off on a lark——

Mr. CONYERS. Mr. Chairman, can we have regular order?

Mr. SMITH. The gentleman's time has expired.

Does the witness have anything to add?

Ms. NAPOLITANO. Yes.

This Committee has a long and proud tradition. These kinds of insinuations demean the Committee. The insinuation that I or my staff would allow someone who is a terrorist to infiltrate——

Mr. GOHMERT. I have not insinuating that Elibiary——

Mr. CONYERS. Mr. Chairman, regular order.

Mr. GOHMERT. He is very nice gentleman. I met him a couple of times. He is a nice guy.

Mr. SMITH. Let me say to the gentleman from——

Mr. GOHMERT. There is no such insinuation.

Mr. SMITH. We will have regular order.

Mr. GOHMERT. The Secretary of Homeland Security——

Mr. SMITH. We will have regular order.

Mr. CONYERS. Mr. Chairman?

Mr. GOHMERT [continuing]. To come in here and make such an allegation that——

Mr. CONYERS. Mr. Chairman, can we have regular order?

Mr. SMITH. The Committee will be in order. I understand the frustration of the gentleman from Texas, but I don't believe he is going to get a different answer and the gentleman's time has expired.

Mr. CONYERS. And he is out of order, too.

Mr. SMITH. The gentleman from Texas, Mr. Poe, is recognized.

Mr. POE. Thank you, Mr. Chairman.

Madam Secretary, thank you.

Are you familiar with these people or these cases, the Lois Decker case in New York, Ashton Cline-McMurray case in Massachusetts, the Binh Thai Luc case in California? Are you familiar with those names?

Ms. NAPOLITANO. I may know of them by different descriptors.

Mr. POE. Let me briefly go through these, and I want to talk about specifically criminals.

As a former judge and prosecutor, as you were, crime is something that none of us like, but let's center in on some criminals in the United States that are still here, that don't go home when they are supposed to.

Lois Decker was a grandmother and a mother in New York when she was murdered, a 73-year-old mother murdered by a citizen of Bangladesh, was illegally in the United States. He was a convicted felon.

The system worked. While in prison, he was ordered back to Bangladesh. He never went back, because Bangladesh wouldn't take him.

He gets out of prison. He murders Lois Decker, a 73-year-old grandmother, steals her car and some other things.

Ashton Cline-McMurray, 16-year-old child coming home from a football game was murdered by—or was beaten by an individual from Cambodia. Same situation. Never went back when he was supposed to.

Binh Luc from California was sent to prison for armed robbery, gets out of prison. He was ordered to go back to Vietnam. They never took him back. He gets out. He murders five people in San Francisco.

We have this recurring issue of criminals committing crimes from foreign countries. The law requires they go back home. They don't take them back.

We actually have a law that says there is supposed to be some diplomatic—diplomatic visas are supposed to be rejected for people who don't go back.

In my investigation of the law, I can only find one time since the law was written that one country was sanctioned for failure to take back lawfully convicted criminals from their country by denial of visas, and that was Ghana. It happened and they took back 112 after we sanctioned them.

The way I understand the law, your department is to let the State Department know that these countries are stonewalling the system, I think gaming the system, won't take back their lawfully convicted—I mean, why would they take them back? They have enough criminals of their own. May as well leave them in the United States. Make them our problem.

But I only see one case, and that was several years ago.

But getting to the concern I have, why isn't that happening more often that the country is sanctioned by diplomatic visas for failure to take back lawfully convicted felons, when, if I read the law, it is a requirement? It says shall take back, or visas will be denied to these countries, diplomatic visas or other kinds of visas.

And I don't see that happening, even though the law says shall. Information from you to the State Department, the State Department is supposed to reject the visas. It isn't happening.

Can you help us out with that, and tell us how we can solve this problem?

Ms. NAPOLITANO. Representative, you have really identified two problems. One is a Supreme Court precedent called Zadvydas, which says we cannot hold people indefinitely, that there is a time limit on that. And the other is the practical problem that there are few countries in the world to which we seek to remove individuals who would refuse to accept them.

The State Department is well aware of this. I think how they are proceeding and the moves they are making is something that you should address to them, but they are well aware of the problem.

Mr. POE. Well, what I hear from the State Department is, they are passing the buck. They say they don't get the information from you, the countries that are non-compliant. That is the answer I get from them, so that is why I am asking you the question.

Are you furnishing them, the State Department, the information of these countries who refuse to take their citizens back? The issue of a 6-month detention is not what I am concerned about. That is the law. I understand that. We can't keep them in jail. They served their time.

That is not the issue. The issue is they get out. And then they are our problem.

The State Department gives me the information they don't get the information from you. Is your department getting that information to State about noncompliant countries?

Ms. NAPOLITANO. Well, we must be, because the State Department is indeed taking action and issuing demarches and other things to some of these countries. The diplomatic tools they are using is something you should address to them. But they must be getting information, because they are moving.

Mr. POE. Do you know of any other country that has been sanctioned and we refused to give them visas because of their noncompliance with——

Ms. NAPOLITANO. I do not know of any.

Mr. POE. Other than Ghana?

Ms. NAPOLITANO. I do not know of any.

Mr. POE. I have more questions, but I will submit them for the record, Mr. Chairman, because I know you won't let me keep talking.

Mr. SMITH. Thank you, Mr. Poe.

The gentleman from Utah, Mr. Chaffetz, is recognized.

Mr. CHAFFETZ. Thank you.

Thank you, Madam Secretary. I appreciate you being here. Certainly, 40 appearances is an impressive number. We do appreciate you being here.

I want to talk very quickly, if I can. I actually sponsored a bill, H.R. 3012. It is Fairness for High-Skilled Immigrants Act, which got rid of the per country cap limitations. And we passed that out of this Committee. We passed it out of the House. It is now awaiting action in the Senate.

I just wanted to confirm that the Administration's view on removing the per country caps and the appointment-based green card side was something that the Administration would be okay with.

Ms. NAPOLITANO. I will have to look into that. But that sounds right. But let me verify that.

Mr. CHAFFETZ. Okay. I want to move now to the Southwest border, because I am concerned about—the President, yourself, the attorney general, have all said that the Southwest border is more secure than it has ever been before.

In Operation Fast and Furious, the Government purposely allowed nearly 2,000 weapons to get into the hands of the drug cartels. How many of those weapons were detained at the border? Do you have any——

Ms. NAPOLITANO. I couldn't answer that.

Mr. CHAFFETZ. My understanding is that there hasn't been one single gun from Operation Fast and Furious apprehended by the Homeland Security or any other law enforcement, other than the two weapons that were found at the scene at the death of Brian Terry.

Am I wrong in that?

Ms. NAPOLITANO. I just can't answer that. I don't know.

Mr. CHAFFETZ. Let me ask you this, you know one of the things that has been touted, as you look at the different sectors around the country and the protection that we are trying to provide this country, the Tucson sector is by far the most problematic.

My question for you is, if the number of detentions is going up, does that mean that the border is more secure? Or if the number of detentions at the border is going down, does that mean that the border is more secure? Which one is it?

Ms. NAPOLITANO. It is down. And let me explain.

Mr. CHAFFETZ. I know it is down, but does that mean it is more secure, or would more apprehensions indicate that it is more secure?

Ms. NAPOLITANO. No, the way it works is that—and this has been historically done because these are difficult things to measure with absolutes. But the apprehension numbers are used as a proxy for how many are attempting. We actually thing that we are now picking up almost everybody who is trying to cross that border illegally. And we can look at that, because we are looking at crime numbers in Phoenix, stash house numbers in Phoenix, other kinds of indicias to whether illegal immigrants are trying to get into the interior of the country.

Mr. CHAFFETZ. In Phoenix, the crime rate between 2008 and 2009 was actually up 6 percent. So to claim it is actually more secure—I look at Nogales. You look at their crime rate from 2009 to 2010.

Now Nogales is the biggest city right on the border in the most problematic sector. You look at 2009 to 2010, the total number of offenses recorded is up 92 percent.

Ms. NAPOLITANO. Well, if I might, since I know the Arizona situation very, very well and pay a lot of attention to it, the Phoenix violent crime rate, kidnappings, stash houses, the other things associated with the illegal immigrant trade, way down; violent crime rate, way down.

Nogales, actually, I would be interested in that number, because it doesn't correspond to any other number for Nogales I have seen. And it doesn't correspond to what the sheriff tells us.

Mr. CHAFFETZ. Well, this is from the Nogales Department of Police. Let me read some numbers: 2009 to 2010, burglary up 82 percent, thefts up 113 percent, thefts from auto up 132 percent, grand theft auto up 70 percent, aggravated assaults up 76 percent, assaults up 81 percent, and damage to property up 81 percent. It doesn't sound like this is the most secure border that we have ever had.

Ms. NAPOLITANO. Well, I will tell you this, knowing Nogales as I do, there are probably a number of reasons for that. And I would challenge the accuracy of those numbers, for a number of reasons.

Why don't you send me a question, and I will be happy to answer it for you.

Mr. CHAFFETZ. That would be great.

Do we have operational control of the border yet?

Ms. NAPOLITANO. I think this Southwest border is as secure as it has been in decades.

Mr. CHAFFETZ. What percentage of the border is secure?

Ms. NAPOLITANO. Well, I would say that we have the ability to move men, materiel, and air cover through the entire Southwest border.

Mr. CHAFFETZ. But we haven't yet recovered a single gun from Fast and Furious even though we purposely gave the drug cartels 2,000 weapons.

This is the concern, and I would appreciate the ongoing dialogue, because I would disagree with the analysis that it is more secure than ever when you have places like Nogales with increasing crime rates.

Mr. SMITH. Would the gentleman yield?

Mr. CHAFFETZ. Yes.

Mr. SMITH. Madam Secretary, I wanted to follow up on a couple of things you just said in response to the gentleman from Utah's questions.

The Government Accounting Office last year said that only 40 percent of the border was under operational control.

Ms. NAPOLITANO. Yes, that——

Mr. SMITH. Do you disagree with that?

Ms. NAPOLITANO. Yes, and it is—unfortunately, it gets into government-ese and different——

Mr. SMITH. Okay, Well, government—I have great faith in the Government Accounting Office. They are objective. They are not under the thumb of the Administration.

Ms. NAPOLITANO. Yes.

Mr. SMITH. But the other thing I wanted to make sure I heard correctly, you said that you thought that virtually everybody crossing the border illegally was being picked up?

Ms. NAPOLITANO. In some areas, yes.

Mr. SMITH. Oh, in some areas. I don't think you made that clear a while ago,

Ms. NAPOLITANO. Okay.

Mr. SMITH. Because believe me, in South Texas, the Border agents I talk to still think that two to three to four individuals are getting across the border illegally for every one apprehended.

Ms. NAPOLITANO. Well, Mr. Chairman, I think the head of the CBP or Border Patrol would be happy to provide you with a briefing. But this is the first time we have been able—we have enough manpower and materiel, first time where we can actually get ahead of changing traffic. And so we are surging in South Texas.

Mr. SMITH. In what areas do you think you are picking up virtually everybody coming across the border illegally?

Ms. NAPOLITANO. Oh, I would have to give you a list, but at least one of the Arizona sectors, I think we are getting virtually everybody.

And it is certainly more than one in three, which was the typical statistic used in the past.

Mr. SMITH. Okay. For you to say you are picking up virtually everybody certainly is not true. South Texas, I doubt that it is true. Southern California——

Ms. NAPOLITANO. We are putting a lot of effort into South Texas now, Mr. Chairman.

Mr. SMITH. Well, as they say, I am going to rely on the testimony of the Border Patrol agents.

I thank the gentleman——

Mr. CHAFFETZ. Mr. Chairman, to suggest that we are picking up—that there is no illegal immigration going on in Arizona is a joke. An absolute joke.

Ms. NAPOLITANO. Mr. Representative, that is not an accurate summation of what I said. I said, in one of the sectors, I think we are getting virtually all. I did not say——

Mr. CHAFFETZ. In Yuma?

Ms. NAPOLITANO. Yuma sector, I think we are getting virtually all. I think the Tucson sector is a very active sector.

But when I compare the numbers in Tucson sector now to what they were a few years ago, there is almost no comparison. It is night and day.

Mr. SMITH. Okay.

Mr. CHAFFETZ. I wish I had more time, but——

Mr. SMITH. Please submit numerous questions.

The gentleman from South Carolina, Mr. Gowdy, is recognized.

Mr. GOWDY. Thank you, Mr. Chairman.

Good afternoon, Madam Secretary.

You mentioned the term prosecutorial discretion eight times in a two and a half page memo, so I want to ask you about that phrase, because it was important enough to use multiple times.

And prosecutors do have a lot of discretion. We have the discretion, as you know, whether to indict; when to indict; in some states, when to call the case for trial; to sentence bargain; to charge bargain.

But I am interested in whether or not there are any limits to prosecutorial discretion, because I can tell you, Madam Secretary, I had to prosecute a lot of cases where I disagreed with the underlying law. I never understood or agreed with the disparity in cocaine base and cocaine powder. The entire time I prosecuted drug cases, I never agreed with the sentencing disparity. It never entered my mind to subordinate the legislative intent with my own.

And I would say the people who think that they benefit from these episodic exceptions to the administration of law equally to be careful. Today it may benefit you; tomorrow it may not.

And with respect, their defense is not—this Administration or even your department—their defense is the fact that we are a Nation of laws and not a Nation of men or women, a Nation of laws.

So let me ask you this. If the DEA administrator decided that he thought marijuana should not be criminalized, does he have the ability, the power, the authority to no longer prosecute marijuana cases?

Ms. NAPOLITANO. Well, I think there are plenty of examples around the country where marijuana cases, particularly low-level, personal possession cases, are not being prosecuted at all, even though the law is still on the books.

Mr. GOWDY. I asked if the DEA administrator had the authority to, by memo, say we are not going to prosecute marijuana cases anymore, because we do not agree with the criminalization of marijuana?

Ms. NAPOLITANO. Well, I think the DEA administrator has the right as part of prosecutorial discretion to say what cases will be prioritized and what will not be, and how those lower priority cases will in fact be handled. That is what happened here.

Mr. GOWDY. I am not talking about case-by-case, because the truth is, Madam Secretary, you already had the authority to decide case-by-case.

In other words, there was no need for your memo. This memo gave you no more authority than you had before you drafted it, which leads some of us to conclude that it was a political memo and not a law enforcement or a legal one.

Can you understand the skepticism of some of us? You already had the authority to decide on a case-by-case basis. So why publicize it, why announce it to the world, unless it was for political purposes?

Ms. NAPOLITANO. Well, in fact, it is the outgrowth of several years. And one of the things that—there was a 2010 memo on our priorities. There was a 2011 memo on prosecutorial discretion.

Then we began going case-by-case through the 350,000 cases already in the backlog. We found that, in doing so, that wasn't enough to really clear out and get out of the huge backlog that we have in lower priority cases.

This memo takes the lowest of the low-priority cases, young people not of their own volition, they are already invested——

Mr. GOWDY. I am familiar with the policy.

Ms. NAPOLITANO. This is the way we are going to handle this.

Mr. GOWDY. I am familiar with the policy, and my response to that is, if you are so right on the policy, then you ought to be able to convince the people who pass the laws, that that is a legislative issue. It is not an executive branch issue.

I am sure that you prosecuted 924(c) cases when you were the U.S. Attorney, and certainly your staff did. That is an example of Congress saying to the judge, you have no discretion when it comes to sentencing. It is going to be 60 months for a garden variety 924(c) regardless of whether or not you think that ought to be the sentence.

And my guess is, I don't know this, my guess is when you were the U.S. Attorney in Arizona, if a judge departed too far below the guidelines, you would appeal that judge, because that was outside his or her discretion.

My question to you is, what is our remedy, as lawmakers, as legislators, when you ignore laws that have been passed?

What is our remedy? To cut off the funding? To direct to you, you have to prosecute this category of cases, because the explanation that I have heard is one of resources, that we don't have the resources to prosecute this category of case?

And, Madam Secretary, tomorrow it may be another category of case, and then the day after another category of case. So, at first blush, it strikes me, it takes as many resources to identify whether your memo applies or not as it would to prosecute the case. How long have they been in the country? What is their educational background? What is their age? Whether or not they have a record of serious misdemeanors?

All of that requires resources, your agency's resources. So it strikes me as—I am not going to use the word——

Mr. LUNGREN [presiding]. The gentleman's time has expired. The witness can answer the question.

Ms. NAPOLITANO. Well, I think you and I clearly disagree on what discretion means and how it can be applied.

But on the resource question, as I mentioned earlier, there will be a fee associated with the process and the adjudication of the process. So this is not anticipated to come out of taxpayer funds.

Mr. LUNGREN. The gentleman's time has expired.

The gentlelady from California, Ms. Chu, is recognized for 5 minutes.

Ms. CHU. Thank you.

Madam Secretary, first of all I want to commend ICE's intellectual property enforcement work, particularly through Operation In Our Sites. These efforts are protecting American consumers and intellectual property owners from fakes and dangerous goods, including counterfeit drugs that are sold online by criminal enterprises, as well as copyright infringing works, such as movies and TV shows that are created by my constituents in my district in Southern California.

And you have had some investigations that have been very important for our area; for instance, an investigation last year which led to prison sentences for owners of a Los Angeles jewelry store who illegally imported and sold counterfeit designer jewelry, some of which tested positive for hazardous levels of lead. In fact, the lab tests showed that there was nearly 20 times the amount lead deemed safe by the Consumer Product Safety Commission for handling by children. And, despite that, these items were labeled lead-free. So you really solved and were able to attack a terrible problem there.

I also want to applaud you for the announcement with regard to our Dream Act students who were brought here by their parents and came here without documentation through no fault of their own, and to have grown up in the United States and want to contribute to this country.

In fact, we have Dream Act students right here in the audience. This means a lot them. The policy will help to ensure that we don't focus our limited taxpayer resources on individuals who don't pose a threat to our country and who want to give their heart to this country that they call home.

And my question has to do with immigration courts. As a longtime prosecutor, you know that you can't enforce a law and prosecute people effectively if you can't get on the court's dockets. Our immigration court system is incredibly backlogged. Right now, there are more than 300,000 pending cases.

If you are an ICE trial attorney in Phoenix who is trying to remove someone who is a high enforcement priority, you are going to have to wait until the year 2018 to get a court date for the merits.

In El Paso, you have to wait until the year 2016 to even get into the court for a master calendar hearing to set a schedule for the case. That doesn't make sense.

Can you describe what DHS is doing to fix up this problem and how your recent Dream Act memorandum will help you clear up this backlog?

Ms. NAPOLITANO. Representative, we have been addressing that. It is really a question for DHS and the Department of Justice. But

we have been addressing it through offering administrative closure to low-priority cases that are caught in the backlog.

We have been able to offer closure, I think, to about 8 percent of those cases. And, then, by what is coming into the immigration court system, making sure that those are the public safety cases, the criminals, the recent border crosses, the repeat violators, those are the ones that we prioritize. And just as we can prioritize, we can deprioritize, that those get our full attention.

Ms. CHU. Let me also ask about the historical precedent to prioritize. When Director Morton first issued his enforcement priorities and prosecutorial discretion memos, some critics attacked the memos as unconstitutional and in violation of the separation of powers doctrine. These same attacks have continued in the wake of your memo on deferred action for Dream Act students.

I wonder if you could respond to this claim and describe for us some of the historical precedent for issuing guidance such as this.

Ms. NAPOLITANO. Well, there is a lot of historical precedent going back decades. I mentioned a few of the key cases, *Chaney v. Heckler*. There is a case, *Reno v. Arab-American Anti-Discrimination league*.

And the recent Arizona decision of this Supreme Court is very clear that, in the immigration field, we possess and should possess enormous discretion on how to actually enforce the laws.

Ms. CHU. In fact, doesn't Chapter 6 of the U.S. Code, Section 202, specifically direct you to establish national immigration enforcement policies and priorities?

Ms. NAPOLITANO. That is true.

Ms. CHU. And, in Congress' annual appropriation bills, have we not directed you to prioritize the removal of serious criminal aliens and fund programs that specifically target such populations?

Ms. NAPOLITANO. Yes, you have.

Ms. CHU. And, aside from Congress' direction, hasn't DHS and INS before issued similar guidance about the use of prosecutorial discretion?

Ms. NAPOLITANO. That is right. Doris Meissner, when she was the commissioner of then-INS, issued a very lengthy memo filled with all of the then existing legal precedent. That memo was cited by Julie Myers, who was the director of ICE before our Administration took over.

So there is a long track record here of how we do this.

And, again, I think it is important to emphasize, what we are trying to do is to increase the proportion not only those we remove from the country, the absolute number, but those of them who are convicted criminals, recent border violators, or repeat violators of our Nation's immigration laws.

Ms. CHU. Thank you.

Mr. LUNGREN. The time of the gentlelady is expired.

And the gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Thank you, Secretary Napolitano, for being here.

Madam Secretary, both the 9/11 Commission report and the 2011 bipartisan report by Senators Lieberman and Collins on the Fort Hood massacre found that a major failure of the national security

apparatus in those instances, to quote their materials, "was the failure to acknowledge the true enemy explicitly as violent, Islamist extremism."

The DHS former top intelligence officer, Charlie Allen, noted that the U.S. Intelligence community doesn't even have, quote, "the minimum essential requirements," unquote, for how to collect information about violent Islamist extremism.

Madam Secretary, as you know, Sun Tzu said that if you cannot identify your enemy, you cannot defeat him. Multiple agencies knew that Major Hasan was communicating with terrorist leader Awlaki, yet the Fort Hood massacre was deemed by this Administration, quote, "workplace violence."

And political extremists don't recognize political correctness. And political correctness seems so extreme inside this Administration that the Attorney General, Eric Holder, came before this Committee and, after being asked numerous times, refused to acknowledge to our Chairman that radical Islam could be a, quote, "factor" in terrorism threats.

And I think this kind of political correctness is killing Americans. Agents inside this Administration have told Members of this Congress that they are often afraid to identify the terrorist enemy and his ideology when the enemy cloaks himself in religion.

So my question is this: If an agent inside your agency needs to identify the next Fort Hood shooter and that agent says that the terrorist is by a jihadist ideology, is that agent going to be punished?

Ms. NAPOLITANO. No.

Mr. FRANKS. And I have your word on that?

Ms. NAPOLITANO. We look at that—we look at varying ideologies, but the notion that we won't say terrorist or Islamist is not accurate.

Mr. FRANKS. And an agent won't be punished for opining the same.

Ms. NAPOLITANO. I wake up in the morning thinking about how to protect this country, and I go to bed at night thinking about how to protect this country, And that is from individuals who seek to harm us of a variety of ideologies, but Islamist or radical violent Islamist is certainly one.

Mr. FRANKS. Okay, well, I have a letter dated October 19th, 2011, from multiple organizations, including several unindicted co-conspirators in the Holy Land Foundation trial. This is, of course, the largest terror-financed trial in U.S. history.

And this letter is addressed to you, to Attorney General Holder, and to Leon Panetta. And it demands a, quote, "purge," unquote, of all counterterrorism training materials on the grounds that some of the materials reflected poorly on Islam. Now, within days, the Administration commenced an unprecedented nationwide purge of its counterterrorism materials.

And an investigation into the FBI purge reveals that radical Islamist ideology is being purged along with information about mainstream Islam without distinction. Essentially, political correctness at the behest of unindicted co-conspirators is prevailing over the recommendations of the 9/11 report and the bipartisan Senate report on Fort Hood.

Has your agency also purged counterterrorism training materials along with the internal discussions that reference radical Islamist ideology and practice?

Ms. NAPOLITANO. Not that I am aware of, no.

Mr. FRANKS. Have you had any discussions with anyone in White House about the contents of that letter?

Ms. NAPOLITANO. No, I haven't.

And let me just say, there are lots of training materials out there, so we are constantly revising and improving based on the intelligence we get and receive and how that is analyzed as to what are the evolving threats against the United States. But that is not a purge; that is just evolution of training materials.

Mr. FRANKS. Are you aware of the purge within the FBI?

Ms. NAPOLITANO. No, I am not.

Mr. FRANKS. The materials, you are not aware of that?

Ms. NAPOLITANO. No, I am not.

Mr. FRANKS. All right. Well, thank you for coming by today and I appreciate your answering the questions.

Ms. NAPOLITANO. You bet.

Mr. LUNGREN. The gentleman yields back his remaining time.

And the gentleman from Arizona, Mr. Quayle, is recognized for 5 minutes.

Mr. QUAYLE. Thank you, Mr. Chairman.

Thank you, Madam Secretary, for being here.

I want to go back to what you said the fee for the process that is going to be starting in August and the fact that it is not going to cost American taxpayers.

Isn't it true that there is also going to be a fee-waiver process as well, so that there is going to be some people who we waive to actually pay the fee so that it will actually cost American taxpayers?

Ms. NAPOLITANO. The decision on that is not yet final, but I don't anticipate there will be a broad fee-waiver process.

Mr. QUAYLE. But there will be a fee-waiver option.

Ms. NAPOLITANO. There may be a slight exception in particular of very deserving cases, but we anticipate this will be a fee-borne process.

Mr. QUAYLE. Okay, so there could possibly be a fee waiver in certain instances.

Ms. NAPOLITANO. For a person of compelling—but let me say—let me be very clear. We have not yet decided this or how to articulate it, and I don't want the expectation out there by the applicants that there is going to be a broad fee-waiver process. There is not.

Mr. QUAYLE. Okay, that would be more discretion on the part of DHS.

Ms. NAPOLITANO. On a very hardship basis.

Mr. QUAYLE. So you mentioned that the memo that you put on shortly after the Supreme Court ruling was a process of many memos, the Morton memos that came out 1 or 2 years ago and now it is your memo.

I think that one of things that is concerning to a lot of us when you are talking about discretion is what is the next memo that is going to be coming out in terms of waiving or not allowing the actual prosecution of certain laws that are on the books?

I mean, is it going to be the next memo that comes out not just from you, but some other, that they are not going to enforce a different law that is on the books?

And what my friend from South Carolina was trying to get at was what is our remedy as legislators? Do we have to, in every single law that we pass, that we pass through the Congress and the President signs, do we have to add a clause that says we really mean it, you have to actually enforce these laws? Because the discretion that you are talking about just seems like this means that the laws that are written and that are actually signed by the President don't really mean anything if they actually have the discretion to disregard them.

So what can we do, as legislators, to make sure that we get the laws that are passed actually fully enforced by the executive branch?

Ms. NAPOLITANO. You know, Representative, I have been an executive my whole career, so it is really hard for me get into that legislative mindset. I will leave that for you.

But I will say we are enforcing the laws. We have removed more people from this country than any prior Administration over a similar time period. In fact, I get criticized for that on a regular basis.

But in the constitution of what is in there, we removed more criminals, border crossers, repeat violators. Ninety percent-plus last year are in those priorities. That is going to increase.

And so I think it is totally within discretion about how you take the laws and say, look, you don't give us—no law enforcement agency has unlimited resources. We all have to make decisions. You would be hard-pressed to find a U.S. Attorneys' Office that takes a check cashing case, even though there is a Federal statute about it. It is a resource question.

Mr. QUAYLE. Do we have to say, look, this law, it is mandatory, you have to enforce it. Is that the route we are going to go? Because that seems to be—I mean, judges aren't allowed to waive the mandatory minimums that are put in place by the legislatures, even in State or Federal.

And so this is what I am trying to get at, is that, when we have a situation where an executive branch does not actually enforce the laws but provides waivers or deferments or whatever you want to call it, we have a situation where the executive branch becomes all-powerful. And you can waive or not enforce any law that is on the books.

And that completely and totally destroys the constitutional framework of our country of separate but co-equal branches of Government. And so I guess that is where we are going to have to go.

But I want to jump really quickly, because my time is limited, to 287(g) that you were talking about earlier.

Director Morton was also testifying last week, and you were saying that there were no removals for the Arizona 287(g) task force programs in the last 2 years?

Ms. NAPOLITANO. For six of them.

Mr. QUAYLE. For six of them?

And which numbers—there were seven of them? Is that what——

Ms. NAPOLITANO. I think—and we could give you the actual numbers. They are not a secret.

Mr. QUAYLE. But, I mean, the word "removal" is very specific in terms of you guys and ICE actually removing the person. But that doesn't necessarily mean that an illegal immigrant was found by that agency that was a part of the task force and was handed over to ICE but then isn't actually removed.

So, I mean, in 2010, the DPS, 112 illegal aliens were processed with ICE; 74 were processed in 2011.

How many of those—I mean, maybe you will have to give me the answer. How many of those were actually removed, even though they were actually processed through ICE?

Because I have noticed that you used the same word that Mr. Morton does as well, but that doesn't get to the crux of how effective are local and State agencies actually apprehending illegal immigrants who are committing other crimes and then giving them to ICE, because then ICE has that discretion that they had been using?

Ms. NAPOLITANO. Well, I think the goal of ICE——

Mr. LUNGREN. The time of the gentleman has expired, but the witness may answer that question.

Ms. NAPOLITANO. Thank you, Mr. Chairman.

You know, our goal is to remove those people who have been committing crimes in the country. So that is why we use removal as the key number.

I think one of the other comparisons you might make, Representative, is between those task forces—and they are hugely expensive, and I will give you that breakout as well, compared to Secure Communities, which we have in all border States, in all the jurisdictions, where we have literally found thousands of criminals and aggravated felons.

So from an administrative, management, cost-effective way of doing this, Secure Communities is so much better.

Mr. QUAYLE. All right. Thank you.

Mr. LUNGREN. The gentleman from South Carolina—or North Carolina, Mr. Coble.

Mr. COBLE. I will hold you harmless for that, Mr. Chairman.

Mr. LUNGREN. Well, you haven't been here that long, so I am still getting to know you.

You are recognized for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Madam Secretary, good to have you back on the Hill.

The distinguished gentleman from South Carolina, Madam Secretary—mentioned, or discussed prosecutorial discretion with you. Let me ask you this, Madam Secretary.

What are you all at Homeland Security doing to assure that the new prosecutorial discretion policies do not result in the release of 17-year-old alien gang members into our communities?

Ms. NAPOLITANO. Well, the use of discretion in the deferred action program, a gang member would not qualify.

Mr. COBLE. I can put that in the bank, right?

Ms. NAPOLITANO. If there is an arrest for a felony or a serious misdemeanor, that person does not—and there is a criminal record

and other indication that this is a gang member, no, that person won't qualify.

Mr. COBLE. I thank you for that.

Madam Secretary, I am going to insert my oars into geographic waters that are far extended from my district. Sometimes that can be a harmful exercise, but I am told that Cook County, Illinois, is a so-called sanctuary jurisdiction that does not cooperate with ICE to deport immigrants who have been arrested. Chicago, I am furthermore informed, is currently experiencing a massive wave of gang-related homicides.

Might not better cooperation between the county and ICE to deport illegal immigrant gang members help or assist alleviate the murder crisis in Chicago?

Ms. NAPOLITANO. Yes.

Mr. COBLE. That is a hypothetical, I will admit.

Ms. NAPOLITANO. Yes, I agree.

Mr. COBLE. All right. Let me go back to the alien minors.

What is being done, Madam Secretary, to ensure that unaccompanied alien minors interdicted at the border, who turn out to be gang members, are not released into our communities?

Ms. NAPOLITANO. Well, again, there is guidance and supervision in the field as to that. There is a consequence delivery system, as I will explain in detail for you, or have someone explain for you. But it would be our total intention to make sure our agents pick that person up.

Mr. COBLE. I thank you. I think I have time for one more question. ICE has found that the membership of violent transnational gangs is comprised largely of foreign-born nationals. Is it not better to deport gang members before they are caught committing major crimes, not after?

Now, in 2005, the House passed legislation authored by Mr. Sensenbrenner to allow for the deportation of all alien gang members. Would you support such legislation?

I don't think it ever got passed in the Senate.

Ms. NAPOLITANO. Yes, I am not familiar with it, Representative, so I am reluctant to comment on it.

Mr. COBLE. Could you get back to me on that?

Ms. NAPOLITANO. Yes.

Mr. COBLE. I would appreciate that.

Mr. Chairman, I think my time is about to expire. Thank you. I yield back.

Mr. LUNGREN. The gentleman yields back.

And the gentlelady from Florida, Mrs. Adams, is recognized for 5 minutes.

Ms. ADAMS. Thank you, Mr. Chairman.

Madam Secretary, we meet again, and I am going to ask you some very similar questions as to the last time we spoke.

I know, in December, you responded to my requests on how many people had been deported under Section 243(d), and I believe that your letter said that is the last step in getting countries to repatriate and to be used only after diplomatic efforts have failed. You also conceded that the Administration has yet to invoke these sanctions.

That was December. Now we are here in July. Have they invoked any? Have you recommended any to the Department of State?

Ms. NAPOLITANO. Well, again, I think——

Ms. ADAMS. Just a yes or a no. I mean, I have sat here all day, and I have listened to the filibustering. I think yes or no. Have you recommended any to the Department of State?

Ms. NAPOLITANO. Again, the information as to which countries are not working with us——

Ms. ADAMS. I will take that as a no. We will move on, because I have a lot of questions.

Ms. NAPOLITANO [continuing]. To the State Department, and it is up to them to make——

Ms. ADAMS. Secretary, with all due respect, I want to get answers to my questions, not answers you want to give me. So a simple yes or no is what I was asking you. If you want to go into further detail, I would love to have you respond in a letter to get further into it, but a yes or no was perfectly satisfactory on a question, have you or have you not submitted any persons to the Department of State under 243(d)?

Ms. NAPOLITANO. I will get back to you in writing.

Ms. ADAMS. Thank you.

Now, is it true that Agent Terry was shooting a beanbag gun the night he was killed?

Ms. NAPOLITANO. I will get back to you in writing.

Ms. ADAMS. Okay. We are going to go that route. That is fine.

Is it true—do you have policies and procedures for your law enforcement officers on how to respond to active shooters?

Ms. NAPOLITANO. I will get back to you in writing.

Ms. ADAMS. So you are planning not to answer any of my questions the rest of this afternoon?

Ms. NAPOLITANO. If you want an either yes or no——

Mr. CONYERS. Mr. Chairman?

Ms. NAPOLITANO [continuing]. And won't let me explain——

Mr. CONYERS. Mr. Chairman——

Ms. NAPOLITANO. [continuing]. I will have to explain in writing.

Ms. ADAMS. Well, let me ask you this.

Mr. CONYERS. I think that this proceeding——

Mr. LUNGREN. Let's have regular order. Regular order.

Mr. CONYERS. Yes, could we have regular order, please?

Ms. ADAMS. Thank you.

I am in possession of what is called "How to Respond to an Active Shooter." How to respond: An active shooter is an individual actively engaged in killing or attempting to kill people in a confined and populated area typically through the use of firearms.

I sent a letter, once I had heard about this, because it was reported all over the news. Fox reported that DHS officials maintained that the active shooter course was designed for all employees, civilian and law enforcement officers, and no one should rush into a situation where they or others around them could get hurt.

Here is something from some of the Border Patrol agents: All immigration law enforcement officers have been required to watch the video.

And when I asked, you said they are not designed to mandate law enforcement actions. However, they are your training. Are they not your training materials?

Ms. NAPOLITANO. They are training materials for civilians. Law enforcement observe them for situational awareness. Our use of force policies are consistent with all of Federal law enforcement. They are in writing, and we will supply them to you.

Ms. ADAMS. Thank you very much. Because the letter I received just said they are not mandated. And I have real concerns when we have a Border Patrol agent who may or may not have been shooting a beanbag up against a very high-powered weapon. We have this who says that you are only to shoot back when your life is threatened. And as a law enforcement officer who was sworn to protect my community, if I was out and about, even off-duty, and someone were to start shooting in a populated area, or nonpopulated, but threaten someone's life, not my own, but threatening other people's lives, I was required to act to stop the aggression and save those lives.

So I just wanted to make sure that this is not something that you are telling your armed law enforcement officers to do, to run away and hide?

Ms. NAPOLITANO. They were told about it and went to the training so they were situationally aware. But the use of force policy is that which is consistent across Federal law enforcement.

Ms. ADAMS. Well, again, maybe you need to get your public information officer that information, because they were quoted as saying it was for all, law enforcement and civilian employees. It was a policy.

Ms. NAPOLITANO. For different purposes.

Ms. ADAMS. I also look forward to getting your information back on 243(d) and how many times you have recommended someone be deported under that.

As you know, these are violent criminals who have served time, and because their country refuses to take them back, they are released into our communities to create and commit more violent crimes.

You know, I am very concerned that we have an option and it has yet to be employed when we have people being murdered by the very people that had threatened them, done time in jail, and because their country wouldn't take them back, were released into the community to kill their victim.

And my time has expired. I yield back.

Mr. LUNGREN. The gentlelady's time has expired.

I am the last questioner, because I had to be in another meeting, is me.

And so, Madam Secretary, thank you for appearing before us. We have had opportunities to have conversation before on the other Committee, Homeland Security. And I appreciate your work and your time.

I must just say, though, as someone who has been involved in immigration law for 30-some years, who is the ranking Republican who carried the Simpson-Mazzoli bill, believing that we had a balance between legalization at that time and enforcement, and then sorely disappointed at the failure of enforcement ever since, it is

very important what we do, and what message it sends, not only to those who are directly affected, but to those who would see how we act and perhaps take advantage of that.

And that is why it bothers me a great deal—I will just put this on the record. It bothers me a great deal that the President had an opportunity for almost 3 and a half years to work on efforts for immigration reform, 5 months before an election decides to announce this particular policy.

And you come before us, and you tell us that we can't tell you all the details of the policy because they haven't worked them out. Normally, you work out what the details are, and then you declare your policy if in fact the intention is to have it work and not just make a political statement.

And that is just my observation. And so it is a disappointment to me, I will tell you. But I understand——

Ms. NAPOLITANO. I think I disagree with you Representative.

Mr. LUNGREN. I would presume that you do.

Ms. NAPOLITANO. I assume you know I would disagree, but let me simply say that this was the evolution of a process that began in 2010.

Mr. LUNGREN. I understand that.

Let me ask you this, if the Congress gave you additional funding and directed that it only go toward removal and deportation cases, would you then alter your position on prosecutorial discretion? Because as I understand it, a great deal of what you have stated your policy to be is a consequence of limited budgets and, therefore, the necessity to establish priorities.

Ms. NAPOLITANO. So you are saying if you give me an unlimited pocketbook, would I take it back? Is that the question?

Mr. LUNGREN. No, that is not my question. And I know you know that was not my question.

My question was, if we gave you additional funding, directed that you use those funds toward removal and deportation cases, would you still come up here and testify that the Administration would have the same policy as it announced in terms of the memorandum and the President's announcement at the White House?

Ms. NAPOLITANO. Yes, and the reason is there are plenty of criminals, border crossers, and repeat violators, more than enough for us to remove from the country. So you can give us more money, we will take it, but we are going to put it into the——

Mr. LUNGREN. Even if we gave you enough money to cover those people that are included in the prosecutorial discretion decision?

Ms. NAPOLITANO. Representative, I think that is so unlikely that it is hard to answer the question.

Mr. LUNGREN. Well, I guess you don't want to answer the question about whether it is about resources or because you happen to disagree with the underlying law.

And I can understand you disagree with the underlying law, but that, it seems to me, is not the basis upon which to hide behind a prosecutorial discretion, a definition where it is not a case-by-case authority. It is, in fact, a broad category that has been established.

There has been a statement here that, because we are covering this group of individuals who, through no fault of their own, came

to the United States, it is in fact almost imperative we do that. My question is, is anybody at fault for them coming to the United States?

Ms. NAPOLITANO. It depends.

Mr. LUNGREN. Well, does your policy include not only, and I know you don't call it amnesty, so we will not call it that. Let's say it is a refusal to take action under the law with respect to this category of individuals.

What does it do with respect to the individuals who brought them here illegally? Are they also covered by prosecutorial discretion?

Ms. NAPOLITANO. They may be covered by prosecutorial discretion, but they are not covered by the deferred action memorandum.

Mr. LUNGREN. So what would we believe then? Individuals that are covered by this, with respect to the quote, unquote, "Quasi Dream ACT" deportation, deferment, or whatever you want to call it. And does that extend to their relatives as a matter of policy?

Ms. NAPOLITANO. No.

Mr. LUNGREN. So that parents would not be covered by this, so the students would stay in the United States, but the parents would be subjected to deportation?

Ms. NAPOLITANO. Well, they would be reviewed under a different standard, if their case came into ICE. And that would be the prosecutorial discretion memo of last June.

Mr. LUNGREN. So the likelihood is they would not be?

Ms. NAPOLITANO. If they had a felony or a serious misdemeanor on their record, they would be a priority case. They would be removable.

Mr. LUNGREN. One last question, because my time is rapidly depleting here.

Yesterday, we had testimony by a TSA representative in another Subcommittee about the issue of pilot licensing or pilot lessons, and the question of checking people before they are able to do that.

And it was brought up by the representative of TSA that, currently, you do not match the list of those who want to apply for pilot lessons with the no-fly list. And that seemed to be incongruous that on a no-fly list I couldn't get on a commercial aircraft, but I could, in fact, go to a pilot training program and not be stopped from doing that, because it is not checked against that list.

Ms. NAPOLITANO. Representative, let me take the opportunity to offer a classified briefing to you. The plain fact of the matter is, there are lots of different ways someone on the no-fly list would not be in a position to get a pilot's license. But I think I need to go in a classified——

Mr. LUNGREN. Okay, I understand.

But the statement was made on the record yesterday that they are not checked against the no-fly list, period. And that is disturbing, if that is the case.

Ms. NAPOLITANO. The TSA representative may not have been aware of all the other things that occur.

Mr. LUNGREN. I appreciate that very much.

I have so many more questions to ask you, but my time is up. And I know you would love to be here and enjoy our time some more, but, alas, that is not possible.

So we thank you for your testimony today. I know that there are questions that will be submitted to you in writing, and I know you will endeavor, as you have stated on the record, to get those to us in a timely fashion, as we define timely here.

And without objection, all Members have 5 legislative days to submit additional written questions for the witness or additional materials for the record.

Mr. LUNGREN. And this hearing is adjourned.

[Whereupon, at 12:55 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARIZONA ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11–182. Argued April 25, 2012—Decided June 25, 2012

An Arizona statute known as S. B. 1070 was enacted in 2010 to address pressing issues related to the large number of unlawful aliens in the State. The United States sought to enjoin the law as preempted. The District Court issued a preliminary injunction preventing four of its provisions from taking effect. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor; §5(C) makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; §6 authorizes state and local officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States"; and §2(B) requires officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the Federal Government. The Ninth Circuit affirmed, agreeing that the United States had established a likelihood of success on its preemption claims.

Held:

1. The Federal Government's broad, undoubted power over immigration and alien status rests, in part, on its constitutional power to "establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, and on its inherent sovereign power to control and conduct foreign relations, see *Toll* v. *Moreno,* 458 U. S. 1, 10. Federal governance is extensive and complex. Among other things, federal law specifies categories of aliens who are ineligible to be admitted to the United States, 8 U. S. C. §1182; requires aliens to register with the Federal Government and to carry proof of status, §§1304(e), 1306(a); imposes sanctions on employers who hire unauthorized workers, §1324a; and specifies which aliens may be removed and the procedures for doing so, see §1227. Removal is a civil matter, and one of its principal features

is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens. It also operates the Law Enforcement Support Center, which provides immigration status information to federal, state, and local officials around the clock. Pp. 2–7.

2. The Supremacy Clause gives Congress the power to preempt state law. A statute may contain an express preemption provision, see, *e.g., Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. ___, ___, but state law must also give way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. See *Gade* v. *National Solid Wastes Management Assn.,* 505 U. S. 88, 115. Intent can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230. Second, state laws are preempted when they conflict with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Pp. 7–8.

3. Sections 3, 5(C), and 6 of S. B. 1070 are preempted by federal law. Pp. 8–19.

(a) Section 3 intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. In *Hines,* a state alien-registration program was struck down on the ground that Congress intended its "complete" federal registration plan to be a "single integrated and all-embracing system." 312 U. S., at 74. That scheme did not allow the States to "curtail or complement" federal law or "enforce additional or auxiliary regulations." *Id.*, at 66–67. The federal registration framework remains comprehensive. Because Congress has occupied the field, even complementary state regulation is impermissible. Pp. 8–11.

(b) Section 5(C)'s criminal penalty stands as an obstacle to the federal regulatory system. The Immigration Reform and Control Act of 1986 (IRCA), a comprehensive framework for "combating the employment of illegal aliens," *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147, makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers, 8 U. S. C. §§1324a(a)(1)(A), (a)(2), and requires employers to verify prospective employees' employment authorization status,

§§1324a(a)(1)(B), (b). It imposes criminal and civil penalties on employers, §§1324a(e)(4), (f), but only civil penalties on aliens who seek, or engage in, unauthorized employment, *e.g.,* §§1255(c)(2), (c)(8). IRCA's express preemption provision, though silent about whether additional penalties may be imposed against employees, "does *not* bar the ordinary working of conflict pre-emption principles" or impose a "special burden" making it more difficult to establish the preemption of laws falling outside the clause. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869–872. The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on unauthorized employees. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. Pp. 12–15.

(c) By authorizing state and local officers to make warrantless arrests of certain aliens suspected of being removable, §6 too creates an obstacle to federal law. As a general rule, it is not a crime for a removable alien to remain in the United States. The federal scheme instructs when it is appropriate to arrest an alien during the removal process. The Attorney General in some circumstances will issue a warrant for trained federal immigration officers to execute. If no federal warrant has been issued, these officers have more limited authority. They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." §1357(a)(2). Section 6 attempts to provide state officers with even greater arrest authority, which they could exercise with no instruction from the Federal Government. This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform an immigration officer's functions. This includes instances where the Attorney General has granted that authority in a formal agreement with a state or local government. See, *e.g.,* §1357(g)(1). Although federal law permits state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," §1357(g)(10)(B), this does not encompass the unilateral decision to detain authorized by §6. Pp. 15–19.

4. It was improper to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that §2(B)'s enforcement in fact conflicts with federal immigration law and its objectives. Pp. 19–24.

(a) The state provision has three limitations: A detainee is presumed not to be an illegal alien if he or she provides a valid Arizona driver's license or similar identification; officers may not consider race, color, or national origin "except to the extent permitted by the

United States [and] Arizona Constitution[s]"; and §2(B) must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." P. 20.

(b) This Court finds unpersuasive the argument that, even with those limits, §2(B) must be held preempted at this stage. Pp. 20–24.

(1) The mandatory nature of the status checks does not interfere with the federal immigration scheme. Consultation between federal and state officials is an important feature of the immigration system. In fact, Congress has encouraged the sharing of information about possible immigration violations. See §§1357(g)(10)(A), 1373(c). The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, 563 U. S., at ___. Pp. 20–21.

(2) It is not clear at this stage and on this record that §2(B), in practice, will require state officers to delay the release of detainees for no reason other than to verify their immigration status. This would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. But §2(B) could be read to avoid these concerns. If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. Without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that conflicts with federal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277. This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect. Pp. 22–24.

641 F. 3d 339, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., THOMAS, J., and ALITO, J., filed opinions concurring in part and dissenting in part. KAGAN, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 11–182

ARIZONA, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2012]

JUSTICE KENNEDY delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the state senate. See also H. 2162 (2010) (amending S. 1070). Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Note following Ariz. Rev. Stat. Ann. §11–1051 (West 2012). The law's provisions establish an official state policy of "attrition through enforcement." *Ibid.* The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

I

The United States filed this suit against Arizona, seeking to enjoin S. B. 1070 as preempted. Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Ariz.

Rev. Stat. Ann. §13–1509 (West Supp. 2011). Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as §5(C). See §13–2928(C). Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." §13–3883(A)(5). Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government. See §11–1051(B) (West 2012).

The United States District Court for the District of Arizona issued a preliminary injunction preventing the four provisions at issue from taking effect. 703 F. Supp. 2d 980, 1008 (2010). The Court of Appeals for the Ninth Circuit affirmed. 641 F. 3d 339, 366 (2011). It agreed that the United States had established a likelihood of success on its preemption claims. The Court of Appeals was unanimous in its conclusion that §§3 and 5(C) were likely preempted. Judge Bea dissented from the decision to uphold the preliminary injunction against §§2(B) and 6. This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status. 565 U. S. ___ (2011).

II

A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll* v. *Moreno*, 458 U. S. 1, 10 (1982); see generally S. Legomsky & C. Rodríguez, Immigration

and Refugee Law and Policy 115–132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll, supra,* at 10 (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936)).

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. See, *e.g.,* Brief for Argentina et al. as *Amici Curiae;* see also *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 588–589 (1952). Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. See Brief for Madeleine K. Albright et al. as *Amici Curiae* 24–30.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung* v. *Freeman,* 92 U. S. 275, 279–280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines* v. *Davidowitz,* 312 U. S. 52, 64 (1941).

Federal governance of immigration and alien status is

extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U. S. C. §1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§1301–1306. Failure to do so is a federal misdemeanor. §§1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, §1622; and it imposes sanctions on employers who hire unauthorized workers, §1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See §1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* 8–13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See §1229a(c)(4); see also, *e.g.*, §§1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

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.

Agencies in the Department of Homeland Security play a major role in enforcing the country's immigration laws. United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. See Dept. of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2010, p. 1 (2011). In 2010, CBP's Border Patrol apprehended almost half a million people. *Id.*, at 3. Immigration and Customs Enforcement (ICE), a second agency, "conducts criminal investigations involving the enforcement of immigration-related statutes." *Id.*, at 2. ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock. See App. 91. ICE officers are responsible "for the identification, apprehension, and removal of illegal aliens from the United States." Immigration Enforcement Actions, *supra,* at 2. Hundreds of thousands of aliens are removed by the Federal Government every year. See *id.,* at 4 (reporting there were 387,242 removals, and 476,405 returns without a removal order, in 2010).

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Dept. of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 93 (2011) (Table 35). Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population. See Passel & Cohn, Pew Hispanic Center, U. S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade 3 (2010). And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime. See, *e.g.,* Camarota & Vaughan, Center for Immigration Studies, Immigration and Crime: Assessing a Conflicted Situation 16 (2009) (Table 3) (estimating that unauthorized aliens comprise 8.9% of the population and are responsible for 21.8% of the felonies in Maricopa County, which includes Phoenix).

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. Brief for Petitioners 6. Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED / Active Drug and Human Smuggling Area / Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." App. 170; see also Brief for Petitioners 5–6. The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal

analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.

III

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. See *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring). From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372 (2000); *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–211 (1824). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. See, *e.g.*, *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. ___, ___ (2011) (slip op., at 4).

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 115 (1992). The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the

federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see *English* v. *General Elec. Co.*, 496 U. S. 72, 79 (1990).

Second, state laws are preempted when they conflict with federal law. *Crosby, supra,* at 372. This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U. S., at 67; see also *Crosby, supra*, at 373 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." *Rice, supra,* at 230; see *Wyeth* v. *Levine*, 555 U. S. 555, 565 (2009).

The four challenged provisions of the state law each must be examined under these preemption principles.

IV

A

Section 3

Section 3 of S. B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. §11–1509(A) (West Supp. 2011). In effect, §3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to

regulate. See Brief for United States 27, 31.

The Court discussed federal alien-registration requirements in *Hines* v. *Davidowitz*, 312 U. S. 52. In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." *Id.*, at 70. The new federal law struck a careful balance. It punished an alien's willful failure to register but did not require aliens to carry identification cards. There were also limits on the sharing of registration records and fingerprints. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." *Id.*, at 74. Because this "complete scheme . . . for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce additional or auxiliary regulations." *Id.*, at 66–67. As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program. See *id.*, at 59, 74.

The present regime of federal regulation is not identical to the statutory framework considered in *Hines*, but it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U. S. C. §1304(e). Other aspects, however, have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Compare §1302(a) with *id.*, §452(a) (1940 ed.). Detailed information is required, and any change of address has to be reported to the Federal Government. Compare §§1304(a), 1305(a) (2006 ed.), with *id.*, §§455(a), 456 (1940 ed.). The statute continues to provide penalties for the willful failure to register. Compare §1306(a) (2006 ed.), with *id.*, §457 (1940 ed.).

The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration. See *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 419, n. 11 (2003)

(characterizing *Hines* as a field preemption case); *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 (1956) (same); see also Dinh, Reassessing the Law of Preemption, 88 Geo. L. J. 2085, 2098–2099, 2107 (2000) (same). The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a "'harmonious whole.'" *Hines, supra,* at 72. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 249 (1984).

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 288–289 (1986). Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law. See *California* v. *Zook*, 336 U. S. 725, 730–731, 733 (1949); see also *In re Loney*, 134 U. S. 372, 375–376 (1890) (States may not impose their own punishment for perjury in federal courts).

Arizona contends that §3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive

on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347–348 (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wisconsin Dept., supra,* at 288 (States may not impose their own punishment for repeat violations of the National Labor Relations Act). Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

There is a further intrusion upon the federal scheme. Even where federal authorities believe prosecution is appropriate, there is an inconsistency between §3 and federal law with respect to penalties. Under federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation. See 8 U. S. C. §1304(e) (2006 ed.); 18 U. S. C. §3561. State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon). See Ariz. Rev. Stat. Ann. §13–1509(D) (West Supp. 2011). This state framework of sanctions creates a conflict with the plan Congress put in place. See *Wisconsin Dept., supra,* at 286 ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity" (internal quotation marks omitted)).

These specific conflicts between state and federal law simply underscore the reason for field preemption. As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." 312 U. S., at 66–67. Section 3 is preempted by federal law.

B

Section 5(C)

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Ariz. Rev. Stat. Ann. §13–2928(C) (West Supp. 2011). Violations can be punished by a $2,500 fine and incarceration for up to six months. See §13–2928(F); see also §§13–707(A)(1) (West 2010); 13–802(A); 13–902(A)(5). The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 1971 Cal. Stats. ch. 1442, §1(a). The law was upheld against a preemption challenge in *De Canas* v. *Bica*, 424 U. S. 351 (1976). *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.,* at 356. At that point, however, the Federal Government had expressed no more than "a peripheral concern with [the] employment of illegal entrants." *Id.*, at 360; see *Whiting*, 563 U. S., at ___ (slip op., at 3).

Current federal law is substantially different from the regime that prevailed when *De Canas* was decided. Congress enacted IRCA as a comprehensive framework for

"combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147 (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U. S. C. §§1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. See §§1324a(a)(1)(B), (b); 8 CFR §274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. See 8 U. S. C. §§1324a(e)(4), (f); 8 CFR §274a.10.

This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.,* penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. See 8 U. S. C. §§1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See §1227(a)(1)(C)(i); 8 CFR §214.1(e). In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. See 18 U. S. C. §1546(b). Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct. See 8 U. S. C. §§1324a(b)(5), (d)(2)(F)–(G).

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary

and unworkable." U. S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners 65–66 (1981); see Pub. L. 95–412, §4, 92 Stat. 907. Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. See Brief for Service Employees International Union et al. as *Amici Curiae* 9–12. But Congress rejected them. See, *e.g.,* 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. See, *e.g.,* Hearings before the Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3, pp. 919–920 (1971) (statement of Rep. Rodino, the eventual sponsor of IRCA in the House of Representatives).

IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. See 8 U. S. C. §1324a(h)(2); *Whiting, supra,* at ___–___ (slip op., at 1–2). But the existence of an "express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles" or impose a "special burden" that would make it more difficult to establish the preemption of laws falling outside the clause. *Geier* v. *American Honda Motor Co.,* 529 U. S. 861, 869–872 (2000); see *Sprietsma* v. *Mercury Marine,* 537 U. S. 51, 65 (2002).

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and exe-

cution of the full purposes and objectives of Congress." *Hines*, 312 U. S., at 67. Under §5(C) of S. B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although §5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 287 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. See *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action"). Section 5(C) is preempted by federal law.

C

Section 6

Section 6 of S. B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." Ariz. Rev. Stat. Ann. §13–3883(A)(5) (West Supp. 2011). The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. See *INS* v. *Lopez-*

Mendoza, 468 U. S. 1032, 1038 (1984). If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a Notice to Appear. See 8 U. S. C. §1229(a); 8 CFR §239.1(a) (2012). The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. See 8 U. S. C. §1229(a)(1). If an alien fails to appear, an *in absentia* order may direct removal. §1229a(5)(A).

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." 8 U. S. C. §1226(a); see Memorandum from John Morton, Director, ICE, to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (hereinafter 2011 ICE Memorandum) (describing factors informing this and related decisions). And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. See 8 CFR §241.2(a)(1). In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law. See §§241.2(b), 287.5(e)(3). If no federal warrant has been issued, those officers have more limited authority. See 8 U. S. C. §1357(a). They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." §1357(a)(2).

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible remova-

bility than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government. See §1357(g)(1); see also §1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens off the coast of the United States"); §1252c (authority to arrest in specific circumstance after consultation with the Federal Government); §1324(c) (authority to arrest for bringing in and harboring certain aliens). Officers covered by these agreements are subject to the Attorney General's direction and supervision. §1357(g)(3). There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. See *Padilla* v. *Kentucky*, 559 U. S. ___, ___–___ (2010) (ALITO, J., concurring in judgment) (slip op., at 4–7). As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer. See §1357(g)(2); cf. 8 CFR §§287.5(c) (arrest power contingent on training), 287.1(g) (defining the

training).

By authorizing state officers to decide whether an alien should be detained for being removable, §6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. See, *e.g., Reno* v. *American-Arab Anti-Discrimination Comm.,* 525 U. S. 471, 483–484 (1999); see also Brief for Former INS Commissioners 8–13. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. See *Jama* v. *Immigration and Customs Enforcement,* 543 U. S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances" (internal quotation marks omitted)); see also *Galvan* v. *Press,* 347 U. S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . ."); *Truax* v. *Raich,* 239 U. S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government").

In defense of §6, Arizona notes a federal statute permitting state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U. S. C. §1357(g)(10)(B). There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. The Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force

with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. See Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13–14 (2011), online at http://www.dhs.gov/files/resources/immigration.shtm (all Internet materials as visited June 21, 2012, and available in Clerk of Court's case file). State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody. See §1357(d). But the unilateral state action to detain authorized by §6 goes far beyond these measures, defeating any need for real cooperation.

Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, §6 creates an obstacle to the full purposes and objectives of Congress. See *Hines*, 312 U. S., at 67. Section 6 is preempted by federal law.

D

Section 2(B)

Section 2(B) of S. B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012). The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Ibid.* The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." *Ibid.* Third, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." §11–1051(L) (West 2012).

The United States and its *amici* contend that, even with these limits, the State's verification requirements pose an obstacle to the framework Congress put in place. The first concern is the mandatory nature of the status checks. The second is the possibility of prolonged detention while the checks are being performed.

1

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U. S. C. §1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See §1373(c); see also §1226(d)(1)(A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens). ICE's Law Enforcement Support Center operates "24 hours a day, seven days a week, 365 days a year" and provides, among other things, "immigration status, identity information and real-time assistance to local, state and federal law

enforcement agencies." ICE, Fact Sheet: Law Enforcement Support Center (May 29, 2012), online at http://www.ice.gov/news/library/factsheets/lesc.htm. LESC responded to more than one million requests for information in 2009 alone. App. 93.

The United States argues that making status verification mandatory interferes with the federal immigration scheme. It is true that §2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. See Brief for United States 47–50. In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed. This might be the case, for example, when an alien is an elderly veteran with significant and longstanding ties to the community. See 2011 ICE Memorandum 4–5 (mentioning these factors as relevant).

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U. S. C. §1357(g)(10)(A). A federal statute regulating the public benefits provided to qualified aliens in fact instructs that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." §1644. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, 563 U. S., at ___–___ (slip op., at 23–24) (rejecting argument that federal law preempted Arizona's requirement that employers determine whether employees were eligible to work through the federal E-Verify system where the Federal Government had encouraged its use).

2

Some who support the challenge to §2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. See, *e.g.,* Brief for Former Arizona Attorney General Terry Goddard et al. as *Amici Curiae* 37, n. 49. Detaining individuals solely to verify their immigration status would raise constitutional concerns. See, *e.g.*, *Arizona* v. *Johnson*, 555 U. S. 323, 333 (2009); *Illinois* v. *Caballes*, 543 U. S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"). And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. Cf. Part IV–C, *supra* (concluding that Arizona may not authorize warrantless arrests on the basis of removability). The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

But §2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of §2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry. See Reply Brief for Petitioners 12, n. 4 ("[Section 2(B)] does not require the verification be completed during the stop or detention if that is not reasonable or practicable"); cf. *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (finding no Fourth Amendment violation where questioning about

immigration status did not prolong a stop).

To take another example, a person might be held pending release on a charge of driving under the influence of alcohol. As this goes beyond a mere stop, the arrestee (unlike the jaywalker) would appear to be subject to the categorical requirement in the second sentence of §2(B) that "[a]ny person who is arrested shall have the person's immigration status determined before [he] is released." State courts may read this as an instruction to initiate a status check every time someone is arrested, or in some subset of those cases, rather than as a command to hold the person until the check is complete no matter the circumstances. Even if the law is read as an instruction to complete a check while the person is in custody, moreover, it is not clear at this stage and on this record that the verification process would result in prolonged detention.

However the law is interpreted, if §2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law. See, *e.g.*, *United States* v. *Di Re*, 332 U. S. 581, 589 (1948) (authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law); *Gonzales* v. *Peoria*, 722 F. 2d 468, 475–476 (CA9 1983) (concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law), overruled on other grounds in *Hodgers-Durgin* v. *de la Vina*, 199 F. 3d 1037 (CA9 1999).

The nature and timing of this case counsel caution in evaluating the validity of §2(B). The Federal Government

has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts" (citation omitted)). As a result, the United States cannot prevail in its current challenge. See *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960) ("To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists"). This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

V

Immigration policy shapes the destiny of the Nation. On May 24, 2012, at one of this Nation's most distinguished museums of history, a dozen immigrants stood before the tattered flag that inspired Francis Scott Key to write the National Anthem. There they took the oath to become American citizens. The Smithsonian, News Release, Smithsonian Citizenship Ceremony Welcomes a Dozen New Americans (May 24, 2012), online at http://newsdesk.si.edu/releases. These naturalization ceremonies bring together men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. 8 CFR §337.1(a) (2012).

The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

* * *

The United States has established that §§3, 5(C), and 6 of S. B. 1070 are preempted. It was improper, however, to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.

The judgment of the Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 11–182

ARIZONA, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2012]

JUSTICE SCALIA, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 104 (1938). Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

I

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated:

> "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to

> the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares violate it, incurs the penalty decreed to render it effectual." The Law of Nations, bk. II, ch. VII, §94, p. 309 (B. Kapossy & R. Whatmore eds. 2008).

See also I R. Phillimore, Commentaries upon International Law, pt. III, ch. X, p. 233 (1854) ("It is a received maxim of International Law that, the Government of a State may prohibit the entrance of strangers into the country").[1]

There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." *Mayor of New York* v. *Miln*, 11 Pet. 102, 132–133 (1837). And the Constitution did not strip the States of that authority. To the contrary, two of the Constitution's provisions were designed to enable the States to prevent "the intrusion of obnoxious aliens through other States." Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 The Writings of James Madison 226 (1900); accord, The Federalist No. 42, pp. 269–271 (C. Rossiter ed. 1961) (J. Madison). The Articles of Confeder-

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[1]Many of the 17th-, 18th-, and 19th-century commentators maintained that states should exclude foreigners only for good reason. Pufendorf, for example, maintained that states are generally expected to grant "permanent settlement to strangers who have been driven from their former home," though acknowledging that, when faced with the prospect of mass immigration, "every state may decide after its own custom what privilege should be granted in such a situation." 2 Of the Law of Nature and Nations, bk. III, ch. III, §10, p. 366 (C. Oldfather & W. Oldfather eds. 1934). See generally Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 83–87 (2002). But the authority to exclude was universally accepted as inherent in sovereignty, whatever prudential limitations there might be on its exercise.

ation had provided that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." Articles of Confederation, Art. IV. This meant that an unwelcome alien could obtain all the rights of a citizen of one State simply by first becoming an *inhabitant* of another. To remedy this, the Constitution's Privileges and Immunities Clause provided that "[t]he *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1 (emphasis added). But if one State had particularly lax citizenship standards, it might still serve as a gateway for the entry of "obnoxious aliens" into other States. This problem was solved "by authorizing the general government to establish a uniform rule of naturalization throughout the United States." The Federalist No. 42, *supra,* at 271; see Art. I, §8, cl. 4. In other words, the naturalization power was given to Congress not to abrogate States' power to exclude those they did not want, but to vindicate it.

Two other provisions of the Constitution are an acknowledgment of the States' sovereign interest in protecting their borders. Article I provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing it's inspection Laws*." Art. I, §10, cl. 2 (emphasis added). This assumed what everyone assumed: that the States could exclude from their territory dangerous or unwholesome goods. A later portion of the same section provides that "[n]o State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*." Art. I, §10, cl. 3 (emphasis added). This limits the States' sovereignty (in a way not relevant here) but leaves intact their inherent power to protect their territory.

Notwithstanding "[t]he myth of an era of unrestricted

immigration" in the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in Southern States) freed blacks. Neuman, The Lost Century of American Immigration (1776–1875), 93 Colum. L. Rev. 1833, 1835, 1841–1880 (1993). State laws not only provided for the removal of unwanted immigrants but also imposed penalties on unlawfully present aliens and those who aided their immigration.[2] *Id.,* at 1883.

In fact, the controversy surrounding the Alien and Sedition Acts involved a debate over whether, under the Constitution, the States had *exclusive* authority to enact such immigration laws. Criticism of the Sedition Act has become a prominent feature of our First Amendment jurisprudence, see, *e.g., New York Times Co.* v. *Sullivan,* 376 U. S. 254, 273–276 (1964), but one of the Alien Acts[3] also aroused controversy at the time:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . . ." An Act concerning Aliens, 1 Stat. 570, 570–571.

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[2] *E.g.,* Va. Code Tit. 54, ch. 198, §39 (1849) ("If a master of a vessel or other person, knowingly, import or bring into this state, from any place out of the *United States,* any person convicted of crime . . . he shall be confined in jail for three months, and be fined one hundred dollars").

[3] There were two Alien Acts, one of which dealt only with enemy aliens. An Act respecting Alien Enemies, 1 Stat. 577.

The Kentucky and Virginia Resolutions, written in denunciation of these Acts, insisted that the power to exclude unwanted aliens rested solely in the States. Jefferson's Kentucky Resolutions insisted "that alien friends are under the jurisdiction and protection of the laws of the state wherein they are [and] that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct from their power over citizens." Kentucky Resolutions of 1798, reprinted in J. Powell, Languages of Power: A Sourcebook of Early American Constitutional History 131 (1991). Madison's Virginia Resolutions likewise contended that the Alien Act purported to give the President "a power nowhere delegated to the federal government." Virginia Resolutions of 1798, reprinted in Powell, *supra,* at 134 (emphasis omitted). Notably, moreover, the Federalist proponents of the Act defended it primarily on the ground that "[t]he removal of aliens is the usual preliminary of hostility" and could therefore be justified in exercise of the Federal Government's war powers. Massachussets Resolutions in Reply to Virginia, reprinted in Powell, *supra,* at 136.

In *Mayor of New York* v. *Miln,* this Court considered a New York statute that required the commander of any ship arriving in New York from abroad to disclose "the name, place of birth, and last legal settlement, age and occupation . . . of all passengers . . . with the intention of proceeding to the said city." 11 Pet., at 130–131. After discussing the sovereign authority to regulate the entrance of foreigners described by De Vattel, the Court said:

> "The power . . . of New York to pass this law having undeniably existed at the formation of the constitution, the simply inquiry is, whether by that instrument it was taken from the states, and granted to congress; for if it were not, it yet remains with them." *Id.,* at 132.

And the Court held that it remains. *Id.,* at 139.

II

One would conclude from the foregoing that after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so. Since the founding era (though not immediately), doubt about the Federal Government's power has disappeared. Indeed, primary responsibility for immigration policy has shifted from the States to the Federal Government. Congress exercised its power "[t]o establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, very early on, see An Act to establish an uniform Rule of Naturalization, 1 Stat. 103. But with the fleeting exception of the Alien Act, Congress did not enact any legislation regulating *immigration* for the better part of a century. In 1862, Congress passed "An Act to prohibit the 'Coolie Trade' by American Citizens in American Vessels," which prohibited "procuring [Chinese nationals] . . . to be disposed of, or sold, or transferred, for any term of years or for any time whatever, as servants or apprentices, or to be held to service or labor." 12 Stat. 340. Then, in 1875, Congress amended that act to bar admission to Chinese, Japanese, and other Asian immigrants who had "entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes." An act supplementary to the acts in relation to immigration, ch. 141, 18 Stat. 477. And in 1882, Congress enacted the first general immigration statute. See An act to regulate Immigration, 22 Stat. 214. Of course, it hardly bears mention that Federal immigration law is now extensive.

I accept that as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than

for the States. As this Court has said, it is an "'accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.'" *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 (1893) (quoting *Ekiu* v. *United States*, 142 U. S. 651, 659 (1892)). That is why there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in Art. I, §9, which provided that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ."

In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so. I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: there is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area—and the so-called field preemption arising from that action, upon which the Court's opinion so heavily relies, *ante,* at 9–11—cannot be regarded as such a prohibition. We are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the *core* of state sovereignty:

the power to exclude. Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that "Congress . . . unequivocally expres[s] its intent to abrogate," *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 55 (1996) (internal quotation marks and citation omitted). Implicit "field preemption" will not do.

Nor can federal power over illegal immigration be deemed exclusive because of what the Court's opinion solicitously calls "foreign countries['] concern[s] about the status, safety, and security of their nationals in the United States," *ante,* at 3. The Constitution gives all those on our shores the protections of the Bill of Rights—but just as those rights are not expanded for foreign nationals because of their countries' views (some countries, for example, have recently discovered the death penalty to be barbaric), neither are the fundamental sovereign powers of the States abridged to accommodate foreign countries' views. Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. This is not the first time it has found that a nuisance and a bother in the conduct of foreign policy. Four years ago, for example, the Government importuned us to interfere with thoroughly constitutional state judicial procedures in the criminal trial of foreign nationals because the international community, and even an opinion of the International Court of Justice, disapproved them. See *Medellín* v. *Texas,* 552 U. S. 491 (2008). We rejected that request, as we should reject the Executive's invocation of foreign-affairs considerations here. Though it may upset foreign powers—and even when the Federal Government desperately wants to avoid upsetting foreign powers—the States have the right to protect their borders against foreign nationals, just as they have the right to execute foreign nationals for murder.

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority. I proceed to consider the challenged provisions in detail.

§2(B)

> "For any lawful stop, detention or arrest made by a law enforcement official . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. . . ." S. B. 1070, §2(B), as amended, Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012).

The Government has conceded that "even before Section 2 was enacted, state and local officers had state-law authority to inquire of DHS [the Department of Homeland Security] about a suspect's unlawful status and otherwise cooperate with federal immigration officers." Brief for United States 47 (citing App. 62, 82); see also Brief for United States 48–49. That concession, in my view, obviates the need for further inquiry. The Government's conflict-pre-emption claim calls on us "to determine whether, *under the circumstances of this particular case,* [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941) (emphasis added). It is impossible to make such a finding without a factual record concerning the manner in which Arizona is implementing these provisions—something the Government's pre-enforcement challenge has pretermitted. "The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States* v. *Salerno,* 481 U. S. 739, 745 (1987). And on its face, §2(B) merely tells state officials that they are authorized to do something that they were, by the Government's concession, already authorized to do.

The Court therefore properly rejects the Government's challenge, recognizing that, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2B will be construed in a way that creates a conflict with federal law." *Ante,* at 23. Before reaching that conclusion, however, the Court goes to great length to assuage fears that "state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status." *Ante,* at 22. Of course, any investigatory detention, including one under §2(B), may become an "unreasonable . . . seizur[e]," U. S. Const., Amdt. IV, if it lasts too long. See *Illinois* v. *Caballes,* 543 U. S. 405, 407 (2005). But that has nothing to do with this case, in which the Government claims that §2(B) is pre-empted by federal immigration law, not that anyone's Fourth Amendment rights have been violated. And I know of no reason why a protracted detention that does not violate the Fourth Amendment would contradict or conflict with any federal immigration law.

§6

> "A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." S. B. 1070, §6(A)(5), Ariz. Rev. Stat. Ann. §13–3883(A)(5) (West Supp. 2011).

This provision of S. B. 1070 expands the statutory list of offenses for which an Arizona police officer may make an arrest without a warrant. See §13–3883. If an officer has probable cause to believe that an individual is "removable" by reason of a public offense, then a warrant is not required to make an arrest. The Government's primary contention is that §6 is pre-empted by federal immigration law because it allows state officials to make arrests "without regard to federal priorities." Brief for United States 53. The Court's opinion focuses on limits that Congress has placed on *federal* officials' authority to arrest removable aliens and the possibility that state officials will make arrests "to achieve [Arizona's] own immigration policy" and "without any input from the Federal Government." *Ante,* at 17.

Of course on this pre-enforcement record there is no reason to assume that Arizona officials will ignore federal immigration policy (unless it be the questionable policy of not wanting to identify illegal aliens who have committed offenses that make them removable). As Arizona points out, federal law expressly provides that state officers may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U. S. C. §1357(g)(10)(B); and "cooperation" requires neither identical efforts nor prior federal approval. It is consistent with the Arizona statute, and with the "cooperat[ive]" system that Congress has created, for state officials to arrest a removable alien,

contact federal immigration authorities, and follow their lead on what to do next. And it is an assault on logic to say that identifying a removable alien and holding him for federal determination of whether he should be removed "violates the principle that the removal process is entrusted to the discretion of the Federal Government," *ante,* at 18. The State's detention does not represent commencement of the removal process unless the Federal Government makes it so.

But that is not the most important point. The most important point is that, as we have discussed, Arizona is *entitled* to have "its own immigration policy"—including a more rigorous enforcement policy—so long as that does not conflict with federal law. The Court says, as though the point is utterly dispositive, that "it is not a crime for a removable alien to remain present in the United States," *ante,* at 15. It is not a federal crime, to be sure. But there is no reason Arizona cannot make it a state crime for a removable alien (or any illegal alien, for that matter) to remain present in Arizona.

The Court quotes 8 U. S. C. §1226(a), which provides that, "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Section 1357(a)(2) also provides that a federal immigration official "shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any [federal immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." But statutory limitations upon the actions of federal officers in enforcing the United States' power to protect its borders do not on their face apply to the actions of state officers in enforcing the State's power to protect its borders. There is no more reason to read these provisions as implying that state officials are subject to similar limi-

tations than there is to read them as implying that only federal officials may arrest removable aliens. And in any event *neither* implication would constitute the sort of clear elimination of the States' sovereign power that our cases demand.

The Court raises concerns about "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed." *Ante,* at 17. But we have no license to assume, without any support in the record, that Arizona officials would use their arrest authority under §6 to harass anyone. And it makes no difference that federal officials might "determine [that some unlawfully present aliens] should not be removed," *ibid.* They may well determine not to remove from the United States aliens who have no right to be here; but unless and until these aliens have been given the right to remain, Arizona is entitled to arrest them and *at least* bring them to federal officials' attention, which is all that §6 necessarily entails. (In my view, the State can go further than this, and punish them for their unlawful entry and presence in Arizona.)

The Government complains that state officials might not heed "federal priorities." Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

§3

> "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8

> [U. S. C.] §1304(e) or §1306(a)." S. B. 1070, §3(A), as amended, Ariz. Rev. Stat. Ann. §13–1509(A).

It is beyond question that a State may make violation of federal law a violation of state law as well. We have held that to be so even when the interest protected is a distinctively federal interest, such as protection of the dignity of the national flag, see *Halter* v. *Nebraska,* 205 U. S. 34 (1907), or protection of the Federal Government's ability to recruit soldiers, *Gilbert* v. *Minnesota,* 254 U. S. 325 (1920). "[T]he State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes." *Id.,* at 331 (internal quotation marks omitted). Much more is that so when, as here, the State is protecting its *own* interest, the integrity of its borders. And we have said that explicitly with regard to illegal immigration: "Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Plyler* v. *Doe,* 457 U. S. 202, 228, n. 23 (1982).

The Court's opinion relies upon *Hines* v. *Davidowitz, supra. Ante,* at 9–10. But that case did not, as the Court believes, establish a "field preemption" that implicitly eliminates the States' sovereign power to exclude those whom federal law excludes. It held that the States are not permitted to establish "additional or auxiliary" registration requirements for aliens. 312 U. S., at 66–67. But §3 does not establish additional or auxiliary registration requirements. It merely makes a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law. *Hines* does not prevent the State from relying on the federal

registration system as "an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitutional validity has not been questioned." *Id.,* at 75–76 (Stone, J., dissenting). One such statute is Arizona's law forbidding illegal aliens to collect unemployment benefits, Ariz. Rev. Stat. Ann. §23–781(B) (West 2012). To enforce that and other laws that validly turn on alien status, Arizona has, in Justice Stone's words, an interest in knowing "the number and whereabouts of aliens within the state" and in having "a means of their identification," 312 U. S., at 75. And it can punish the aliens' failure to comply with the provisions of federal law that make that knowledge and identification possible.

In some areas of uniquely federal concern—*e.g.,* fraud in a federal administrative process (*Buckman Co.* v. *Plaintiffs' Legal Comm.,* 531 U. S. 341 (2001)) or perjury in violation of a federally required oath (*In re Loney,* 134 U. S. 372 (1890))—this Court has held that a State has no legitimate interest in enforcing a federal scheme. But the federal alien registration system is certainly not of uniquely federal interest. States, private entities, and individuals rely on the federal registration system (including the E-Verify program) on a regular basis. Arizona's legitimate interest in protecting (among other things) its unemployment-benefits system is an entirely adequate basis for making the violation of federal registration and carry requirements a violation of state law as well.

The Court points out, however, *ante,* at 11, that in some respects the state law exceeds the punishments prescribed by federal law: It rules out probation and pardon, which are available under federal law. The answer is that it makes no difference. Illegal immigrants who violate §3 violate *Arizona* law. It is one thing to say that the Supremacy Clause prevents Arizona law from excluding those whom federal law admits. It is quite something else to say that a violation of Arizona law cannot be punished

more severely than a violation of federal law. Especially where (as here) the State is defending its own sovereign interests, there is no precedent for such a limitation. The sale of illegal drugs, for example, ordinarily violates state law as well as federal law, and no one thinks that the state penalties cannot exceed the federal. As I have discussed, moreover, "field preemption" cannot establish a prohibition of additional state penalties in the area of immigration.

Finally, the Government also suggests that §3 poses an obstacle to the administration of federal immigration law, see Brief for United States 31–33, but "there is no conflict in terms, and no possibility of such conflict, [if] the state statute makes federal law its own," *California* v. *Zook*, 336 U. S. 725, 735 (1949).

It holds no fear for me, as it does for the Court, that "[w]ere §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Ante,* at 11. That seems to me entirely appropriate when the State uses the federal law (as it must) as the criterion for the exercise of *its own power*, and the implementation of *its own policies* of excluding those who do not belong there. What I do fear—and what Arizona and the States that support it fear—is that "federal policies" of nonenforcement will leave the States helpless before those evil effects of illegal immigration that the Court's opinion dutifully recites in its prologue (*ante,* at 6) but leaves unremedied in its disposition.

§5(C)

> "It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public

place or perform work as an employee or independent contractor in this state." S. B. 1070, §5(C), as amended, Ariz. Rev. Stat. Ann. §13–2928(C).

Here, the Court rightly starts with *De Canas* v. *Bica*, 424 U. S. 351 (1976), which involved a California law providing that "'[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.'" *Id.*, at 352 (quoting California Labor Code Ann. §2805(a)). This Court concluded that the California law was not pre-empted, as Congress had neither occupied the field of "regulation of employment of illegal aliens" nor expressed "the clear and manifest purpose" of displacing such state regulation. *Id.*, at 356–357 (internal quotation marks omitted). Thus, at the time *De Canas* was decided, §5(C) would have been indubitably lawful.

The only relevant change is that Congress has since enacted its own restrictions on employers who hire illegal aliens, 8 U. S. C. §1324a, in legislation that also includes some civil (but no criminal) penalties on illegal aliens who accept unlawful employment. The Court concludes from this (reasonably enough) "that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment," *ante*, at 13. But that is not the same as a deliberate choice to prohibit the States from imposing criminal penalties. Congress's intent with regard to exclusion of state law need not be guessed at, but is found in the law's express pre-emption provision, which excludes "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon *those who employ, or recruit or refer for a fee for employment,* unauthorized aliens," §1324a(h)(2) (emphasis added). Common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests

that the specification of pre-emption for laws punishing "those who employ" implies the lack of pre-emption for other laws, including laws punishing "those who seek or accept employment."

The Court has no credible response to this. It quotes our jurisprudence to the effect that an "express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles." *Ante,* at 14 (quoting *Geier* v. *American Honda Motor Co.,* 529 U.S. 861, 869 (2000) (internal quotation marks omitted)). True enough—*conflict* preemption principles. It then goes on say that since "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment," "[i]t follows that a state law to the contrary is an obstacle to the regulatory system Congress chose." *Ante,* at 15. For "'[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn.'" *Ibid.* (quoting *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.,* 485 U.S. 495, 503 (1988)). All that is a classic description not of *conflict* pre-emption but of *field* pre-emption, which (concededly) does not occur beyond the terms of an express pre-emption provision.

The Court concludes that §5(C) "would interfere with the careful balance struck by Congress," *ante,* at 15, (another field pre-emption notion, by the way) but that is easy to say and impossible to demonstrate. The Court relies primarily on the fact that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting [the Immigration Reform and Control Act of 1986 (IRCA)]," "[b]ut Congress rejected them." *Ante,* at 14. There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States. To tell the

truth, it was most likely expressive of what inaction ordinarily expresses: nothing at all. It is a "naïve assumption that the failure of a bill to make it out of committee, or to be adopted when reported to the floor, is the same as a congressional rejection of what the bill contained." *Crosby* v. *National Foreign Trade Council,* 530 U. S. 363, 389 (2000) (SCALIA, J., concurring in judgment) (internal quotation marks and alterations omitted).

* * *

The brief for the Government in this case asserted that "the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely." Brief for United States 21. Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift. Despite Congress's prescription that "the immigration laws of the United States should be enforced vigorously and uniformly," IRCA §115, 100 Stat. 3384, Arizona asserts without contradiction and with supporting citations:

> "[I]n the last decade federal enforcement efforts have focused primarily on areas in California and Texas, leaving Arizona's border to suffer from comparative neglect. The result has been the funneling of an increasing tide of illegal border crossings into Arizona. Indeed, over the past decade, over a third of the Nation's illegal border crossings occurred in Arizona." Brief for Petitioners 2–3 (footnote omitted).

Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive's unwise targeting of that funding?

But leave that aside. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate "scarce enforcement resources"—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.[4] If an individual unlawfully present in the United States

"• came to the United States under the age of sixteen;

"• has continuously resided in the United States for at least five years . . . ,

"• is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran . . . ,

"• has not been convicted of a [serious crime]; and

"• is not above the age of thirty,"[5]

then U. S. immigration officials have been directed to "defe[r] action" against such individual "for a period of two years, subject to renewal."[6] The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonen-

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[4]Preston & Cushman, Obama to Permit Young Migrants to Remain in U. S., N. Y. Times, June 16, 2012, p. A1.

[5]Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U. S. Customs and Border Protection; Alejandro Mayorkas, Director, U. S. Citizenship and Immigration Services; and John Morton, Director, U. S. Immigration and Customs Enforcement, p. 1 (June 15, 2012), online at http://www.dhs.gov (all Internet materials as visited June 22, 2012, and available in Clerk of Court's case file).

[6]*Id.*, at 2.

forcement program envisions, will necessarily be *deducted* from immigration enforcement. The President said at a news conference that the new program is "the right thing to do" in light of Congress's failure to pass the Administration's proposed revision of the Immigration Act.[7] Perhaps it is, though Arizona may not think so. But to say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.

The Court opinion's looming specter of inutterable horror—"[i]f §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations," *ante,* at 10—seems to me not so horrible and even less looming. But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Today's judgment surely fails that test. At the Constitutional Convention of 1787, the delegates contended with "the jealousy of the states with regard to their sovereignty." 1 Records of the Federal Convention 19 (M. Farrand ed. 1911) (statement of Edmund Randolph). Through ratification of the fundamental charter that the Convention produced, the States ceded much of their sovereignty to the Federal Government. But much of it remained jealously

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[7] Remarks by the President on Immigration (June 15, 2012), online at http://www.whitehouse.gov.

guarded—as reflected in the innumerable proposals that never left Independence Hall. Now, imagine a provision—perhaps inserted right after Art. I, §8, cl. 4, the Naturalization Clause—which included among the enumerated powers of Congress "To establish Limitations upon Immigration that will be exclusive and that will be enforced only to the extent the President deems appropriate." The delegates to the Grand Convention would have rushed to the exits.

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona's estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.

Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

SUPREME COURT OF THE UNITED STATES

No. 11–182

ARIZONA, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2012]

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with JUSTICE SCALIA that federal immigration law does not pre-empt any of the challenged provisions of S. B. 1070. I reach that conclusion, however, for the simple reason that there is no conflict between the "ordinary meanin[g]" of the relevant federal laws and that of the four provisions of Arizona law at issue here. *Wyeth* v. *Levine*, 555 U. S. 555, 588 (2009) (THOMAS, J., concurring in judgment) ("Pre-emption analysis should not be a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict" (brackets; internal quotation marks omitted)).

Section 2(B) of S. B. 1070 provides that, when Arizona law enforcement officers reasonably suspect that a person they have lawfully stopped, detained, or arrested is unlawfully present, "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" pursuant to the verification procedure established by Congress in 8 U. S. C. §1373(c). Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012). Nothing in the text of that or any other federal statute prohibits Arizona from directing its officers to make immigration-related inquiries in these situations. To the contrary, federal law expressly states that "no State or local government entity may be prohib-

ited, or in any way restricted, from sending to or receiving from" federal officials "information regarding the immigration status" of an alien. 8 U. S. C. §1644. And, federal law imposes an affirmative obligation on federal officials to respond to a State's immigration-related inquiries. §1373(c).

Section 6 of S. B. 1070 authorizes Arizona law enforcement officers to make warrantless arrests when there is probable cause to believe that an arrestee has committed a public offense that renders him removable under federal immigration law. States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority. See *United States* v. *Di Re,* 332 U. S. 581, 589 (1948) (holding that state law determines the validity of a warrantless arrest for a violation of federal law "in the absence of an applicable federal statute"). Here, no federal statute purports to withdraw that authority. As JUSTICE SCALIA notes, *ante,* at 12 (opinion concurring in part and dissenting in part), federal law does limit the authority of *federal* officials to arrest removable aliens, but those statutes do not apply to *state* officers. And, federal law expressly recognizes that state officers may "cooperate with the Attorney General" in the "apprehension" and "detention" of "aliens not lawfully present in the United States." §1357(g)(10)(B). Nothing in that statute indicates that such cooperation requires a prior "request, approval, or other instruction from the Federal Government." *Ante,* at 18 (majority opinion).

Section 3 of S. B. 1070 makes it a crime under Arizona law for an unlawfully present alien to willfully fail to complete or carry an alien registration document in violation of 8 U. S. C. §1304(e) and §1306(a). Section 3 simply incorporates federal registration standards. Unlike the Court, I would not hold that Congress pre-empted the field of enforcing those standards. "[O]ur recent cases have

frequently rejected field pre-emption in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting); see, *e.g., New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 415 (1973). Here, nothing in the text of the relevant federal statutes indicates that Congress intended enforcement of its registration requirements to be exclusively the province of the Federal Government. That Congress created a "full set of standards governing alien registration," *ante,* at 10 (majority opinion), merely indicates that it intended the scheme to be capable of working on its own, not that it wanted to preclude the States from enforcing the federal standards. *Hines* v. *Davidowitz*, 312 U. S. 52 (1941), is not to the contrary. As JUSTICE SCALIA explains, *ante,* at 14, *Hines* at most holds that federal law pre-empts the States from creating additional registration requirements. But here, Arizona is merely seeking to enforce the very registration requirements that Congress created.

Section 5(C) of S. B. 1070 prohibits unlawfully present aliens from knowingly applying for, soliciting, or performing work in Arizona. Section 5(C) operates only on individuals whom Congress has already declared ineligible to work in the United States. Nothing in the text of the federal immigration laws prohibits States from imposing their own criminal penalties on such individuals. Federal law expressly pre-empts States from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon *those who employ*, or recruit or refer for a fee for employment, unauthorized aliens." 8 U. S. C. §1324a(h)(2) (emphasis added). But it leaves States free to impose criminal sanctions on the employees themselves.

Despite the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they "stan[d] as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, supra,* at 67. I have explained that the "purposes and objectives" theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. See *Wyeth,* 555 U. S., at 604 (opinion concurring in judgment); see also *Williamson* v. *Mazda Motor of America, Inc.,* 562 U. S. ___, ___–___ (2011) (opinion concurring in judgment) (slip op., at 2–3); *Haywood* v. *Drown,* 556 U. S. 729, 767 (2009) (dissenting opinion). Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes. See *Wyeth, supra,* at 604 (THOMAS, J., concurring in judgment). Thus, even assuming the existence of some tension between Arizona's law and the supposed "purposes and objectives" of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

SUPREME COURT OF THE UNITED STATES

No. 11–182

ARIZONA, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2012]

JUSTICE ALITO, concurring in part and dissenting in part.

This case concerns four provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, S. B. 1070. Section 2(B) requires Arizona law enforcement officers to make a "reasonable attempt," "when practicable," to ascertain the immigration status of any person whom an officer lawfully stops, detains, or arrests "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012). Section 3 provides that an alien who willfully fails "to complete or carry an alien registration document" in violation of 8 U. S. C. §1304(e) or §1306(a) is guilty of a misdemeanor. Ariz. Rev. Stat. Ann. §13–1509(A) (West Supp. 2011). Section 5(C) makes it a misdemeanor for an unauthorized alien who is unlawfully present in the United States "to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." Ariz. Rev. Stat. Ann. §13–2928(C). And §6 authorizes Arizona law enforcement officers to arrest without a warrant any person whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Ariz. Rev. Stat. Ann. §13–3883(A)(5).

I agree with the Court that §2(B) is not pre-empted.

That provision does not authorize or require Arizona law enforcement officers to do anything they are not already allowed to do under existing federal law. The United States' argument that §2(B) is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.

I also agree with the Court that §3 is pre-empted by virtue of our decision in *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). Our conclusion in that case that Congress had enacted an "all-embracing system" of alien registration and that States cannot "enforce additional or auxiliary regulations," *id.,* at 66–67, 74, forecloses Arizona's attempt here to impose additional, state-law penalties for violations of the federal registration scheme.

While I agree with the Court on §2(B) and §3, I part ways on §5(C) and §6. The Court's holding on §5(C) is inconsistent with *De Canas* v. *Bica*, 424 U. S. 351 (1976), which held that employment regulation, even of aliens unlawfully present in the country, is an area of traditional state concern. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest. I do not believe Congress has spoken with the requisite clarity to justify invalidation of §5(C). Nor do I believe that §6 is invalid. Like §2(B), §6 adds virtually nothing to the authority that Arizona law enforcement officers already exercise. And whatever little authority they have gained is consistent with federal law.

Section 2(B)

A

Although §2(B) of the Arizona law has occasioned much controversy, it adds nothing to the authority that Arizona law enforcement officers, like officers in all other States, already possess under federal law. For that reason, I

agree with the Court that §2(B) is not pre-empted.

Section 2(B) quite clearly does not expand the authority of Arizona officers to make stops or arrests. It is triggered only when a "lawful stop, detention or arrest [is] made . . . in the enforcement of *any other [state or local] law or ordinance*." Ariz. Rev. Stat. Ann. §11–1051(B) (emphasis added). Section 2(B) thus comes into play only when an officer has reasonable suspicion or probable cause to believe that a person has committed a nonimmigration offense. Arizona officers plainly possessed this authority before §2(B) took effect.

Section 2(B) also does not expand the authority of Arizona officers to inquire about the immigration status of persons who are lawfully detained. When a person is stopped or arrested and "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," §2(B) instructs Arizona officers to make a "reasonable attempt," "when practicable," to ascertain that person's immigration status. Ariz. Rev. Stat. Ann. §11–1051(B). Even before the Arizona Legislature enacted §2(B), federal law permitted state and local officers to make such inquiries. In 8 U. S. C. §1357(g)(10)(A), Congress has made clear that state and local governments need not enter into formal agreements with the Federal Government in order "to communicate with the [Federal Government] regarding the immigration status of any individual." In addition, Congress has mandated that neither the Federal Government nor any state or local government may "prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [the Federal Government] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." §1373(a); see also §1644 (providing that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [the Federal Government] information regarding the

immigration status, lawful or unlawful, of an alien in the United States"). And while these provisions preserve the authority of state and local officers to seek immigration-status information from the Federal Government, another federal statute, §1373(c), requires that the Federal Government respond to any such inquiries "by providing the requested verification or status information." It comes as no surprise, therefore, that many States and localities permit their law enforcement officers to make the kinds of inquiries that §2(B) prescribes. See App. 294–298 (reporting that officers in 59 surveyed state and local jurisdictions "generally" ask arrestees about their immigration status while 34 do not and that officers in 78 jurisdictions "generally" inform Immigration and Customs Enforcement (ICE) when they believe an arrestee to be an undocumented alien while only 17 do not). Congress has invited state and local governments to make immigration-related inquiries and has even obligated the Federal Government to respond. Through §2(B), Arizona has taken Congress up on that invitation.

The United States does not deny that officers may, *at their own discretion*, inquire about the immigration status of persons whom they lawfully detain. Instead, the United States argues that §2(B) is pre-empted because it impedes federal-state cooperation by *mandating* that officers verify the immigration status of every detained person if there is reason to believe that the person is unlawfully present in the country. The United States claims that §2(B)'s mandate runs contrary to federal law in that it "precludes officers from taking [the Federal Government's] priorities and discretion into account." Brief for United States 50. "[B]y interposing a mandatory state law between state and local officers and their federal counterparts," writes the United States, §2(B) "stands as an obstacle to the accomplishment of the federal requirement of cooperation and the full effectuation of the enforcement judgment and

discretion Congress has vested in the Executive Branch." *Ibid.* (internal quotation marks and citation omitted).

The underlying premise of the United States' argument seems to be that state and local officers, when left to their own devices, generally take federal enforcement priorities into account. But there is no reason to think that this premise is true. And even if it were, it would not follow that §2(B)'s blanket mandate is at odds with federal law. Nothing in the relevant federal statutes *requires* state and local officers to consider the Federal Government's priorities before requesting verification of a person's immigration status. Neither 8 U. S. C. §1357(g)(10) nor §1373(a) conditions the right of state and local officers to communicate with the Federal Government on their first taking account of its priorities. Nor does §1373(c) condition the Federal Government's obligation to answer requests for information on the sensitivity of state and local officers to its enforcement discretion. In fact, §1373(c) dictates that the Federal Government "shall respond" to any inquiry seeking verification of immigration status, and that command applies whether or not the requesting officer has bothered to consider federal priorities. Because no federal statute requires such consideration, §2(B) does not conflict with federal law.

In any event, it is hard to see how state and local officers could proceed in conformity with the Federal Government's enforcement priorities without making an inquiry into a suspected alien's immigration status. For example, one of the Federal Government's highest priorities is the apprehension and removal of aliens who have failed to comply with a final order of removal. See App. 108. How can an officer identify those persons without first inquiring about their status? At bottom, the discretion that ultimately matters is not whether to verify a person's immigration status but whether to act once the person's status is known. For that reason, §2(B)'s verification

requirement is not contrary to federal law because the Federal Government retains the discretion that matters most—that is, the discretion to enforce the law in particular cases. If an Arizona officer contacts the Federal Government to verify a person's immigration status and federal records reveal that the person is in the country unlawfully, the Federal Government decides, presumably based on its enforcement priorities, whether to have the person released or transferred to federal custody. Enforcement discretion thus lies with the Federal Government, not with Arizona. Nothing in §2(B) suggests otherwise.

The United States' attack on §2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. Cf. *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 330 (1994) (holding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional" an "otherwise valid, congressionally condoned" state law). If §2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?

Like most law enforcement agencies, ICE does not set out inflexible rules for its officers to follow. To the contrary, it provides a list of factors to guide its officers' enforcement discretion on a case-by-case basis. See Memorandum from John Morton, Director, ICE, to All Field Office Directors et al., p. 4 (June 17, 2011) ("This list is not exhaustive and no one factor is determinative. ICE offi-

cers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities"). Among those factors is "the agency's civil immigration enforcement priorities," *ibid.*, which change from administration to administration. If accepted, the United States' pre-emption argument would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations. This argument, to say the least, is fundamentally at odds with our federal system.

B

It has been suggested that §2(B) will cause some persons who are lawfully stopped to be detained in violation of their constitutional rights while a prolonged investigation of their immigration status is undertaken. But nothing on the face of the law suggests that it will be enforced in a way that violates the Fourth Amendment or any other provision of the Constitution. The law instructs officers to make a "reasonable attempt" to investigate immigration status, and this language is best understood as incorporating the Fourth Amendment's standard of reasonableness. Indeed, the Arizona Legislature has directed that §2(B) "shall be implemented in a manner consistent with federal laws . . . protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." Ariz. Rev. Stat. Ann. §11–1051(L).

In the situations that seem most likely to occur, enforcement of §2(B) will present familiar Fourth Amendment questions. To take a common situation, suppose that a car is stopped for speeding, a nonimmigration offense. (Recall that §2(B) comes into play only where a stop or arrest is made for a nonimmigration offense.) Suppose

also that the officer who makes the stop subsequently acquires reasonable suspicion to believe that the driver entered the country illegally, which is a federal crime. See 8 U. S. C. §1325(a).

It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws. See, *e.g., Miller* v. *United States*, 357 U. S. 301, 305 (1958); *United States* v. *Di Re*, 332 U. S. 581, 589 (1948). I see no reason why this principle should not apply to immigration crimes as well. Lower courts have so held. See, *e.g., Estrada* v. *Rhode Island*, 594 F. 3d 56, 65 (CA1 2010) (upholding the lawfulness of a detention because the officer had an objectively reasonable belief that the arrestees "had committed immigration violations"); *United States* v. *Vasquez-Alvarez*, 176 F. 3d 1294, 1296 (CA10 1999) (noting that "state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws"); *Gonzales* v. *Peoria*, 722 F. 2d 468, 475 (CA9 1983), overruled on other grounds, *Hodgers-Durgin* v. *de la Vina*, 199 F. 3d 1037 (1999) (en banc) (holding that "federal law does not preclude local enforcement of the criminal provisions" of federal immigration law). And the United States, consistent with the position long taken by the Office of Legal Counsel (OLC) in the Department of Justice, does not contend otherwise. See Brief for United States 55, n. 33; see also Memorandum from OLC to the Attorney General (Apr. 3, 2002), App. 268–273; Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26 (1996).

More importantly, no federal statute casts doubt on this authority. To be sure, there are a handful of statutes that purport to authorize state and local officers to make immigration-related arrests in *certain* situations. See, *e.g.,* 8 U. S. C. §1103(a)(10) (providing for the extension of "any" immigration enforcement authority to state and local

officers in the event of an "actual or imminent mass influx of aliens arriving off the coast"); §1252c(a) (providing authority to arrest criminal aliens who had illegally reentered the country but only after consultation with the Federal Government); §1324(c) (providing authority to make arrests for transporting and harboring certain aliens). But a grant of federal arrest authority in some cases does not manifest a clear congressional intent to displace the States' police powers in all other cases. Without more, such an inference is too weak to overcome our presumption against pre-emption where traditional state police powers are at stake. Accordingly, in our hypothetical case, the Arizona officer may arrest the driver for violating §1325(a) if the officer has probable cause. And if the officer has reasonable suspicion, the officer may detain the driver, to the extent permitted by the Fourth Amendment, while the question of illegal entry is investigated.

We have held that a detention based on reasonable suspicion that the detainee committed a particular crime "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois* v. *Caballes*, 543 U. S. 405, 407 (2005). But if during the course of a stop an officer acquires suspicion that a detainee committed a different crime, the detention may be extended for a reasonable time to verify or dispel that suspicion. Cf. *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (holding that "no additional Fourth Amendment justification" was required because any questioning concerning immigration status did not prolong the detention). In our hypothetical case, therefore, if the officer, after initially stopping the car for speeding, has a reasonable suspicion that the driver entered the country illegally, the officer may investigate for evidence of illegal entry. But the length and nature of this investigation must remain within the limits set out in our Fourth Amendment cases. An investigative stop, if prolonged, can become an arrest and

thus require probable cause. See *Caballes, supra,* at 407. Similarly, if a person is moved from the site of the stop, probable cause will likely be required. See *Hayes* v. *Florida,* 470 U. S. 811, 816 (1985) (holding that the line between detention and arrest is crossed "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes").

If properly implemented, §2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of §2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up. These civil-liberty concerns, I take it, are at the heart of most objections to §2(B). Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped for some other reason entered the country illegally, and there is a risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained. To mitigate this risk, Arizona could issue guidance to officers detailing the circumstances that typically give rise to reasonable suspicion of unlawful presence. And in the spirit of the federal-state cooperation that the United States champions, the Federal Government could share its own guidelines. Arizona could also provide officers with a nonexclusive list containing forms of identification sufficient under §2(B) to dispel any suspicion of unlawful presence. If Arizona accepts licenses from most States as proof of legal status, the problem of roadside detentions will be greatly mitigated.[1]

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[1] When the Real ID Act takes effect, the Federal Government will no longer accept state forms of identification that fail to meet certain federal requirements. §202(a)(1), 119 Stat. 312. One requirement is that any identification be issued only on proof that the applicant is lawfully present in the United States. §202(c)(2)(B), *id.,* at 313. I

Section 3

I agree that §3 is pre-empted because, like the Court, I read the opinion in *Hines* to require that result. Although there is some ambiguity in *Hines*, the Court largely spoke in the language of field pre-emption. The Court explained that where Congress "has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U. S., at 66–67. In finding the Pennsylvania alien-registration law pre-empted, the Court observed that Congress had "provided a standard for alien registration in a single integrated and all-embracing system" and that its intent was "to protect the personal liberties of law-abiding aliens through one uniform national registration system." *Id.,* at 74. If we credit our holding in *Hines* that Congress has enacted "a single integrated and all-embracing system" of alien registration and that States cannot "complement" that system or "enforce additional or auxiliary regulations," *id.,* at 66–67, 74, then Arizona's attempt to impose additional, state-law penalties for violations of federal registration requirements must be invalidated.

Section 5(C)

While I agree that §3 is pre-empted, I disagree with the Court's decision to strike down §5(C). I do so in large measure because the Court fails to give the same solicitude to our decision in *De Canas,* 424 U. S. 351, as it is willing to give our decision in *Hines*. In *De Canas,* the Court upheld against a pre-emption challenge a state law imposing fines on employers that hired aliens who were

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anticipate that most, if not all, States will eventually issue forms of identification that suffice to establish lawful presence under §2(B).

unlawfully present in the United States. The Court explained that the mere fact that "aliens are the subject of a state statute does not render it a regulation of immigration." 424 U. S., at 355. The Court emphasized instead that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.,* at 356. In light of that broad authority, the Court declared that "[o]nly a demonstration that complete ouster of state power . . . was 'the clear and manifest purpose of Congress' would justify" the conclusion that "state regulation designed to protect vital state interests must give way to paramount federal legislation." *Id.,* at 357 (some internal quotation marks omitted); see also *Bates* v. *Dow Agrosciences LLC,* 544 U. S. 431, 449 (2005) ("In areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest'" (some internal quotation marks omitted)).

The Court now tells us that times have changed. Since *De Canas,* Congress has enacted "a comprehensive framework for combating the employment of illegal aliens," and even though aliens who seek or obtain unauthorized work are not subject to criminal sanctions, they can suffer civil penalties. *Ante,* at 12–13 (internal quotation marks omitted). Undoubtedly, federal regulation in this area is more pervasive today. But our task remains unchanged: to determine whether the federal scheme discloses a clear and manifest congressional intent to displace state law.

The Court gives short shrift to our presumption *against* pre-emption. Having no express statement of congressional intent to support its analysis, the Court infers from stale legislative history and from the comprehensiveness of the federal scheme that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Ante,* at 13.

Because §5(C) imposes such penalties, the Court concludes that it stands as an obstacle to the method of enforcement chosen by Congress. *Ante,* at 15.

The one thing that is clear from the federal scheme is that Congress chose not to impose *federal* criminal penalties on aliens who seek or obtain unauthorized work. But that does not mean that Congress also chose to pre-empt *state* criminal penalties. The inference is plausible, but far from necessary. As we have said before, the "decision not to adopt a regulation" is not "the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma* v. *Mercury Marine,* 537 U. S. 51, 65 (2002). With any statutory scheme, Congress chooses to do some things and not others. If that alone were enough to demonstrate pre-emptive intent, there would be little left over for the States to regulate, especially now that federal authority reaches so far and wide. States would occupy tiny islands in a sea of federal power. This explains why state laws implicating traditional state powers are not pre-empted unless there is a "clear and manifest" congressional intention to do so.

Not only is there little evidence that Congress intended to pre-empt state laws like §5(C), there is some evidence that Congress intended the opposite result. In making it unlawful for employers to hire unauthorized aliens, see 8 U. S. C. §1324a(a), Congress made it clear that "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" upon employers was pre-empted, §1324a(h)(2). Noticeably absent is any similar directive pre-empting state or local laws targeting aliens who seek or obtain unauthorized employment. Given that Congress expressly pre-empted certain state and local laws pertaining to employers but remained silent about laws pertaining to employees, one could infer that Congress intended to preserve state and local authority to

regulate the employee side of the equation. At the very least, it raises serious doubts about whether Congress intended to pre-empt such authority.

The Court dismisses any inferences that might be drawn from the express pre-emption provision. See *ante,* at 14. But even though the existence of that provision "does *not* bar the ordinary working of conflict pre-emption principles" or impose a "'special burden'" against pre-emption, *Geier* v. *American Honda Motor Co.,* 529 U. S. 861, 869–870 (2000), it is still probative of congressional intent. And it is the intent of Congress that is the "ultimate touchstone." *Retail Clerks* v. *Schermerhorn,* 375 U. S. 96, 103 (1963).

The Court infers from Congress' decision not to impose *federal* criminal penalties that Congress intended to pre-empt *state* criminal penalties. But given that the express pre-emption provision covers only state and local laws regulating *employers,* one could just as well infer that Congress did not intend to pre-empt state or local laws aimed at alien *employees* who unlawfully seek or obtain work. Surely Congress' decision not to extend its express pre-emption provision to state or local laws like §5(C) is more probative of its intent on the subject of pre-emption than its decision not to impose federal criminal penalties for unauthorized work. In any event, the point I wish to emphasize is that inferences can be drawn either way. There are no necessary inferences that point decisively for or against pre-emption. Therefore, if we take seriously that state employment regulation is a traditional state concern and can be pre-empted only on a showing of "clear and manifest" congressional intent as required by *De Canas,* then §5(C) must survive. "Our precedents establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce of United States of America* v. *Whiting,* 563 U. S. ___, ___ (2011) (plurality opinion)

(slip op., at 22) (internal quotation marks omitted). I do not believe the United States has surmounted that barrier here.

Section 6

I also disagree with the Court's decision that §6 is preempted. This provision adds little to the authority that Arizona officers already possess, and whatever additional authority it confers is consistent with federal law. Section 6 amended an Arizona statute that authorizes warrantless arrests. See Ariz. Rev. Stat. §13–3883 (West 2010). Before §6 was added, that statute already permitted arrests without a warrant for felonies, misdemeanors committed in the arresting officer's presence, petty offenses, and certain traffic-related criminal violations. See §§13–3883(A)(1)–(4). Largely duplicating the authority already conferred by these prior subsections, §6 added a new subsection, §13–3883(A)(5) (West Supp. 2011), that authorizes officers to make warrantless arrests on probable cause that the arrestee has committed a "public offense" for which the arrestee is removable from the United States. A "public offense" is defined as conduct that is punishable by imprisonment or a fine according to the law of the State where the conduct occurred and that would be punishable under Arizona law had the conduct occurred in Arizona. See §13–105(27).

In what way, if any, does §6 enlarge the arrest authority of Arizona officers? It has been suggested that §6 confers new authority in the following three circumstances: (1) where the arrestee committed but has not been charged with committing an offense in another State; (2) where the officer has probable cause to believe the arrestee committed an offense for which he was previously arrested but not prosecuted; and (3) where the arrestee committed but has already served the sentence for a removable offense. 641 F. 3d 359, 361 (CA9 2011). These are exceedingly

narrow categories, involving circumstances that will rarely arise. But such cases are possible, and therefore we must decide whether there are circumstances under which federal law precludes a state officer from making an arrest based on probable cause that the arrestee committed a removable offense.

A

The idea that state and local officers may carry out arrests in the service of federal law is not unprecedented. As previously noted, our cases establish that state and local officers may make warrantless arrests for violations of federal law and that "in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Di Re,* 332 U. S., at 589; see also *Miller,* 357 U. S., at 305 (stating that, where a state officer makes an arrest based on federal law, "the lawfulness of the arrest without warrant is to be determined by reference to state law"). Therefore, given the premise, which I understand both the United States and the Court to accept, that state and local officers do have inherent authority to make arrests in aid of federal law, we must ask whether Congress has done anything to curtail or pre-empt that authority in this particular case.

Neither the United States nor the Court goes so far as to say that state and local officers have no power to arrest criminal aliens based on their removability. To do so would fly in the face of 8 U. S. C. §1357(g)(10). Under §§1357(g)(1)–(9), the Federal Government may enter into formal agreements with States and municipalities under which their officers may perform certain duties of a federal immigration officer. But §1357(g)(10)(B) makes clear that States and municipalities need not enter into those agreements "otherwise to cooperate . . . in the identification, apprehension, detention, or removal of aliens not

lawfully present in the United States." It goes without saying that state and local officers could not provide meaningful cooperation in the apprehension, detention, and ultimate removal of criminal aliens without some power to make arrests.

Although §1357(g)(10) contemplates state and local authority to apprehend criminal aliens for the purpose of removal, the Court rejects out of hand any possibility that officers could exercise that authority without federal direction. Despite acknowledging that there is "ambiguity as to what constitutes cooperation," the Court says that "no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Ante,* at 18. The Court adopts an unnecessarily stunted view of cooperation. No one would say that a state or local officer has failed to cooperate by making an on-the-spot arrest to enforce federal law. Unsolicited aid is not necessarily uncooperative.

To be sure, were an officer to persist in making an arrest that the officer knows is unwanted, such conduct would not count as cooperation. But nothing in the relevant federal statutes suggests that Congress does not want aliens who have committed removable offenses to be arrested.[2] To the contrary, §1226(c)(1) commands that the Executive "shall take into custody any alien" who is deportable for having committed a specified offense. And §1226(c)(2) substantially limits the circumstances under which the Executive has discretion to release aliens held in custody under paragraph (1). So if an officer arrests an alien who is removable for having committed one of the crimes listed in §1226(c)(1), the Federal Government is

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[2]That goes for the Executive Branch as well, which has made the apprehension and removal of criminal aliens a priority. See App. 108.

obligated to take the alien into custody.

That Congress generally requires the Executive to take custody of criminal aliens casts considerable doubt on the Court's concern that §6 is an obstacle to the Federal Government's exercise of discretion. The Court claims that the authority conferred by §6 "could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case" and that this "would allow the State to achieve its own immigration policy," resulting in the "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed." *Ante,* at 17. But §1226(c)(1) belies the Court's fear. In many, if not most, cases involving aliens who are removable for having committed criminal offenses, Congress has left the Executive no discretion but to take the alien into custody. State and local officers do not frustrate the removal process by arresting criminal aliens. The Executive retains complete discretion over whether those aliens are ultimately removed. And once the Federal Government makes a determination that a particular criminal alien will not be removed, then Arizona officers are presumably no longer authorized under §6 to arrest the alien.

To be sure, not all offenses for which officers have authority to arrest under §6 are covered by §1226(c)(1). As for aliens who have committed those offenses, Congress has given the Executive discretion under §1226(a) over whether to arrest and detain them pending a decision on removal. But the mere fact that the Executive has enforcement discretion cannot mean that the exercise of state police powers in support of federal law is automatically pre-empted. If that were true, then state and local officers could never make arrests to enforce any federal statute because the Executive always has at least some general discretion over the enforcement of federal law as a practical matter. But even assuming that the express

statutory grant of discretion in §1226(a) somehow indicates a congressional desire to pre-empt unilateral state and local authority to arrest criminal aliens covered by that provision, §6 is not pre-empted on its face given its substantial overlap with §1226(c)(1).

It bears emphasizing that §6 does not mandate the warrantless apprehension of all aliens who have committed crimes for which they are removable. Instead, it only grants state and local officers permission to make such arrests. The trouble with this premature, facial challenge is that it affords Arizona no opportunity to implement its law in a way that would avoid any potential conflicts with federal law. For example, Arizona could promulgate guidelines or regulations limiting the arrest authority conferred by §6 to the crimes specified in §1226(c)(1). And to the extent §1226(c)(1) is unclear about which exact crimes are covered,[3] Arizona could go even further and identify specific crimes for which there is no doubt an alien would be removable. The point is that there are plenty of permissible applications of §6, and the Court should not invalidate the statute at this point without at least some indication that Arizona has implemented it in a manner at odds with Congress' clear and manifest intent. We have said that a facial challenge to a statute is "the most difficult challenge to mount successfully" because "the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987); see also *Anderson* v. *Edwards*, 514 U. S. 143, 155, n. 6 (1995) (applying the *Salerno* standard in a pre-emption case). As to §6, I do not believe the United States has carried that

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[3] I readily admit that it can be difficult to determine whether a particular conviction will necessarily make an alien removable. See *Padilla* v. *Kentucky*, 559 U. S. ___, ___ (2010) (ALITO, J., concurring in judgment) (slip op., at 4).

heavy burden.

B

Finally, the Court tells us that §6 conflicts with federal law because it provides state and local officers with "even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." *Ante,* at 16–17. The Court points to 8 U. S. C. §1357(a)(2), which empowers "authorized" officers and employees of ICE to make arrests without a federal warrant if "the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." Because §6 would allow Arizona officers to make arrests "regardless of whether a federal warrant has issued or the alien is likely to escape," *ante,* at 17, the Court concludes that §6 is an obstacle to the accomplishment of Congress' objectives. But §6 is an obstacle only to the extent it conflicts with Congress' clear and manifest intent to preclude state and local officers from making arrests except where a federal warrant has issued or the arrestee is likely to escape. By granting warrantless arrest authority to *federal officers,* Congress has not manifested an unmistakable intent to strip *state and local officers* of their warrantless arrest authority under state law.

Likewise, limitations on federal arrest authority do not mean that the arrest authority of state and local officers must be similarly limited. Our opinion in *Miller,* 357 U. S. 301, is instructive. In that case, a District of Columbia officer, accompanied by a federal officer, made an arrest based on a suspected federal narcotics offense. *Id.,* at 303–304. The federal officer did not have statutory authorization to arrest without a warrant, but the local officer did. *Id.,* at 305. We held that District of Columbia law dictated the lawfulness of the arrest. *Id.,* at 305–306.

Where a state or local officer makes a warrantless arrest to enforce federal law, we said that "the lawfulness of the arrest without warrant is to be determined by reference to state law." *Id.,* at 305. Under §6, an Arizona officer may be authorized to make an arrest that a federal officer may not be authorized to make under §1357(a)(2). As *Miller* makes clear, that fact alone does not render arrests by state or local officers pursuant to §6 unlawful. Nor does it manifest a clear congressional intent to displace the exercise of state police powers that are brought to bear in aid of federal law.

MEMORANDUM July 13, 2012

To: Prepared for Distribution to Multiple Congressional Requesters

From: Andorra Bruno, Specialist in Immigration Policy, 7-7865
Todd Garvey, Legislative Attorney, 7-0174
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Subject: **Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children***

This Congressional Research Service (CRS) memorandum provides background and analysis related to the memorandum issued by the Department of Homeland Security (DHS) on June 15, 2012, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. Under the DHS directive, certain individuals who were brought to the United States as children and meet other criteria will be considered for relief from removal. Intended to respond to a variety of congressional requests on the policy set forth in the DHS memorandum, this CRS memorandum discusses the content of the June 15, 2012 memorandum, as well as the unauthorized alien student issue and related DREAM Act legislation, past administrative exercises of prosecutorial discretion to provide relief from removal, the legal authority for the actions contemplated in the DHS memorandum, and other related issues. For further information, please contact Andorra Bruno (unauthorized students and the DREAM Act), Todd Garvey (constitutional authority), Kate Manuel (other legal issues), or Ruth Wasem (antecedents of deferred departure and access to federal benefits).

Overview of Unauthorized Alien Students

The unauthorized alien (noncitizen) population includes minors and young adults who were brought, as children, to live in the United States by their parents or other adults. These individuals are sometimes referred to as "unauthorized alien students," or, more colloquially, as "DREAM Act kids" or "DREAMers."

While living in the United States, unauthorized alien children are able to receive free public education through high school.[1] Many unauthorized immigrants who graduate from high school and want to attend

[1] The legal authority for disallowing state discrimination against unauthorized aliens in elementary and secondary education is the 1982 Supreme Court decision in Plyler v. Doe. See also CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

college, however, find it difficult to do so. One reason for this is that they are ineligible for federal student financial aid.[2] Another reason relates to a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[3] that discourages states and localities from granting unauthorized aliens certain "postsecondary education benefits" (referred to here as the "1996 provision").[4] More broadly, as unauthorized aliens, they are typically unable to work legally and are subject to removal from the United States.[5]

According to DHS estimates, there were 1.4 million unauthorized alien children under age 18 living in the United States in January 2011. In addition, there were 1.6 million unauthorized individuals aged 18 to 24, and 3.7 million unauthorized individuals aged 25 to 34.[6] These data represent totals and include all individuals in the specified age groups regardless of length of presence in the United States, age at time of initial entry into the United States, or educational status. Numerical estimates of potential beneficiaries of the policy set forth in DHS's June 15, 2012 memorandum are provided below.

Legislation

Multiple bills have been introduced in recent Congresses to provide relief to unauthorized alien students. These bills have often been entitled the Development, Relief, and Education for Alien Minors Act, or the DREAM Act. A common element in these bills is that they would enable certain unauthorized alien students to obtain legal status through an immigration procedure known as *cancellation of removal*[7] and at some point in the process, to obtain legal permanent resident (LPR) status, provided they meet all the applicable requirements. Multiple DREAM Act bills have been introduced in the 112th Congress but none have seen any legislative action.[8]

Traditional DREAM Act bills

Since the 109th Congress, "standard" DREAM Act bills have included language to repeal the 1996 provision mentioned above and to enable certain unauthorized alien students to adjust status (that is, to obtain LPR status in the United States). These bills have proposed to grant LPR status on a conditional basis to an alien who, among other requirements, could demonstrate that he or she:

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[2] Higher Education Act (HEA) of 1965 (P.L. 89-329), as amended, November 8, 1965, 20 U.S.C. §1001 *et seq.*

[3] IIRIRA is Division C of P.L. 104-208, September 30, 1996.

[4] This provision, section 505, nominally bars states from conferring postsecondary education benefits (e.g., in-state tuition) to unauthorized aliens residing within their jurisdictions if similar benefits are not conferred to out-of-state U.S. citizens. Nevertheless, about a dozen states effectively do grant in-state tuition to resident unauthorized aliens without granting similar benefits to out-of-state citizens, and courts that have considered these provisions have upheld them.

[5] For additional information, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

[6] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker.

[7] Cancellation of removal is a discretionary form of relief that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien's status is adjusted to that of a legal permanent resident.

[8] For additional analysis of DREAM Act legislation, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*.

- was continuously physically present in the United States for at least five years preceding the date of enactment;
- was age 15 or younger at the time of initial entry;
- had been a person of good moral character since the time of initial entry;
- was at or below a specified age (age has varied by bill) on the date of enactment; and
- had been admitted to an institution of higher education in the United States or had earned a high school diploma or the equivalent in the United States.

The bills also include special requirements concerning inadmissibility,[9] and some would disqualify any alien convicted of certain state or federal crimes. After six years in conditional LPR status, an alien could have the condition on his or her status removed and become a full-fledged LPR if he or she meets additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the uniformed services[10] for at least two years. Two similar bills with these elements (S. 952, H.R. 1842)—both entitled the DREAM Act of 2011—have been introduced in the 112th Congress.

Other Versions of the DREAM Act

Revised versions of the DREAM Act have also been introduced in Congress in recent years. In the 111th Congress, the House approved one of these DREAM Act measures as part of an unrelated bill, the Removal Clarification Act of 2010 (H.R. 5281).[11] Unlike earlier DREAM Act bills, this measure[12] did not include a repeal of the 1996 provision and proposed to grant eligible individuals an interim legal status prior to enabling them to adjust to LPR status. Under this measure, an alien meeting an initial set of requirements like those included in traditional DREAM Act bills (enumerated in the previous section) would have been granted conditional *nonimmigrant*[13] status for five years. This status could have been extended for another five years if the alien met additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the Armed Forces for at least two years. The applications to obtain conditional status initially and to extend this status would have been subject to surcharges. At the end of the second conditional period, the conditional nonimmigrant could have applied to adjust to LPR status.

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[9] The Immigration and Nationality Act (INA) enumerates classes of inadmissible aliens. Under the INA, except as otherwise provided, aliens who are inadmissible under specified grounds, such as health-related grounds or criminal grounds, are ineligible to receive visas from the Department of State or to be admitted to the United States by the Department of Homeland Security.

[10] As defined in Section 101(a) of Title 10 of the U.S. Code, *uniformed services* means the Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard); the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service.

[11] The Senate failed, on a 55-41 vote, to invoke cloture on a motion to agree to the House-passed DREAM Act amendment, and H.R. 5281 died at the end of the Congress.

[12] The language is the same as that in H.R. 6497 in the 111th Congress.

[13] Nonimmigrants are legal temporary residents of the United States.

Two bills in the 112th Congress—the Adjusted Residency for Military Service Act, or ARMS Act (H.R. 3823) and the Studying Towards Adjusted Residency Status Act, or STARS Act (H.R. 5869)—follow the general outline of the House-approved measure described above, but include some different, more stringent requirements. These bills would provide separate pathways for unauthorized students to obtain LPR status through military service (ARMS Act) or higher education (STARS Act). Neither bill would repeal the 1996 provision and, thus, would not eliminate the statutory restriction on state provision of postsecondary educational benefits to unauthorized aliens.

The initial requirements for conditional nonimmigrant status under the ARMS Act are like those in the traditional DREAM Act bills discussed above. The STARS Act includes most of these requirements, as well as others that are not found in other DREAM Act bills introduced in the 112th Congress. Two new STARS Act requirements for initial conditional status are: (1) admission to an accredited four-year college, and (2) submission of the application for relief before age 19 or, in some cases, before age 21.

Under both the ARMS Act and the STARS Act, the conditional nonimmigrant status would be initially valid for five years and could be extended for an additional five years if applicants meet a set of requirements. In the case of the ARMS Act, these requirements would include service in the Armed Forces on active duty for at least two years or service in a reserve component of the Armed Forces in active status for at least four years. In the case of the STARS Act, the requirements for an extension of status would include graduation from an accredited four-year institution of higher education in the United States. After obtaining an extension of status, an alien could apply to adjust to LPR status, as specified in each bill.

DHS Memorandum of June 15, 2012

On June 15, 2012, the Obama Administration announced that certain individuals who were brought to the United States as children and meet other criteria would be considered for relief from removal. Under the memorandum, issued by Secretary of Homeland Security Janet Napolitano, these individuals would be eligible for deferred action[14] for two years, subject to renewal, and could apply for employment authorization.[15] The eligibility criteria for deferred action under the June 15, 2012 memorandum are:

- under age 16 at time of entry into the United States;
- continuous residence in the United States for at least five years preceding the date of the memorandum;

[14] Deferred action is "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion." U.S. Department of Homeland Security, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities," http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm.

[15] U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

- in school, graduated from high school or obtained general education development certificate, or honorably discharged from the Armed Forces;
- not convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and not otherwise a threat to national security or public safety; and
- age 30 or below.

These eligibility criteria are similar to those included in DREAM Act bills discussed above. The deferred action process set forth in the June 15, 2012 memorandum, however, would not grant eligible individuals a legal immigration status.[16]

Based on these eligibility criteria, the Pew Hispanic Center has estimated that the policy set forth in the June 15, 2012 memorandum could benefit up to 1.4 million unauthorized aliens in the United States. This potential beneficiary population total includes 0.7 million individuals under age 18 and 0.7 million individuals aged 18 to 30.[17]

Antecedents of the Policy

The Attorney General and, more recently, the Secretary of Homeland Security have had prosecutorial discretion in exercising the power to remove foreign nationals. In 1959, a major textbook of immigration law stated, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."[18] Specific guidance on how prosecutorial discretion was applied in individual cases was elusive in the early years.[19] Generally, prosecutorial discretion is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; deciding to detain an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to let the alien depart voluntarily; and executing a removal order. (The legal authority to exercise prosecutorial discretion is discussed separately below.)

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[16] The DHS memorandum states: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law." Ibid., p. 3.

[17] Pew Hispanic Center, "Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy," June 15, 2012, http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation-policy/.

[18] Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

[19] For example, in 1961, an official with the former Immigration and Naturalization Service (INS) offered his insights on circumstances in which discretionary relief from removal might be provided. The first factor he cited was age: "I have always felt that young people should be treated in our proceedings as are juveniles in the Courts who have violated criminal law.... My personal opinion is that certainly someone under eighteen is entitled to extra consideration." He added that persons over 60 or 65 years of age should be given special consideration. He also emphasized length of residence in the United States as a factor, noting that "five years is a significant mark in immigration law." Other factors he raised included good moral character, family ties in the United States, and exceptional and unusual hardship to the alien as well as family members. Aaron I. Maltin, Special Inquiry Officer, "Relief from Deportation," *Interpreter Releases*, vol. 38, no. 21 (June 9, 1961), pp. 150-155. He also discussed refugee and asylum cases.

Over the next few decades, an official guidance on discretionary relief from removal began to take shape. A 1985 Congressional Research Service "white paper" on discretionary relief from deportation described the policies of Immigration and Naturalization Service (INS)[20] at that time.

> Currently, three such discretionary procedures are relatively routinely used by INS to provide relief from deportation. One of the procedures – stay of deportation – is defined under INS regulations; another—deferred departure or deferred action – is described in INS operating instructions; and the third – extended voluntary departure—has not been formally defined and appears to be evolving.

The CRS "white paper" further noted that the executive branch uses these three forms of prosecutorial discretion "to provide relief the Administration feels is appropriate but which would not be available under the statute."[21]

In an October 24, 2005, memorandum, William Howard, then-Principal Legal Advisor of DHS's Immigration and Customs Enforcement (ICE), cited several policy factors relevant to the need to exercise prosecutorial discretion. One factor he identified was institutional change. He wrote:

> "Gone are the days when INS district counsels... could simply walk down the hall to an INS district director, immigrant agent, adjudicator, or border patrol officer to obtain the client's permission to proceed ... Now the NTA-issuing clients might be in different agencies, in different buildings, and in different cities from our own."

Another issue Howard raised was resources. He pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

> "Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000."[22]

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or someone for whom sympathetic humanitarian circumstances "cry for an exercise of prosecutorial discretion."[23]

In November 2007, then-DHS Assistant Secretary for ICE Julie L. Myers issued a memorandum in which she clarified that the replacement of the "catch and release" procedure with the "catch and return" policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not "diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to

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[20] Most of the immigration-related functions of the former INS were transferred to the U.S. Department of Homeland Security when it was created in 2002 by the Homeland Security Act (P.L. 107-296). Three agencies in DHS have important immigration functions in which prosecutorial discretion may come into play: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).

[21] Sharon Stephan, *Extended Voluntary Departure and Other Blanket Forms of Relief from Deportation*, Congressional Research Service, 85-599 EPW, February 23, 1985.

[22] William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all OPLA Chief Counsel, October 24, 2005.

[23] *Ibid.*

meritorious health-related cases and caregiver issues."[24] Assistant Secretary Myers referenced and attached a November 7, 2000, memorandum entitled "Exercising Prosecutorial Discretion," which was written by former INS Commissioner Doris Meissner. The 2000 memorandum stated, in part:

> "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals."[25]

Meissner further stated that prosecutorial discretion should not become "an invitation to violate or ignore the law."[26]

The Meissner, Howard, and Myers memoranda provide historical context for the March 2011 memorandum on prosecutorial discretion written by ICE Director John Morton.[27] Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to civil immigration enforcement.[28] Under these guidelines, ICE's top three civil immigration enforcement priorities are to: (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,[29] and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.[30]

In a June 17, 2011 memorandum, Morton spells out 18 factors that are among those that should be considered in weighing prosecutorial discretion. The factors include those that might halt removal

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[24] Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion*, memorandum, November 7, 2007. CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel. (Hereafter CRS R42057, *Interior Immigration Enforcement*.)

[25] Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

[26] *Ibid.*

[27] John Morton, Director, Immigration and Customs Enforcement, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens*, memorandum, March 2, 2011.

[28] ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," http://www.ice.gov/about/overview/. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

[29] The memorandum does not define "recent illegal entrants." DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; and DHS policy is to pursue expedited removal proceedings against aliens who are determined to be inadmissible because they lack proper documents, are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, are encountered by an immigration officer within 100 miles of the U.S. border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States for over 14 days. See CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[30] CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

proceedings, such as whether the person's immediate relative is serving in the military, whether the person is a caretaker of a person with physical or mental disabilities, or whether the person has strong ties to the community. The factors Morton lists also include those that might prioritize a removal proceeding, such as whether the person has a criminal history, whether the person poses a national security or public safety risk, whether the person recently arrived in the United States, and how the person entered. At the same time, the memorandum states:

> "This list is not exhaustive and no one factor is determinative. ICE officers, agents and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."

The Morton memorandum would halt removal proceedings on those foreign nationals that are not prioritized for removal. The foreign nationals whose removals are halted in keeping with the Morton memorandum might be given deferred action or some other relief from removal. [31]

Deferred Action

In 1975, INS issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The INS Operating Instructions said that consideration should be given to advanced or tender age, lengthy presence in the United States, physical or mental conditions requiring care or treatment in the United States, and the effect of deportation on the family members in the United States. On the other hand, those INS Operating Instructions made clear that criminal, immoral or subversive conduct or affiliations should also be weighed in denying deferred action.[32] Today within DHS, all three of the immigration-related agencies—ICE, U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP)—possess authority to grant deferred action. A foreign national might be considered for deferred action at any stage of the administrative process.[33]

Because of where the foreign national may be in the process, ICE issuances of deferred action are more likely to be aliens who are detained or in removal proceedings. It is especially important to note, as mentioned above, that not all prosecutorial discretion decisions to halt removal proceedings result in a grant of deferred action to the foreign national. Voluntary departure, for example, might be an alternative outcome of prosecutorial discretion.[34]

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[31] John Morton, Director of Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention and Removal of Aliens*, memorandum to field office directors, special agents in charge, and chief counsels, June 17, 2011.

[32] Shoba Sivaprasad Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal*, Spring 2010.

[33] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol. 6, §72.03.

[34] Voluntary departure typically means that the alien concedes removability and departs the United States on his or her own recognizance, rather than with a final order of removal.

Other Forms of Deferred Departure

In addition to deferred action, which is granted on a case-by-case basis, the Administration may use prosecutorial discretion, under certain conditions, to provide relief from deportation that is applied as blanket relief.[35] The statutory authority cited by the agency for these discretionary procedures is generally that portion of the INA that confers on the Attorney General the broad authority for general enforcement and the section of the law covering the authority for voluntary departure.[36]

The two most common uses of prosecutorial discretion to provide blanket relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure (EVD).[37] The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate. Foreign nationals who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.

The executive branch has provided blanket or categorical deferrals of deportation numerous times over the years. CRS has compiled a list of these administrative actions since 1976 in **Appendix A**.[38] As the table indicates, most of these discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters. In many of these instances, Congress was considering legislative remedies for the affected groups, but had not yet enacted immigration relief for them. The immigration status of those who benefited from these deferrals of deportation often—but not always—was resolved by legislation adjusting their status (**Appendix A**).

Two Illustrative Examples

Several of the categorical deferrals of deportation that were **not** country-specific bear some similarities to the June 15, 2012 policy directive. Two examples listed in **Appendix A** are summarized below: the "Silva letterholders" class and the "family fairness" relatives. Both of these groups receiving discretionary relief from deportation were unique in their circumstances. While each group included many foreign nationals who would otherwise be eligible for LPR visas, they were supposed to wait in numerically-limited visa categories. These wait times totaled decades for many of them. Congress had considered but not enacted legislation addressing their situations. Ultimately, their cases were resolved by provisions folded into comprehensive immigration legislation.[39]

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[35] In addition to relief offered through prosecutorial discretion, the INA provides for Temporary Protected Status (TPS). TPS may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[36] §240 of INA, 8 U.S.C. §1229a; §240B, 8 U.S.C. §1229c.

[37] As TPS is spelled out in statute, it is not considered a use of prosecutorial discretion, but it does provide blanket relief from removal temporarily.

[38] **Appendix A** only includes those administrative actions that could be confirmed by copies of official government guidance or multiple published accounts. For example, reports of deferred action after Hurricane Katrina or the September 11, 2001, terrorist attacks could not be verified, though it seems likely that the Administration did provide some type of temporary reprieve.

[39] These policies and legal provisions pre-date the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (referenced above), which added substantial new penalties and bars for illegal presence in the United States.

The "Silva letterholders" were foreign nationals from throughout the Western Hemisphere who were in the United States without legal authorization. In 1976, the Attorney General opined that the State Department had been incorrectly charging the visas for Cuban refugees against the Western Hemisphere numerical limits from 1966 to 1976. A class action case named for Mr. Refugio Silva was filed to recapture the 145,000 LPR visas given to Cubans for foreign nationals with approved petitions from other Western Hemisphere nations. Apparently many of the aliens involved in the case were already in the country, out-of-status, even though they had LPR petitions pending. In other words, they had jumped the line. In 1977, the Attorney General temporarily suspended the expulsion while the class action case moved forward. Class members were allowed to apply for work authorization. Meanwhile, Congress passed amendments to the INA in 1978 that put the Western Hemisphere nations under the per-country cap, which further complicated their situation, by making visa availability more difficult for some but not all of the Western Hemisphere countries. The courts ruled for the Silva class, but the 145,000 recaptured visas were inadequate to cover the estimated 250,000 people who had received letters staying their deportation and permitting them to work. When the dependents of the Silva letterholders were included, the estimated number grew to almost half a million. Most of those in the Silva class who did not get one of the recaptured visas were ultimately eligible to legalize through P.L. 99-603, the Immigration Reform and Control Act (IRCA) of 1986.

Another example are the unauthorized spouses and children of aliens who legalized through IRCA. As Congress was debating IRCA, it weighed and opted not to provide a legalization pathway for the immediate relatives of aliens who met the requirements of IRCA unless they too met those requirements. As IRCA's legalization programs were being implemented, the cases of unauthorized spouses and children who were not eligible to adjust with their family came to the fore. In 1987, Attorney General Edward Meese authorized the INS district directors to defer deportation proceedings where "compelling or humanitarian factors existed." Legislation addressing this population was introduced throughout the 1980s, but not enacted. In 1990, INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA, dropping the where "compelling or humanitarian factors existed" requirement. At the time, McNary stated that an estimated 1.5 million unauthorized aliens would benefit from the policy. The new policy also allowed the unauthorized spouses and children to apply for employment authorizations. Ultimately, the Immigration Act of 1990 (P.L. 101-649) provided relief from deportation and employment authorization to them so they could remain in the United States until a family-based immigration visa became available. P.L. 101-649 also provided additional visas for the family-based LPR preference category in which they were waiting.

Legal Authority Underlying the June 15, 2012 Memorandum

The Secretary of Homeland Security would appear to have the authority to grant both deferred action and work authorization, as contemplated by the June 15 memorandum, although the basis for such authority is different in the case of deferred action than in the case of work authorization. The determination as to whether to grant deferred action has traditionally been recognized as within the prosecutorial discretion of immigration officers[40] and, thus, has been considered an inherent power of the executive branch, to which

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[40] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (characterizing a grant of deferred action as within the prosecutorial discretion of immigration officers); Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 2 (listing "granting deferred action or staying a final order of removal" among the determinations in which immigration officers may exercise prosecutorial discretion).

the Constitution entrusts decisions about whether to enforce particular cases.[41] While it could perhaps be argued that decisions to refrain from fully enforcing a law might, in some instances, run afoul of particular statutes that set substantive priorities for or otherwise circumscribe an agency's power to discriminate among the cases it will pursue, or run afoul of the President's constitutional obligation to "take care" that the law is faithfully executed, such claims may not lend themselves to judicial resolution.[42] In contrast, when it enacted the Immigration Reform and Control Act of 1986, Congress delegated to the Attorney General (currently, the Secretary of Homeland Security) the authority to grant work authorization to aliens who are unlawfully present.[43]

Authority to Exercise Prosecutorial Discretion

The established doctrine of "prosecutorial discretion" provides the federal government with "broad" latitude in determining when, whom, and whether to prosecute particular violations of federal law.[44] The decision to prosecute is one that lies "exclusively" with the prosecutor.[45] This doctrine, which is derived from the Constitution's requirement that the President "shall take Care that the Laws be faithfully executed,"[46] has traditionally been considered to be grounded in the constitutional separation of powers.[47] Indeed, both federal and state courts have ruled that the exercise of prosecutorial discretion is an executive function necessary to the proper administration of justice. Thus, prosecutorial discretion may be appropriately characterized as a constitutionally-based doctrine.

Prosecutorial Discretion Generally

In granting discretion to enforcement officials, courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors—such as the strength of evidence, deterrence value, and existing enforcement priorities—"not readily susceptible to the kind of analysis the courts are competent to undertake."[48] Moreover, the Executive Branch has asserted that "because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress."[49]

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[41] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that the Attorney General and the United States Attorneys have wide latitude in enforcing federal criminal law because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'").

[42] *See infra* notes 66-85 and accompanying text.

[43] P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

[44] United States v. Goodwin, 457 U.S. 368, 380 (1982). *See also* Exercising Prosecutorial Discretion, *supra* note 40, at 2 (defining prosecutorial discretion as "the authority of an agency charged with enforcing a law to decide whether to enforce, or not enforce, the law against someone").

[45] *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the *Confiscation Cases*, 7 Wall. 454 (1869) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case…")).

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

[47] *See, e.g.*, *Armstrong*, 517 U.S. at 464.

[48] Wayte v. United States, 470 U.S. 598, 607 (1985).

[49] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 114 (1984). This traditional conception, however, may have been qualified in some respects following the Supreme Court's decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an "independent counsel" under the Ethics in Government Act.[49] In sustaining the validity of the statute's (continued...)

An agency decision to initiate an enforcement action in the *administrative* context "shares to some extent the characteristics of the decision of a prosecutor in the executive branch" to initiate a prosecution in the *criminal* context.[50] Thus, just as courts are hesitant to question a prosecutor's decisions with respect to whether to bring a criminal prosecution, so to are courts cautious in reviewing an agency's decision not to bring an enforcement action. In the seminal case of *Heckler v. Cheney*, the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[51] The Court noted that agency enforcement decisions, like prosecution decisions, involve a "complicated balancing" of agency interests and resources—a balancing that the agency is "better equipped" to evaluate than the courts.[52] The *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-enforcement decisions, holding that an "agency's decision not to take enforcement action should be presumed immune from judicial review."[53] That presumption however, may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"[54] as is discussed below.

Prosecutorial Discretion in the Immigration Context

In *Reno v. American-Arab Anti-Discrimination Committee*, a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"[55] which entails civil (rather than criminal) proceedings. While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,[56] the Court's language is broad and arguably can be construed to

(...continued)

appointment and removal conditions, the Court suggested that although the independent counsel's prosecutorial powers—including the "no small amount of discretion and judgment [exercised by the counsel] in deciding how to carry out his or her duties under the Act"—were executive in that they had "typically" been performed by Executive Branch officials, the court did not consider such an exercise of prosecutorial power to be "so central to the functioning of the Executive Branch" as to require Presidential control over the independent counsel. 487 U.S. 654 (1988). While the ultimate reach of *Morrison* may be narrow in that the independent counsel was granted only limited jurisdiction and was still subject to the supervision of the Attorney General, it does appear that Congress may vest certain prosecutorial powers, including the exercise of prosecutorial discretion, in an executive branch official who is independent of traditional presidential controls.

[50] Heckler v. Cheney, 470 U.S. 821, 832 (1985).

[51] *Id.* at 831. Accordingly, such decisions are generally precluded from judicial review under the Administrative Procedure Act (APA). 5 U.S.C. §701 (establishing an exception to the APA's presumption of reviewability where "agency action is committed to agency discretion by law.").

[52] *Heckler*, 470 U.S. at 831.

[53] *Id.* at 832.

[54] *Id.* at 833.

[55] 525 U.S. 471, 490 (1999). *See also* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (noting that immigration is a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").

[56] Specifically, the Court noted that any delays in criminal proceedings caused by judicial review of exercises of prosecutorial discretion would "merely … postpone the criminal's receipt of his just desserts," while delays in removal proceedings would "permit and prolong a continuing violation of United States law," and could potentially permit the alien to acquire a basis for changing his or her status. *Reno*, 525 U.S. at 490. The Court further noted that immigration proceedings are unique in that they can implicate foreign policy objectives and foreign-intelligence techniques that are generally not implicated in criminal (continued...)

encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[57] According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of … individual case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on … international relations."[58]

In addition to such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion afforded first to INS and, later, the immigration components of DHS. These decisions include:

- whether to parole an alien into the United States;[59]
- whether to commence removal proceedings and what charges to lodge against the respondent;[60]
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests in an immigration judge;[61]
- whether to grant deferred action or extended voluntary departure;[62]
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;[63] and
- whether to impose a fine for particular offenses.[64]

The recognition of immigration officers' prosecutorial discretion in granting deferred action is arguably particularly significant here, because the June 15 memorandum contemplates the grant of deferred action to aliens who meet certain criteria (e.g., came to the United States under the age of sixteen).

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proceedings. *Id.* at 491. It also found that the interest in avoiding selective or otherwise improper prosecution in immigration proceedings, discussed below, is "less compelling" than in criminal proceedings because deportation is not a punishment and may be "necessary to bring to an end *an ongoing violation* of United States law." *Id.* (emphasis in original).

[57] No. 11-182, Opinion of the Court, slip op. at 4-5 (June 25, 2011). Justice Scalia's dissenting opinion, in contrast, specifically cited the June 15 memorandum when asserting that "there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift." Opinion of Scalia, J., slip op., at 19 (June 25, 2011).

[58] No. 11-182, Opinion of the Court, slip op. at 4-5.

[59] *See, e.g.*, Matter of Artigas, 23 I. & N. Dec. 99 (2001).

[60] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012).

[61] *See, e.g.*, Matter of G-N-C, 22 I. & N. Dec. 281 (1998).

[62] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (deferred action); Hotel & Rest. Employees Union Local 25 v. Smith, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988), *aff'g*, 563 F. Supp. 157 (D.D.C. 1983) (extended voluntary departure).

[63] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012); Matter of York, 22 I. & N. Dec. 660 (1999).

[64] *See, e.g.*, Matter of M/V Saru Meru, 20 I. & N. Dec. 592 (1992).

Limitations on the Exercise of Prosecutorial Discretion

While the executive branch's prosecutorial discretion is broad, it is not "unfettered,"[65] and has traditionally been exercised pursuant to individualized determinations. Thus, an argument could potentially be made that the permissible scope of prosecutorial or enforcement discretion is exceeded where an agency utilizes its discretion to adopt a broad policy of non-enforcement as to particular populations in an effort to prioritize goals and maximize limited resources. It would appear, especially with respect to agency enforcement actions, that the invocation of prosecutorial discretion does not create an absolute shelter from judicial review, but rather is subject to both statutory and constitutional limitations.[66] As noted by the U.S. Court of Appeals for the District of Columbia Circuit: "the decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness."[67] While it is apparent, then, that the exercise of prosecutorial discretion is subject to certain restrictions, the precise boundaries beyond which the executive may not cross remain unclear. Moreover, even if existing statutory or constitutional restrictions were conceivably applicable to the June 15 memorandum, standing principles would likely prevent judicial resolution of any challenge to the memorandum on these grounds.[68]

Potential Statutory Limitations on the Exercise of Prosecutorial Discretion

With respect to statutory considerations, the presumption following the Supreme Court's decision in *Heckler v. Cheney* has been that agency decisions not to initiate an enforcement action are unreviewable. However, *Heckler* expressly held that this presumption against the reviewability of discretionary enforcement decisions can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[69] Consistent with *Heckler*, a court may be willing to review a broad agency non-enforcement policy where there is evidence that Congress intended to limit enforcement discretion by "setting substantive priorities, or by otherwise circumscribing the agency's power to discriminate among issues or cases it will pursue."[70] The *Heckler* opinion also suggested that scenarios in which an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" may be subject to a different standard of review.[71]

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

[66] Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) ("It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.")

[67] *Id.* at 679 (citing *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970)).

[68] In order to satisfy constitutional standing requirements, a prospective plaintiff must have suffered a personal and particularized injury that is "fairly traceable" to the defendant's conduct and is likely to be redressed by the relief requested from the court. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984). It is difficult to envision a potential plaintiff who has been adequately injured by the issuance of the June 15 memorandum such that the individual could satisfy the Court's standing requirements. Standing is a threshold justiciability requirement. Thus, unless a plaintiff can attain standing to challenge the DHS directive, it would not appear that a court would have the opportunity to evaluate the directive's validity.

[69] 470 U.S. 821, 833 (1985).

[70] *Id.*

[71] *Id.* at 833 n.4 ("Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable (continued...)

Reviewability of the policy underlying the June 15 memorandum might, however, be limited even under a broad reading of *Heckler*, in part, because the INA does not generally address deferred action,[72] much less provide guidelines for immigration officers to follow in exercising it. Some commentators have recently asserted that amendments made to Section 235 of the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removed immigration officers' discretion as to whether to bring removal proceedings against aliens who unlawfully entered the United States.[73] Specifically, this argument holds that, pursuant to Section 235, as amended:

1) any alien present in the United States who has not been admitted (i.e., aliens who entered unlawfully) "shall be deemed … an applicant for admission;"

2) all aliens who are applicants for or otherwise seeking admission "shall be inspected by immigration officers;" and

3) in the case of an alien who is an applicant for admission, if the examining immigration officer determines that the alien is not clearly and beyond a doubt entitled to be admitted, the alien "shall be detained" for removal proceedings.[74]

It appears, however, that this argument may have been effectively foreclosed by the majority opinion in *Arizona*, where the Supreme Court expressly noted the "broad discretion exercised by immigration officials" in the removal process.[75] Moreover, the argument apparently relies upon a construction of the word "shall" that has generally been rejected in the context of prosecutions and immigration enforcement actions.[76] Rather than viewing "shall" as indicating mandatory agency actions, courts and the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration law in removal cases, have instead generally found that prosecutors and enforcement officers

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under §701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'").

[72] The INA uses the phrase "deferred action" only three times, in very specific contexts, none of which correspond to the proposed grant of deferred action contemplated by the June 15 memorandum. *See* 8 U.S.C. §1151 note (addressing the extension of posthumous benefits to certain surviving spouses, children, and parents); 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("Any [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."); 8 U.S.C. §1227(d)(2) (providing that the denial of a request for an administrative stay of removal does not preclude the alien from applying for deferred action, among other things). However, INS and, later, DHS policies have long addressed the use of deferred action in other contexts on humanitarian grounds and as a means of prioritizing cases. *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 821 (2004) (discussing a 1970's INA Operations Instruction on deferred action). This Instruction was rescinded in 1997, but the policy remained in place. *See, e.g.*, Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 6-72 IMMIGR. L. & PROC. §72.03 (2012).

[73] *See, e.g.*, Kris W. Kobach, *The "DREAM" Order Isn't Legal*, NEW YORK POST, June 21, 2012, http://www.nypost.com/p/news/opinion/opedcolumnists/the_dream_order_isn_legal_4WAYaqJucaFK6MS0onMJCO.

[74] Arizona v. United States, No. 11-182, *Amicus Curiae* Brief of Secure States Initiative in Support of Petitioners, at 8-9 (quoting 8 U.S.C. §1225(a)(1), (a)(3), and (b)(2)(A)).

[75] No. 11-182, Opinion of the Court, slip op. at 4-5.

[76] *Cf.* Exercising Prosecutorial Discretion, *supra* note 40, at 3 ("[A] statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion.").

retain discretion to take particular actions even when a statute uses "shall" or "must" when discussing these actions.[77]

It is also unclear that the actions contemplated by the June 15 memorandum conflict with any substantive priorities set by Congress, or are "so extreme as to amount to an abdication" of DHS's responsibilities under the INA. For example, it appears that an argument could potentially be made to the contrary that the policy comports with the increased emphasis that Congress has placed upon the removal of "criminal aliens" with amendments made to the INA by IRCA, IIRIRA, and other statutes.[78] The June 15 memorandum expressly excludes from eligibility for deferred action persons who have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors,[79] thereby potentially allowing immigration officers to focus their enforcement activities upon the "criminal aliens" who were identified as higher priorities for removal in earlier Obama Administration guidance on prosecutorial discretion.[80] In addition, Congress has funded immigration enforcement activities at a level that immigration officials have indicated is insufficient for the removal of all persons who are present in the United States without authorization. This level of funding figures prominently in the Obama Administration's rationale for designating certain aliens as lower priorities for removal,[81] and could potentially be said to counter any assertion that the Obama Administration's policy amounts to an "abdication" of its statutory responsibilities.

Potential Constitutional Limitations on the Exercise of Prosecutorial Discretion

With respect to constitutional considerations, it is clear that executive branch officials may not exercise prosecutorial discretion in a manner that is inconsistent with established constitutional protections or other constitutional provisions. Selective prosecution cases commonly illustrate such an abuse of prosecutorial discretion. These cases typically arise where certain enforcement determinations, such as whether to prosecute a specific individual, are made based upon impermissible factors, such as race or religion.[82] A separate constitutional argument may be forwarded, however, in situations where the

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[77] *See, e.g.*, Matter of E-R-M & L-R-M, 25 I. & N. Dec. 520, 523 (2011) (finding that determinations as to whether to pursue expedited removal proceedings (as opposed to removal proceedings under Section 240 of the INA) are within ICE's discretion, even though the INA uses "shall" in describing who is subject to expedited removal). The Board here specifically noted that, "in the Federal criminal code, Congress has defined most crimes by providing that whoever engages in certain conduct 'shall' be imprisoned or otherwise punished. But this has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute." *Id.* at 522.

[78] *See, e.g.*, IRCA, P.L. 99-603, §701, 100 Stat. 3445 (codified, as amended, at 8 U.S.C. §1229(d)(1)) (making the deportation of aliens who have been convicted of certain crimes an enforcement priority by requiring immigration officers to "begin any deportation proceeding as expeditiously as possible after the date of … conviction"); IIRIRA, P.L. 104-208, div. C, 110 Stat. 3009-546 to 3009-724 (expanding the definition of "aggravated felony," convictions for which can constitute grounds for removal, and creating additional criminal grounds for removal).

[79] Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[80] *See, e.g.*, John Morton, Director, U.S. ICE, Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, at 1-2, http://www.ice.gov/doclib/news/releases/2011/110302washingtonde.pdf.

[81] *Id.*, at 1 (estimating that ICE has resources to remove annually less than four percent of the noncitizens who are in the United States without authorization).

[82] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding that a decision may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). *But see Reno*, 525 U.S. at 488 ("[A]s a general matter … an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his (continued...)

executive branch has, in effect, broadly refused to enforce a duly enacted statute by implementing a blanket ban on enforcement such that the agency has "expressly adopted a general policy which is in effect an abdication of its statutory duty."[83] By refusing to fully enforce certain aspects of a statutory provision, such an action may exceed the permissible scope of prosecutorial discretion and violate the President's duty that the "laws be faithfully executed."[84] However, CRS was unable to find a single case in which a court invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care clause. Moreover, it is unclear whether the June 15 memorandum would constitute an absolute non-enforcement policy so as to amount to an "abdication" of a statutory obligation, as discussed previously. Though establishing a department-wide policy regarding a group of individuals who meet certain criteria, the directive suggests that the listed criteria should be "considered" in each individual case. Thus, the directive could be interpreted as setting forth criteria for consideration in each individual exercise of prosecutorial discretion, rather than implementing a ban on deportation actions for qualified individuals.[85]

Authority to Grant Work Authorization

The INA grants the Secretary of Homeland Security arguably wide latitude to issue work authorization, including to aliens who are unlawfully present. Since the enactment of IRCA in 1986, federal law has generally prohibited the hiring or employment of "unauthorized aliens."[86] However, the definition of "unauthorized alien" established by IRCA effectively authorizes the Secretary to grant work authorization to aliens who are unlawfully present by defining an "unauthorized alien" as one who:

> with respect to the employment of an alien at a particular time, ... is not either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General [currently, Secretary of Homeland Security].[87]

Regulations promulgated by INS and DHS further provide that aliens who have been granted deferred action and can establish an "economic necessity for employment" may apply for work authorization.[88]

When first promulgated in 1987,[89] these regulations were challenged through the administrative process on the grounds that they exceeded INS's statutory authority.[90] Specifically, the challengers asserted that

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deportation.").

[83] *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

[84] U.S. Const. art. II, §3.

[85] As is discussed elsewhere in this memorandum, there have been other instances where deferred action or extended voluntary departure was granted to individuals who were part of a more broadly defined group (e.g., persons from Nicaragua, surviving spouses and children of deceased U.S. citizens, victims and witnesses of crimes).

[86] *See* 8 U.S.C. §§1324a-1324b.

[87] 8 U.S.C. §1324a(h)(3).

[88] 8 C.F.R. §274a.12(c)(14). Under these regulations, the "basic criteria" for establishing economic necessity are the federal poverty guidelines. *See* 8 C.F.R. §274a.12(e).

[89] *See* INS, Control of Employment of Aliens: Final Rule, 52 Fed. Reg. 16216 (May 1, 1987).

[90] INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (Dec. 4, 1987) (denying a petition for rulemaking submitted by the Federation for American Immigration Reform, which sought the rescission of certain regulations pertaining to employment authorization for aliens in the United States).

the statutory language referring to aliens "authorized to be … employed by this chapter or by the Attorney General" did not give the Attorney General authority to grant work authorization "except to those aliens who have already been granted specific authorization by the Act."[91] Had this argument prevailed, the authority of INS and, later, DHS to grant work authorization to persons granted deferred action would have been in doubt, because the INA does not expressly authorize the grant of employment documents to such persons. However, INS rejected this argument on the grounds that the:

> only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[92]

Subsequent case law has generally affirmed that immigration officials have broad discretion in determining whether to deny or revoke work authorizations to persons granted deferred action, or in other circumstances.[93] These cases would appear to suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria (e.g., economic necessity) are met.

Corollary Policy Implications: Access to Federal Benefits

Many observers characterize foreign nationals with relief from removal who obtain temporary work authorizations as "quasi-legal" unauthorized migrants.[94] They may be considered "lawfully present" for some very narrow purposes under the INA (such as whether the time in deferred status counts as illegal presence under the grounds of inadmissibility) but are otherwise unlawfully present. Foreign nationals to whom the government has issued temporary employment authorization documents (EADs) may legally obtain social security numbers (SSNs).[95] Possession of a valid EAD or SSN issued for temporary employment, however, does not trigger eligibility for federal programs and services. In other words, foreign nationals who are granted deferred action may be able to work but are not entitled to federally-funded public assistance, except for specified emergency services.[96]

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[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Perales v. Casillas, 903 F.2d 1043, 1045 (5th Cir. 1990) ("[T]he agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law."); Chan v. Lothridge, No. 94-16936, 1996 U.S. App. LEXIS 8491 (9th Cir. 1996) (finding that INS did not abuse its discretion in denying interim work authorization to the petitioner while his application for asylum was pending); Kaddoura v. Gonzales, No. C06-1402RSL, 2007 U.S. Dist. LEXIS 37211 (W.D. Wash. 2007) (finding that the court lacked jurisdiction to hear a suit seeking to compel U.S. Citizenship and Immigration Services to grant work authorization because such actions are discretionary acts).

[94] The "quasi-legal" unauthorized aliens fall in several categories. The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS). They have sought asylum in the United States and their cases have been pending for at least 180 days. They are immediate family or fiancées of LPRs who are waiting in the United States for their legal permanent residency cases to be processed. Or, they have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs. These are circumstances in which DHS issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States.

[95] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[96] CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the eligibility of all noncitizens for means-tested public assistance, with exceptions for LPRs with a substantial U.S. work history or military connection. Regarding unauthorized aliens, Section 401 of PRWORA barred them from any federal public benefit except the emergency services and programs expressly listed in Section 401(b) of PRWORA. This overarching bar to unauthorized aliens hinges on how broadly the phrase "federal public benefit" is implemented. The law defines this phrase to be

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[97]

So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation.

Thus, beneficiaries of the June 15, 2012 policy directive will be among those "quasi-legal" unauthorized migrants who have EADs and SSNs—but who are not otherwise authorized to reside in the United States.

[97] §401(c) of PRWORA, 8 U.S.C. §1611.

Appendix. Past Administrative Directives on Blanket or Categorical Deferrals of Deportation

Selected Major Directives, 1976-2011

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1976	Extended voluntary departure (EVD) for Lebanese on a case-by-case basis	Otherwise deportable Lebanese in the United States.	NA	Lebanese received TPS from 1991 to 1993.
1977	EVD for Ethiopians	Otherwise deportable Ethiopians in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by the Immigration Reform and Control Act (IRCA) of 1986 to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ethiopians.
1977	The Attorney General temporarily suspended the expulsion of certain natives of Western Hemisphere countries, known as the "Silva Letterholders." They were granted stays and permitted to apply for employment authorization.	A group of aliens with approved petitions filed a class action lawsuit to recapture about 145,000 visas assigned to Cubans.	250,000	Many of these cases were not resolved until the passage of IRCA.
1978	EVD for Ugandans	Otherwise deportable Ugandans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ugandans.
1979	EVD for Nicaraguans	Otherwise deportable Nicaraguans in the United States.	NA	EVD ended in September 1980.
1979	EVD for Iranians	Otherwise deportable Iranians in the United States.	NA	EVD ended in December 1979, and they were encouraged to apply for asylum.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1980	EVD for Afghans	Otherwise deportable Afghans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Afghans.
1984	EVD for Poles	Otherwise deportable Poles in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Poles.
1987	Memorandum from Attorney General Edward Meese directing the Immigration and Naturalization Service (INS) not to deport any Nicaraguans and to grant them work authorizations.	Nicaraguans who demonstrated a "well-founded fear of persecution," who had been denied asylum, or had been denied withholding of deportation.	150,000 to 200,000	Legislation to grant stays of deportation to Nicaraguans as well as Salvadorans had received action by committees in both chambers during the 1980s. Congress ultimately enacted legislation legalizing the Nicaraguans, the Nicaraguan Adjustment and Central American Relief Act (P.L. 105-100).
1987	Attorney General Edward Meese authorized INS district directors to defer deportation proceedings of certain family members of aliens legalized through IRCA.	This policy directive applied where "compelling or humanitarian factors existed" in the cases of families that included spouses and children ineligible to legalize under IRCA.	NA	Legislation to enable the immediate family of aliens legalized through IRCA to also adjust status had been introduced. (See 1990 "Family Fairness" directive below.)
1989	Attorney General Richard Thornburgh instructed INS to defer the enforced departure of any Chinese national in the United States through June 6, 1990.	Chinese nationals whose nonimmigrant visas expired during this time were to report to INS to benefit from this deferral and to apply, if they wished, for work authorizations.	80,000	Legislation that included provisions to establish Temporary Protected Status (TPS) was moving through Congress at that time.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1990	Executive Order 12711 of April 11, 1990, provided temporary protection for certain nationals of the People's Republic of China (PRC) and their dependents. It permitted temporary deferral of enforcement of the departure from the United States and conferred eligibility for certain other benefits through January 1, 1994.	Chinese nationals and dependents who were in the U.S. on or after June 5, 1989, up to and including the date of Executive Order 12711.	80,000	The Chinese Student Protection Act of 1992 (CSPA) (P.L. 102-404) enabled Chinese with deferred enforced departure to become lawful permanent residents.
1990	INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA. The policy dropped the where "compelling or humanitarian factors existed" requirement and allowed the family members to apply for employment authorizations.	Unauthorized spouses and children of aliens legalized under IRCA.	1.5 million	P.L. 101-649 provided relief from deportation and employment authorization to an eligible alien who was the spouse or unmarried child of a legalized alien holding temporary or permanent residence pursuant to IRCA.
1991	Presidential directive to Attorney General instructing him to grant deferred enforced departure to Persian Gulf evacuees who were airlifted to the United States after the invasion of Kuwait in 1990	Aliens who had U.S. citizen relatives or who harbored U.S. citizens during the invasion, largely persons originally from Palestine, India, and the Philippines.	2,227	It is not clear how these cases were handled.
1992	President George H.W. Bush instructed the Attorney General to grant deferred enforced departure (DED) to Salvadorans	Unauthorized Salvadorans who had fled the civil war in the 1980s.	190,000	Congress had passed a law in 1990 giving Salvadorans TPS for 18 months.
1997	President William J. Clinton instructed the Attorney General to grant DED to Haitians for one year.	Haitians who were paroled into the United States or who applied for asylum before December 1, 1995.	40,000	Haitians had been provided TPS from 1993-1997. Legislation enabling Haitians to adjust their status passed at the close of the 105th Congress (P.L. 105-277) in 1998.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1997	INS General Counsel Paul Virtue issues guidelines for deferred action for certain foreign nationals who might gain relief through the Violence Against Women Act.	Battered aliens with approved LPR self-petitions, and their derivative children listed on the self-petition.	NA	Regulations to implement the U visa portions of P.L. 106-386 were promulgated in 2007.
1998	Attorney General Janet Reno temporarily suspended the deportation of aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	Unauthorized aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	NA	This relief was provided in response to Hurricane Mitch. Guatemalans and Salvadorans had their stays of removal extended until March 8, 1999. TPS was given to Hondurans and Nicaraguans.
1999	President William J. Clinton instructed the Attorney General to grant DED to Liberians for one year.	Liberian nationals with TPS who were living in the United States.	10,000	Liberians had been provided TPS from 1991 through 1999; they were given TPS again in 2002.
2007	President George W. Bush directed that DED be provided to Liberians whose TPS expired.	Liberian nationals who had lived in the United States since October 1, 2002, and who had TPS on September 30, 2007.	3,600	
2011	President Barack Obama extended Liberian DED through March 2013.			

Source: CRS review of published accounts, archived CRS materials, and government policy documents.

Notes: Excludes aliens with criminal records or who "pose a danger to national security." *Estimated Number* refers to estimated number of beneficiaries at time of issuance of directive. *NA* means "not available." Other countries whose nationals had some form of deferred deportation prior to 1976 include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam.

28 May 2012

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

re: Executive authority to grant administrative relief
for DREAM Act beneficiaries

Dear Mr. President,

We write as law professors whose teaching and scholarship focus on matters of U.S. immigration and citizenship law. This letter addresses an issue that may arise as agencies and officials within the Executive Branch consider various administrative options in cases involving potential beneficiaries of the Development, Relief, and Education for Alien Minors (DREAM) Act.

In assessing the options that may be available to the Executive Branch, the threshold question is whether there is executive authority to grant administrative relief. This is the question addressed in this letter. Though your Administration has considered various forms of prosecutorial discretion for individual DREAM-eligible applicants, this letter highlights the administrative authority that is available to potential DREAM Act beneficiaries as a group. We offer no views on the policy dimensions of a decision to exercise or to not exercise this authority. We write only to explain that there is clear executive authority for several forms of administrative relief for DREAM Act beneficiaries: deferred action, parole–in–place, and deferred enforced departure.

Deferred action is a long–standing form of administrative relief, originally known as "nonpriority enforcement status."[1] It is one of many forms of prosecutorial discretion available to the Executive Branch. A grant of deferred action can have any of several effects, depending on the timing of the grant. It can prevent an individual from being placed in removal proceedings, suspend any proceedings that have commenced, or stay the enforcement of any existing removal order.[2] It also makes the recipient eligible to apply

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[1] *See generally* T.A. Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 780 (7th ed. 2012); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 248-65 (2010).

[2] Practitioners have reported that, in recent months, some DHS officials have taken the position that deferred action is available only to individuals who are in removal proceedings. At the same time, these officials maintain that once a removal case has been administratively closed, deferred action is no longer available. This position is inconsistent with DHS's prior practice. *See* Citizenship and Immigration Services

for employment authorization.[3] General authority for deferred action exists under Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 1103(a), which grants the Secretary of Homeland Security the authority to enforce the immigration laws. Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decisions to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive.[4] In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971. Federal courts have acknowledged the existence of this executive power at least as far back as the mid–1970s.[5] More recently, this Administration granted deferred action in June 2009 to widows and children of U.S. citizens while legislation to grant them statutory relief was under consideration.[6]

Parole–in–place refers to a form of parole granted by the Executive Branch under the authority of INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Under this provision, the Attorney General "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case–by–case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States."[7] Parole permits a noncitizen to remain lawfully in the United States, although parole does not constitute an "admission" under the INA. Individuals who have been paroled are eligible for work authorization.[8] Under this express authority, previous Presidents have granted parole to noncitizens who did not qualify for admission under existing immigration law. For example, President Jimmy Carter exercised parole authority

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Ombudsman, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, July 11, 2011, at 3-4; Citizenship and Immigration Services, *Fact Sheet: USCIS Provides Interim Deferred Action Relief for Surviving Spouses*, Aug. 31, 2009. It is also inconsistent with case law and with DHS's own regulations. As the Supreme Court has explained, through deferred action: "[T]he INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. . . . *A case may be selected for deferred action treatment at any stage of the administrative process.*" *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 483-84 (1999) (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure §72.03[2][h] (1998)) (quotation marks removed) (emphasis added); *see also* 8 C.F.R. § 274a.12(c)(14) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

[3] *See* 8 C.F.R. § 274a.12(c)(14).

[4] *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

[5] *See, e.g., Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 757-58 (8th Cir. 1976); *David v. INS*, 548 F.2d 219, 223 & n.5 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979), *superseded by rule on other grounds*, as stated in *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985).

[6] *See* DHS Establishes Interim Relief for Widows of U.S. Citizens, June 9, 2009, *available at* http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm.

[7] Although the INA gives the parole authority to the Attorney General, the statutes creating DHS in 2003 essentially transferred the parole–granting authority to DHS.

[8] 8 C.F.R. § 274a.12(c)(11).

to allow Cubans into the United States in 1980.[9] President Bill Clinton did the same in 1994.[10] More recently, this Administration granted parole in January 2010 to Haitian orphans who were in the process of being adopted by U.S. citizens.[11] In May 2010, this Administration adopted the current practice of granting parole to spouses, parents, and children of U.S. citizens serving in the military.[12] Though the text of the statute calls for case–by–case discretion, both historical and current practice make clear that such discretionary judgments may be based on group circumstances.[13] And, as the Supreme Court has made plain, the Administration's use of group circumstances as a basis for decision–making would be entitled to deference.[14]

Deferred enforced departure, often referred to as DED, is a form of prosecutorial discretion that is closely related to deferred action. Almost every Administration since President Dwight D. Eisenhower has granted DED or the analogous "Extended Voluntary Departure" to at least one group of noncitizens.[15] As with deferred action, executive authority to grant deferred enforced departure and extended voluntary departure exists under the general authority to enforce the immigration laws as set out in INA § 103(a), 8 U.S.C. § 1103(a).[16] Though Temporary Protected Status (TPS) in INA § 244, 8 U.S.C. § 1254a, has largely superseded the use of DED in practice, DHS's statutory authority for granting DED on bases other than nationality remains intact, and the President retains his inherent authority with respect to DED. Most recently, this Administration granted DED to Liberians in March 2009.[17] Though DED has been used in response to disturbed conditions in specific countries, there is nothing in the statutory authority for DED that limits its use to such situations. Recipients of DED are eligible to apply for work authorization.[18]

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[9] *See* T.A. Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 520 (7th ed. 2012).

[10] *See id.*

[11] *See* Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans, January 18, 2010, *available at* http://www.dhs.gov/ynews/releases/pr_1263861907258.shtm

[12] *See* Julia Preston, *Immigration Policy Aims to Help Military Families*, N.Y. Times, August 1, 2010, at A15.

[13] For a discussion of the historical use of the parole power, *see, e.g.*, Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 Interpreter Releases 1637 (Dec. 12, 1994). For examples of more recent categorical grants of parole, *see supra* notes 11 and 12.

[14] *See generally Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[15] *See* Ari Weitzhandler, Comment, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. Colo. L. Rev. 249, 256 & nn. 41–43 (1993).

[16] *Hotel and Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (opinion of Mikva, J.), *affirming by an equally divided court* 594 F. Supp. 502 (D.D.C. 1984); *see also American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 768 (N.D. Cal. 1989).

[17] *See* Deferred Enforced Departure of Liberians, March 23, 2009, *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-deferred-enforced-departure-liberians

[18] 8 C.F.R. § 274a.12(c)(14).

These three forms of administrative relief differ in their requirements and consequences. In this letter, we do not reach these questions of specific application. Our purpose in writing is more limited and straightforward: to explain that the Executive Branch has the authority to grant these three forms of administrative relief to some significant number of DREAM Act beneficiaries, and that it has done so both historically and recently in similar situations.

Respectfully yours,

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Appendix I

Congress of the United States
Washington, DC 20515

Embargoed for release Monday
November 8, 1999

Contact: Allen Kay
Rep. Lamar Smith
202-225-4236 (O)
202-225-2659 (cell)
301-990-3749 (H)

November 4, 1999

The Honorable Janet Reno
Attorney General
Department of Justice
10th St. & Constitution Ave. NW
Washington, DC 20530

The Honorable Doris M. Meissner
Commissioner
Immigration and Naturalization Service
425 Eye Street, NW
Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefitting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

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Appendix I, continued

Attorney General Reno and Commissioner Meissner
November 4, 1999
Page 2

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

Rep. Henry J. Hyde

Rep. Barney Frank

Rep. Lamar Smith

Rep. Sheila Jackson Lee

Rep. Bill McCollum

Rep. Martin Frost

Rep. Bill Barrett

Rep. Howard L. Berman

Appendix I, continued

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Rep. F. James Sensenbrenner, Jr.

Rep. Christopher Shays

Rep. Henry A. Waxman

Rep. Kay Granger

Rep. Gene Green

Rep. Silvestre Reyes

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

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[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. <u>How important is the Federal interest in the case, as compared to other cases and priorities</u>? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

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[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien–if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary–for example, a time-limited as opposed to an indefinite bar to future admissibility–and these effects may be considered.
- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.
- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority – such as this memorandum–from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

MEMORANDUM

April 29, 2011

To: Interested Parties

From: Jeanne Butterfield, Esq.
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Re: Executive Branch Authority Regarding Implementation of Immigration Laws and Policies

The role of executive branch authority with respect to the implementation of immigration laws and policies has been well documented. This memorandum offers a short overview of the scope of executive branch authority and provides examples of its use in the immigration context.

Exercising Executive Authority

The authority of law enforcement agencies to exercise discretion in deciding what cases to investigate and prosecute under existing civil and criminal law, including immigration law, is fundamental to the American legal system. Every prosecutor and police officer in the nation makes daily decisions about how to allocate enforcement resources, based on judgments about which cases are the most egregious, which cases have the strongest evidence, which cases should be settled and which should be brought forward to trial.

The Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[1]

In the immigration context, prosecutorial discretion is exercised at every stage in the enforcement process—which tips or leads will be investigated, which arrests will be made, which persons will be detained, which persons will be released on bond, which cases will be brought forward for removal hearings or criminal prosecution, and which removal orders will be executed.

Despite the massive allocation of resources Congress has dedicated to immigration enforcement activities, the funding has limits and the agency must make thoughtful decisions about prosecutorial priorities. In fact, the President has repeatedly announced that the Administration's interior enforcement priority is the prosecution and removal of immigrants who have committed serious crimes. To ensure that this and other prioritization decisions are followed and implemented, it is not uncommon for law enforcement agencies within and outside of the immigration context to provide clear guidance and training to its officers about the exercise of prosecutorial discretion. This type of guidance is not unusual. In fact, numerous memos have been issued by the DHS and its predecessor INS over the years setting forth agency priorities and seeking to provide its officers with clear guideposts for carrying out those priorities. The challenge is often in ensuring that such guidance is understood and followed on the frontlines of immigration enforcement.

Prosecutorial discretion can be exercised on a case-by-case basis with respect to individuals who have come into contact with law enforcement authorities. Or the government can exercise prosecutorial discretion by allowing individuals from explicitly defined groups that it does not consider to be enforcement priorities to ask affirmatively that discretion be applied in their case. This exercise of executive authority is not contrary to current law, but rather a matter of the extension and application of current law to contemporary national needs, values and priorities.

Deferred Action

The executive branch, through the Secretary of Homeland Security, can exercise discretion not to prosecute a case by granting "deferred action" to an otherwise removable (colloquially referred to as "deportable") immigrant.

The former INS had guidelines in the form of "Operations Instructions" regarding the granting of deferred action. These guidelines provided for deferred action in cases where "adverse action would be unconscionable because of the existence of appealing humanitarian factors." [2]

Currently, deferred action is considered to be "a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process."[3]

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[1] Heckler v. Chaney 470 U.S. 821, 831 (1985).

[2] *See* (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii)(1975).

DHS has also described deferred action as an exercise of agency discretion that authorizes an individual to temporarily remain in the U.S. Regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority" (for enforcement action).[4] DHS has stated in recent correspondence with the Hill that factors to be considered in evaluating a request for deferred action include the presence of sympathetic or compelling factors.

Deferred action does not confer any specific status on the individual and can be terminated at any time pursuant to the agency's discretion. DHS regulations, however, do permit deferred action recipients to be granted employment authorization.[5]

Deferred action determinations are made on a case-by-case basis, but eligibility for such discretionary relief can be extended to individuals based on their membership in a discrete class. For example, in June 2009, the Secretary of DHS granted deferred action to individuals who fell in to the following class: widows of U.S. citizens who were unable to adjust their status due to a statutory restriction (related to duration of marriage at time of sponsor's death). [6] Congress subsequently enacted a change in the law to address this particular problem.

Another recent example of the exercise of such executive authority to a class is the grant of deferred action to VAWA (Violence Against Women Act) applicants whose cases were awaiting the promulgation of regulations by DHS. Nearly 12,000 individuals were granted deferred action in 2010 under this exercise of executive authority.

Extended Voluntary Departure/Deferred Enforced Departure

Before the addition of "Temporary Protected Status" to the Immigration and Nationality Act in 1990, the Attorney General used his/her executive authority to temporarily suspend the removal of people from particular countries from the United States because of political strife, natural disasters, or other crises. Temporary relief known as "Extended Voluntary Departure" (EVD) was granted to citizens of Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, Ethiopia, and China in response to various periods of political upheaval and natural disaster between 1960 and 1990.

In the Immigration Act of 1990, Congress enacted the "Temporary Protected Status" (TPS) program. The statute set forth guidelines restricting the Secretary's authority to grant relief from

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[3] *(See "Response to Recommendation #32, Deferred Action", August 7, 2007, at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

[4] 8 C.F.R. 274a.12(c)(14).

[5] *See* 8 C.F.R. § 274a.12(c) (14).

[6] *See "Guidance Regarding Surviving Spouse of Deceased U.S. Citizens and their Children", June 15, 2009, at http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf.*

removal exclusively on the basis of nationality.[7] TPS can only be granted if, after consultation with the foreign government, there is a determination that it is unsafe for foreign nationals to return home due to armed conflict, natural disasters, or other extraordinary conditions.

Those TPS restrictions, however, only limit the exercise of agency discretion when the sole criterion for providing protection from removal is nationality. They do not limit the ***President's*** exercise of class or group-based discretion under what has come to be known as "Deferred Enforced Departure" (DED). The president may direct that DED be granted to any group of foreign nationals pursuant to his foreign relations powers and his prosecutorial discretion authority. The president may grant DED for any specific amount of time and it typically is accompanied by employment authorization.

Executive authority in the form of "Deferred Enforced Departure" (DED) relief was exercised by President George W. Bush in 2007, and extended by President Obama in 2009, for certain nationals of Liberia.[8]

Executive authority granting "Deferred Enforced Departure" was also exercised by President George H.W. Bush for Chinese nationals in the wake of Tiananmen Square events,[9] and by President Clinton for certain Haitian nationals.[10]

Humanitarian Parole or Parole in Place

Under current law, the executive branch, through the Secretary of Homeland Security, has the authority to "parole" or permit the entry of a person into the United States for "urgent humanitarian reasons or significant public benefit."[11] When applied to persons already living in the U.S., this authority is referred to as "parole in place" (PIP). Congress has limited this authority to individual, "case-by-case" determinations, precluding prior practice of using parole authority to admit certain classes of refugees.

Signing Statements

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[7] *See* INA § 244.

[8] *See "Fact Sheet: Liberians Provided Deferred Enforced Departure (DED," September 12, 2007, at http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm; see also "Deferred Enforced Departure" at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fbff3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=fbff3e4d77d73210VgnVCM100000082ca60aRCRD.*

[9] *see Executive Order 12,711, April 11, 1990, at http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-30133/0-0-0-39631/0-0-0-39863.html.*

[10] *See "Deferred Enforced Departure for Certain Haitian Nationals," December 23, 1997, at http://www.ice.gov/doclib/foia/dro_policy_memos/deferredenforceddepartureforcertainhaitiannationals12231997.pdf.*

[11] *See* INA§ 212(d)(5)(A).

Another example of how every Administration makes interpretive judgments regarding how they view and plan to enforce the law is through signing statements.

Every Administration brings its own view and interpretations to bear as it implements newly-enacted laws. These views have commonly been expressed in Presidential "signing statements" that indicate how the President intends to implement any given law and whether he considers any specific provisions of a law to be unconstitutional. For example, when President George H.W. Bush signed the Immigration Act of 1990 into law, he took specific exception to the provision of law making Temporary Protected Status the sole basis for allowing noncitizens to remain temporarily in the United States based on nationality or region of origin. He stated, "I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions.[12]

Signing statements often serve as the basis for shaping regulations and other administration policy determinations. Thus, when President Clinton expressed his displeasure over the unequal treatment of different nationalities in the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), he directed the Attorney General to take the history and background of the people covered as well as the "ameliorative" nature of the law into account when drafting regulations. [13]

More recently, President George W. Bush issued 161 signing statements affecting over 1,100 provisions of law in 160 Congressional enactments. Similarly, President Obama most recently indicated in a signing statement that he considered a budget rider concerning the appointment of certain personnel unconstitutional, writing "Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed."[14]

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[12] Statement on the Signing of the Immigration Act of 1990, November 29, 1990, available from the American Presidency Project: www.presidency.ucsb.edu , http://www.presidency.ucsb.edu/ws/index.php?pid=19117#ixzz1KvDlYZql.

[13] Statement on the Signing of District of Columbia Appropriations Legislation, November 19, 1997, available at: http://www.presidency.ucsb.edu/ws/index.php?pid=53588#axzz1KvDSsLP8.

[14] Statement by the President on H.R. 1473, April 15, 2011, available at: http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473

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PROMINENT EVANGELICALS PRAISE IMMIGRATION POLICY CHANGE

June 15, 2012

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From our friends at the Evangelical Immigration Table:

Prominent Evangelicals Praise Immigration Policy Change

Administrative Relief For Dream Act-Eligible Young People Reinforces Faith Values

Washington, D.C. — *Obama administration officials announced plans today to immediately grant administrative relief to young people who would be eligible for the DREAM Act. Those who qualify will not be deported and will be granted work permits. This sweeping rule change comes the same week that more than 150 evangelical leaders, including Focus on the Family's Jim Daly, came together in an unprecedented manner to launch the Evangelical Immigration Table and call for immigration reform.*

Several signatories to the Evangelical Statement of Principles for Immigration Reform spoke in favor the decision:

Dr. David Fleming, Senior Pastor, Champion Forest Baptist Church (Houston)
"No amnesty, not citizenship, but a humane and common-sense decision on behalf of the children who were brought here through no action nor fault of their own. Now our government can focus more resources on finding those who are a real threat to our national security and to our way of life."

Leith Anderson, President, National Association of Evangelicals
"This new policy is good news for America and is good news for undocumented young adults who come to America through the choice of others. It is the right thing to do. I hope that the Congress will quickly follow with a just and compassionate reform of our entire system of immigration. Our country has already waited a long time to get our immigration laws fixed. This is an encouraging first step."

Rev. Samuel Rodriguez, President, National Hispanic Christian Leadership Conference
"Today's announcement by the Obama Administration protecting Dream Act-eligible young people from deportation is morally just, welcomed, practical, fair and worthy of celebration. As we prepare to celebrate Father's Day this weekend, this announcement presents the antidote to the unfortunate separation of families. I applaud the president for his decision to protect the innocent who currently pay the price for a broken immigration system. Let me reiterate, Justice at times marches, at times protests and at times sings. Yet, Justice will always speak on behalf of those that cannot speak for themselves. Today, Justice spoke loud and clear: The dreams of all children stand worthy of protection."

Stephen Bauman, President and CEO of World Relief
"We commend the administration's leadership at a crucial time. Today's executive order is an encouraging step for immigrant families and a milestone for our country. Let's build upon this new momentum toward comprehensive reform. Creating a better life for immigrants fulfills a biblical, moral, and humane vision. Together, we can realize this vision."

The Reverend Luis Cortés Jr., President, Esperanza
Today, the Obama administration's announcement to stop the deportation of undocumented people age 30 and under who meet certain eligibility criteria and are in school, graduated, or U.S. veterans will have an immediate impact on almost a million eligible children and young adults. Hundreds of thousands of these young people arrived here through no fault of their own, were raised in the United States, and for all intents and purposes are Americans in their culture, language, and life experience. We applaud President Obama for providing thousands of young people with the opportunity to truly thrive, as a recognized and integrated piece of our country's vibrant tapestry. This was a decision based in common-sense understanding of what will make our families, communities, and country stronger. We know that this is a stop-gap measure designed to address just one piece of a much larger problem. This action was necessary due to the failure of Congress to pass any kind of immigration reform in the past 12 years, despite the overwhelming support of the public for reform and many versions of legislation that were drafted and then left by the wayside. This is unquestionably a victory. But this announcement should signal the first step of many, to resolve the problems of our broken system holistically and across the board, and to usher in a new kind of order, peace, safety, and collective well-being in our great nation of immigrants.

Noel Castellanos, CEO, Christian Community Development Association
"Today's action by DHS and the Obama administration to offer deferred action from deportation for Dreamers, along with the ability to work legally, is a hugely important step toward fixing our current immigration system. We applaud the president and Secretary Napolitano for taking this bold step."

Rev. David Beckmann, President, Bread for the World
"Bread for the World welcomes President Obama's announcement of policy changes that could allow almost a million young people to pursue opportunities and the American dream. We encourage bipartisan efforts for a comprehensive approach to immigration reform and U.S. efforts to address global poverty – the main driver of unauthorized immigration."

Rev. Gabriel Salguero, President, National Latino Evangelical Coalition
"Secretary Napolitano's announcement today is a welcome decision. As evangelicals committed to common-sense and humane immigration policies, we remain hopeful. Young immigrants have much to offer this nation and we stand behind them. We now call on Republicans and Democrats to roll up their sleeves and provide long-term legislative solutions."

Jim Wallis, President and CEO, Sojourners
"The announcement from the White House today is very good news for 1 million young people who have a dream of staying in the country where they have lived most of their lives. Instead of being placed in the deportation pipeline, they will receive work permits enabling them to contribute to the nation and help build America's future. This is an important step but only a beginning toward comprehensive reform of an utterly broken immigration system. This week a very broad and deep table of evangelical leaders called on the political leaders of both parties to fix that broken system and protect 'the stranger' whom Christ calls us to defend. As evangelicals we love the 'good news' of the gospel, and today we affirm this good news that gives hope and a future for young immigrants who are an important part of both the church and this country."

Robert Gittelson, Co-Founder, Conservatives for Comprehensive Immigration Reform
"As conservatives who have long advocated for the legislative changes to our immigration laws that have been administratively put into place today by the Obama administration, we are encouraged by today's important development. Certainly this will offer much-needed relief to our suffering communities, and especially to the young people affected under this directive. However, we remain concerned that this fix is only a temporary solution. It is not codified by law, and could be subject to change or elimination by future administrations. Therefore, we are calling on all members of Congress to act quickly and decisively in a bipartisan manner to pass true legislative relief along similar language that was prescribed in today's administrative action."

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BISHOPS WELCOME PRESIDENT'S DEFERRED ACTION ON DREAM ELIGIBLE YOUTH, URGE CONGRESSIONAL ACTION ON DREAM ACT

June 15, 2012

WASHINGTON—The U.S. Conference of Catholic Bishops welcomed the action of President Barack Obama today to defer action to all young people eligible under the Development, Relief, and Education for Alien Minors (DREAM) Act, saying that it would permit young people who were brought into the United States undocumented to come out of the shadows and more fully participate in society.

"This important action will provide legal protection, and work authorization, to a vulnerable group of immigrants who are deserving of remaining in our country and contributing their talents to our communities," said Archbishop Jose Gomez of Los Angeles, chairman of the USCCB Committee on Migration."These youth are bright, energetic, and eager to pursue their education and reach their full potential."

As many as 800,000 young people would be eligible to receive a deferred action on deportation for two years, and a work permit.

Archbishop Gomez said the President's action is no substitute for passage of the DREAM Act and encouraged Congress to enact comprehensive and humane immigration reform.

Full text of Archbishop Gomez's statement follows:

Statement of Most Reverend Jose H. Gomez
Archbishop of Los Angeles
Chairman, USCCB Committee on Migration
On
The Announcement of Deferred Action for DREAM eligible youth
June 15, 2012

On behalf of the U.S. Conference of Catholic Bishops (USCCB), I welcome the announcement by President Obama today that, consistent with his executive authority, he will grant deferred action on a case-by-case basis to youth who entered the United States by age 15 and have not committed certain offenses.Many of these youthwould qualify for immigration relief under the Development, Relief, and Education for Alien Minors (DREAM) Act.

This important action will provide protection from removal and work authorization for a vulnerable group of immigrants who deserve to remain in our country and contribute their talents to our communities.

These youth are bright, energetic, and eager to pursue their education and reach their full potential.They did not enter our nation on their own volition, but rather came to the United States with their parents as children, something all of us would do.

We call upon the President also to review Administration deportation policies and more aggressively pursue the policy of prosecutorial discretion for other populations, a policy which was announced last year.Families continue to be deported and separated, causing undue suffering.

The action by the President today is no substitute for enactment of the DREAM Act in

Congress.We encourage our elected officials of both parties to take this opportunity to work together to enact this important law, which would give these youth a path to citizenship and a chance to become Americans.We also renew our call for bipartisan efforts to enact comprehensive and humane reform our nation's broken immigration system

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Keywords: USCCB, US Bishops, President Barack Obama, Dream Act, immigration, college, military, Archbishop Jose Gomez.

# # # # #

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ELCA NEWS SERVICE
June 19, 2012

ELCA leader grateful for halt in some youth deportations, but more to do
12-40-MRC

CHICAGO (ELCA) - Calling the Obama administration's decision to stop the deportation of young undocumented immigrants who meet certain criteria a step in the right direction, the Rev. H. Julian Gordy said there is still more to do.

Gordy said the administration's policy change, announced June 15, follows an action of the 2011 Churchwide Assembly of the Evangelical Lutheran Church in America (ELCA) that calls for comprehensive federal immigration reform and support for the DREAM Act -- legislation that would provide a path for citizenship for undocumented immigrant youth.

The administration's decision, however, falls short of what's called for in the DREAM Act, according to Gordy, who is bishop of the ELCA Southeastern Synod, Atlanta, and chair of the ELCA Conference of Bishops' Immigration Ready Bench.

"It doesn't allow a path for permanent legal status or citizenship," he said. The policy change "is simply a two-year renewable opportunity for young people to be in the United States legally and temporarily to search for work. It accomplishes some of the goals of the DREAM Act but not all of them. So there's more to do, but we're glad this much has been done."

The change would halt deportations and grant work permits to undocumented immigrant youth if they arrived in the United States before turning 16 and are younger than 30, do not have a criminal record, lived in the United States continuously for at least five years and have some educational achievement or military service, along with other criteria.

Gordy said that the ELCA and other U.S. mainline denominations have stressed the humanitarian aspect of immigration reform, "operating out of a sense that Scripture calls us to love the immigrant among us." He said businesses and many people in law enforcement also support immigration reform "because they believe it's good for business and better public safety."

Although the DREAM Act failed in the Senate in 2010, some senators have recently expressed support for different versions of the act, according to a Lutheran Immigration and Refugee Service news release.

The Obama administration's announcement "builds on bipartisan interest in protecting immigrant youth from deportation and investing in them as future leaders of our great nation," said Linda Hartke, president and CEO of the Lutheran Immigration and Refugee Service.

Based in Baltimore, the agency is one of the nation's leaders in welcoming and advocating for refugees and immigrants, working on behalf of the ELCA.

ELCA congregations and Lutheran social ministry organizations provide critical services to migrant populations, spread the word of welcome and advocate for fair and humane immigration reform.

- - -

About the Evangelical Lutheran Church in America:
The ELCA is one of the largest Christian denominations in the United States, with 4.2 million members in 10,000 congregations across the 50 states and in the Caribbean region. Known as the church of "God's work. Our hands," the ELCA emphasizes the saving grace of God through faith in Jesus Christ, unity among Christians and service in the world. The ELCA's roots are in

the writings of the German church reformer, Martin Luther.

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HIAS Applauds President Obama's Announcement to Stop Deporting DREAMers

Posted on Fri, Jun 15, 2012 at 10:21 am

(New York, NY) -- HIAS, the global migration agency of the American Jewish community, commends President Obama for his new policy for undocumented youth in the U.S. who would qualify for the Development, Relief, and Education for Alien Minors (DREAM) Act. The Department of Homeland Security (DHS) will begin a process for granting "deferred action" to undocumented youth who are in the U.S. and would otherwise qualify for the version of the DREAM Act that passed the House of Representatives in December 2010. Eligible individuals —including but not limited to those who are currently in deportation proceedings—will be allowed to remain and work in the U.S.

It is estimated that 50,000 - 65,000 undocumented students graduate from American high schools each year; many of them were brought to the U.S. when they were very young and grew up in American schools, learning American values and experiencing American culture.

According to Mark Hetfield, HIAS President and CEO (Interim), "The bold move that President Obama has taken today will likely allow nearly one million DREAM-eligible students to stay in America with their families, in the country they call home. The youth of this country are an

invaluable resource. We applaud the President for finally using the power that resides in his office to help them."

HIAS remains a strong advocate for the DREAM Act, which would provide a six-year path to a green card for undocumented children brought to the U.S. more than five years ago if they graduate from high school and continue to college or military service. The DREAM Act would help break the cycle of under-employment, instability, and poverty endured by undocumented immigrants and could reduce dropout rates, criminal justice costs, and the need for public assistance. It would also reward good behavior by young people who, despite their circumstances, have worked hard and remained in school. Last December, despite bipartisan support from a majority of members of Congress, the Senate failed to invoke cloture on the DREAM Act.

Learn more about the DREAM Act.

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"Were it not for the Hebrew Immigrant Aid Society, there might be no Google."
— *The New York Times*

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The Jewish Federations of North America

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world relief

STAND/FOR THE VULNERABLE

World Relief Statement on President Obama's Announcement of Deferred Action for Dream Eligible Youth

June 15th, 2012

This morning, Secretary of Homeland Security Janet Napolitano announced a new administrative policy that will halt the deportation of young people who entered the United States as children and who meet certain other requirements. Under the announced policy, the students will also be allowed to apply affirmatively for employment authorization.

World Relief applauds this decision. We have long advocated administrative relief for these young people, many of whom are members of our local churches, and this announcement is an answer to many prayers. These young people are hard-working, bright individuals who are already contributing to our communities. These young people themselves have done more than anyone to advocate for change, and we celebrate today's announcement with them.

"We commend the Administration's leadership at a crucial time. Today's announcement is an encouraging step for immigrant families and a milestone for our country," said Stephan Bauman, President and CEO of World Relief. "Let's build upon this new momentum towards comprehensive reform. Creating a better life for immigrants fulfills a biblical, moral, and humane vision. Together, we can realize this vision."

The announcement is consistent with the principles announced this week by the Evangelical Immigration Table, a broad coalition of evangelical organizations and leaders committed to immigration reform whose statement was endorsed by leaders including Richard Land, Max Lucado, Bill Hybels, Carlos Campo and Jim Daly, President of Focus on the Family. The principles and full list of endorsers is available at www.evangelicalimmigrationtable.com.

Today's announcement is a positive step, but not enough: we now need the Department of Homeland Security to follow through on the announcement, and we need Congress to find a permanent, legislative solution to this problem. We urge Republicans and Democrats to work together toward that goal. We will continue to work closely with our local church partners to advocate for permanent solutions to immigration reform.

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LIRS Hails Landmark Policy Change Benefitting DREAM Act Youth

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BALTIMORE, June 15, 2012 /PRNewswire-USNewswire/ -- Lutheran Immigration and Refugee Service (LIRS) applauds the Obama Administration for announcing it will halt deportations and grant work permits to undocumented immigrant youth who have no criminal record and meet certain criteria such as military service or educational achievement.

"Since 2010 we've been calling on the Administration to stop deporting young people who are contributing so much to our communities," said LIRS President and CEO Linda Hartke. "We applaud President Obama and the Administration for today's bold announcement of this urgently needed policy change."

Under the change, the Department of Homeland Security (DHS) will stop deporting undocumented immigrant youth and allow them to obtain work permits if they arrived in the United States before they turned 16 and are younger than 30, have no criminal record, have been in the United States for at least five consecutive years, graduated from a U.S. high school or hold a GED, or served in the military.

"LIRS and Lutherans across America welcome the President's decision, which gives these young people, who are our classmates and family, members of our churches and communities, the right to stay in the U.S. and look for jobs," said Hartke. "They have much to give back to America, and they deserve a chance to fulfill their dreams."

The young people affected by this policy are known as "DREAMers" after the DREAM Act. Although most Republicans voted against the DREAM Act in 2010, Sen. Marco Rubio (R-FL), Rep. David Rivera (R-FL-25), and GOP presidential candidate Mitt Romney recently expressed support for different versions of the DREAM Act. The legislation, which failed in the Senate in late 2010, is aimed at providing DREAMers with a path to U.S. citizenship. It has stalled in limbo for a decade, but some within the GOP have signalled openness to striking a deal that would find a solution acceptable to both sides.

"The announcement builds on bipartisan interest in protecting immigrant youth from deportation and investing in them as future leaders of our great nation," said Hartke. "While more work is needed to pass the DREAM Act to provide these youth with permanency and a path to citizenship, we applaud President Obama for this bold move."

LIRS and its Lutheran constituency have longstanding commitment and leadership on the DREAM Act on Capitol Hill and within communities across the country where its 60 grassroots legal and social service partners work.

About LIRS
LIRS is nationally recognized for its leadership advocating on behalf of refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations, and for providing services to migrants through over 60 grassroots legal and social service partners across the United States.

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Press Release: Deferred Action for Immigrant Children is Step in Right Direction

For Immediate Release: June 15, 2012
Contact: Sarah Kropp, 202-789-1011

The National Association of Evangelicals (NAE) welcomes the White House announcement that the government will no longer deport otherwise law-abiding children of undocumented immigrants. This action does not by itself fix our broken immigration system, but it is an important step in the right direction.

"This new policy is good news for America and is good news for undocumented young adults who came to America through the choice of others. It is the right thing to do," said Leith Anderson, NAE President. "I hope that the Congress will quickly follow with a just and compassionate reform of our entire system of immigration. Our country has already waited a long time to get our immigration laws fixed. This is an encouraging first step."

In 2009, the NAE Board of Directors passed a resolution on immigration reform, which was one of the earliest of such calls from a national religious organization. The administration's new policy is consistent with the NAE resolution, and with the principles announced this week by the Evangelical Immigration Table, a broad coalition of evangelical organizations and leaders committed to immigration reform, including the Southern Baptist Convention, Focus on the Family, Max Lucado, Bill Hybels and Carlos Campo. The full list of endorsers is available at www.evangelicalimmigrationtable.com.

In an interview with *Christianity Today*, Daly said, "[The Focus on the Family board] talked about the NAE statement, strengthening the laws, recognizing the dignity of human beings and what these people face and try to bring some order to it. Let's get behind this, not play politics with it left or right and not fearmonger with it. These are people that need dignity. Even though in some cases they've broken the law, there's always that heartfelt story out there where you just tear up looking at what they're facing now. We need to do what's humane."

The NAE resolution, among other things, asks the government to "recognize the central importance of the family in society by ... reevaluating the impact of deportation on families." It also calls for "a sound, equitable process toward earned legal status for currently undocumented immigrants, who desire to embrace the responsibilities and privileges that a company citizenship." The full resolution can be found at www.nae.net/immigration2009.

SEARCH www.nae.net

Press Contacts

To arrange an interview or to be added to our media list, email Sarah Kropp, Communications Director, or call 202-789-1011.

Quick Quotes

"The Supreme Court ruled that the individual mandate to purchase health insurance is constitutional, but it has not ruled on the whether the government can mandate insurance policies to include provisions that violate the religious convictions of some employers. Congress and the administration can and should resolve this controversy by exempting all religious organizations from provisions that violate their religious convictions."

Galen Carey
Vice President
Government Relations

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"America's Largest Hispanic Christian Organization"
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Rev. Samuel Rodriguez and NHCLC Respond to President's Announcement on Dream Act, Children and Deportations

Return to NHCLC in the News

UPDATED PRESS STATEMENT
June 15, 2012 3:00p.m. EST

Rev. Samuel Rodriguez and NHCLC Respond to President's Announcement on Dream Act, Children and Deportations:

"Today's announcement by the Obama Administration protecting Dream Act eligible young people from deportation is morally just, welcomed, practical, fair and worthy of celebration. As we prepare to celebrate Father's day this weekend, this announcement presents the antidote to the unfortunate separation of families. I applaud the President for his decision to protect the innocent who currently pay the price for a broken immigration system. Let me reiterate, Justice at times marches, at times protests and at times sings. Yet, Justice will always speak on behalf of those that cannot speak for themselves. Today, Justice spoke loud and clear, the dreams of all children stand worthy of protection. Today, we placed our feet at the edge of the Jordan. We may not be in the Promise Land yet, but today, our children can begin to contemplate a better life on the other side. Today, we left the desert of despair and begin a true journey where the dream becomes reality."

Rev. Samuel Rodriguez
President
National Hispanic Christian Leadership Conference
Hispanic Evangelical Association

About The NHCLC

The National Hispanic Christian Leadership Conference is the Hispanic Evangelical Association, the Nation's largest Christian Hispanic organization, uniting, serving and representing the Hispanic Born Again Community via 40,118 member churches and over 16 million constituents by reconciling the vertical and horizontal of the Christian message through the 7 Directives of Life, Family, Great Commission, Stewardship, Justice, Education and Youth.

###

FOR MORE INFORMATION & INTERVIEWS:

NHCLC Marketing & PR Director

Matti Stevenson - 719.360.0586 - matti@nhclc.org

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New York - Agudath Israel Hails Obama Immigration Policy on Young People

Published on: June 19th, 2012 at 11:14 AM

News Source: VIN News Staff

New York - The immigration policy enunciated by the Obama Administration regarding individuals who entered the United States in their youth was applauded by Agudath Israel of America, a national Orthodox Jewish organization. Under the new U.S. Department of Homeland Security (DHS) directive, there would be "deferred action" for a period of two years in regard to some individuals who face removal from the country. Persons falling within this category will be eligible to apply for work authorization.

"The policy is both pragmatic and proper," said David Grunblatt, Chair of Agudath Israel's Legal Services Network Immigration Committee. "These foreign-born individuals were brought to this country as youngsters, were educated here, have contributed their talents here and continue to live here. They should not live in the shadow of being expelled from the U.S. to a country where they have never lived and might not even speak the language."

The DHS' policy is discretionary in nature and is intended to be applied on a case by case basis to persons not above age 30. Eligibility criteria include: entry into the U.S. under age 16, continuous residence for five years, and current enrollment in school, graduation from high school or honorable discharge from the Armed Forces. Persons will not be deemed eligible if they have been convicted of a felony or significant misdemeanor, or otherwise pose a threat to national security or public safety.

DHS has also made clear that "deferred action" confers no substantive right, immigration status, or pathway to citizenship.

"The policy addresses an urgent and unfortunate situation -- one that has affected many members of the Jewish Community that have sought our help but for whom little could be done," concluded Rabbi Abba Cohen, Agudath Israel's Vice President for Federal Affairs and Washington Director. "And, given our community's history, we must be particularly sensitive that our immigration policies embody compassion and common sense. This is a positive step in that direction.

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CWS welcomes 'deferred action' from deportation for 800,000-1,000,000 undocumented young people

Friday, June 15, 2012

New York, NY – Church World Service welcomed the Obama Administration's announcement today of "deferred action" from the threat of deportation for an estimated 800,000 to one million DREAMers – undocumented immigrant young people who grew up in the United States and simply want to get an education, establish their lives and contribute to this country.

"Too many DREAM students were still among the 400,000 immigrants the United States deported last year," said CWS Immigration and Refugee Program Director Erol Kekic. "This opportunity for deferred action means that as many as a million young people can finally rest easy and get on with their lives in the United States, the country that is their home."

By executive order, announced today (June 15), undocumented immigrants may receive deferred action (for two years, renewable) and apply to work legally if they:

- came to the United States at age 15 or younger and are now 30 or younger;
- have lived here for at least five years as of today; are in school or have graduated from high school, earned a GED or served in the military;
- have not been convicted of a felony, significant misdemeanor or multiple misdemeanor offenses, and
- do not otherwise pose a threat to national security or public safety.

Kekic noted that today's order is a big step toward fulfillment of the DREAM Act, but stops short of creating a path toward citizenship for eligible immigrant young people, "a goal we will continue to pursue."

"Most of these young people know no country but the United States," he said. "Many do not remember their home country or language. At the same time, they have so many talents to offer the United States. Expelling them is tragic for them and shortsighted policy for the United States. We need the DREAMers' youthful energy to keep renewing America."

Kekic urged the Obama Administration to stand by today's executive order and ensure that it is consistently and fully implemented by the Department of Homeland Security.

For more information:

Department of Homeland Security
www.dhs.gov/ynews/releases/20120612-napolitano-announces-deferred-action-process-for-young-people.shtm

U.S. Immigration and Customs Enforcement
www.ice.gov/news/releases/1206/120615washingtondc.htm

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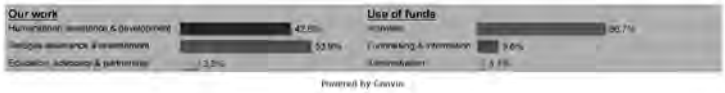
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For Immediate Release: Friday, June 15, 2012

"President Obama Stands Up for Immigration Fairness: Takes the Lead in Protecting Undocumented Young Adults from Deportation"

Statement of AFSCME President Gerald W. McEntee on President Obama's announcement this morning:

"AFSCME applauds President Obama's smart, fair and humane decision to allow undocumented young people who were brought to the United States as children to avoid deportation and to work in our country legally. This bold and courageous action will allow these young people to continue to develop their talents and academic skills -- which is the fair and right thing to do -- and our country will reap the benefits of their contributions.

"AFSCME has long supported the Development, Relief and Education for Alien Minors (DREAM) Act, which would accomplish similar goals. AFSCME calls on Congress to build on this important Administration initiative by passing the DREAM Act, which would provide these youth with a path to full citizenship, and passing comprehensive immigration reform to fix all of our nation's broken immigration system."

AFSCME's 1.6 million members provide the vital services that make America happen. With members in hundreds of different occupations — from nurses to corrections officers, child care providers to sanitation workers — AFSCME advocates for fairness in the workplace, excellence in public services and prosperity and opportunity for all working families.

###

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CWA: Obama Administration Offers Path to Opportunity for 800,000 Young 'Dreamers'

0 Share

Jun 15, 2012

CWA: Obama Administration Offers Path to Opportunity for 800,000 Young 'Dreamers'

Following is a statement by CWA President Larry Cohen:

"All of us in the Communications Workers of America applaud today's White House action. Providing rights and a path to opportunity for these Dreamers inspires all of us, and reminds us that the United States always has been a nation of immigrants determined to build better lives for themselves, their families and their community.

Restoring the American dream for working people in this nation is the critical problem of the day. Now, for 800,000 of our young Dreamers, horror has turned to excitement, despair to promise.

We will continue to work for the dreams and aspirations of all working Americans. Regardless of our birth place, we share common goals. We applaud President Obama and his team for this huge step forward. It makes us more determined to keep pushing forward and to never give up."

###

Contact: Candice Johnson, CWA Communications, 202-434-1168, cjohnson@cwa-union.org

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2012 Customer Service Conference

Oct 14, 2012 - Oct 17, 2012: St. Louis, MO

AFL-CIO Executive Council Meeting

Nov 9, 2012 - Nov 9, 2012: Washington, D.C.

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- For the Media

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Laborers' International Union of North America

LiUNA!

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Contact: Richard Greer, 202-942-2262, 202-251-5347 or rgreer@liuna.org

Statement of Terry O'Sullivan
General President of LIUNA
On Obama Administration's Halt to Deportation of Some Child Immigrants

Washington, D.C. (June 15, 2012) – Terry O'Sullivan, General President of LIUNA – the Laborers' International Union of North America – made the following statement today on the Obama Administration's Executive Order affecting some undocumented immigrants who were brought to the U.S. as children:

> LIUNA, a union built by immigrant families who have helped build America, applauds the Obama Administration Executive Order which will allow some undocumented immigrants brought to the U.S. as children to remain in the country.
>
> It is a matter of fairness and the principles for which our nation stands. Children who did not choose to enter or remain in the U.S. illegally, who have earned a high school education or served in our military, who are contributing to our nation and have no criminal history deserve the opportunity to continue their lives here. They should not be forced to live in fear of deportation.
>
> LIUNA has long supported the DREAM Act and this policy change moves our country closer to the Act's goals. We call on Congress to overcome its partisan blockage of both the full Dream Act and the long-term solution to immigration issues, which is adoption of comprehensive immigration reform.

###

The half-million members of LIUNA – the Laborers' International Union of North America – are on the forefront of the construction industry, a powerhouse of workers who are proud to build America.

For Immediate Release
June 15, 2012

Contact: Chris Garlock (202-974-8153 / cgarlock@dclabor.org)

Statement by Metro Washington Council, AFL-CIO President Joslyn Williams on President Obama's Announcement on Deferred Action for Immigrant Youth

Working families in the metropolitan DC area applaud the Obama Administration's announcement to provide relief from deportation to immigrant youth brought to this country by their parents at a young age. The President's actions bring much-needed security and encouragement to metro DC's youth who can finally live without fear of separation from their families and deportation to a country they barely remember. This talented group of young Americans was educated here and should be permitted to pursue their dreams where they call home. Beginning today, the DC-area's best and brightest can finally contribute to our nation's economy and help our communities prosper. The AFL-CIO commends the Administration for its courage and leadership in taking an important step towards a more just America.

President Obama's announcement is a critical step to beginning to address our nation's dire need for comprehensive immigration reform. We call on DC and Maryland elected officials to work with the President towards a legislative solution that will address the parents and families of these immigrant youth, and the millions of undocumented workers who are now living in the shadows.

NC State AFL-CIO, PO Box 10805, Raleigh, NC 27605

FOR IMMEDIATE RELEASE

Contact: Jeremy Sprinkle, Communications Director, 919-833-6678, jeremy@aflcionc.org;

STATEMENT BY NC STATE AFL-CIO'S PRESIDENT JAMES ANDREWS ON PRESIDENT OBAMA'S ANNOUNCEMENT ON DEFERRED ACTION FOR IMMIGRANT YOUTH

DREAMers raised and educated in North Carolina will get the chance to help their home state prosper without fear of deportation

Raleigh, N.C., June 15, 2012 – Working families in North Carolina applaud the Obama Administration's announcement to provide relief from deportation to immigrant youth brought to this country by their parents at a young age. The President's actions bring much-needed security and encouragement to North Carolina's youth who can finally live without fear of separation from their families and deportation to a country they barely remember. This talented group of young Americans was educated here and should be permitted to pursue their dreams where they call home.

Beginning today, all of North Carolina's best and brightest youth can finally contribute to our nation's economy and help our communities prosper. The AFL-CIO commends the Administration for its courage and leadership in taking an important step towards a more just America.

President Obama's announcement is a critical step to beginning to address our nation's dire need for comprehensive immigration reform. We call on North Carolina's elected officials to work with the President towards a legislative solution that will address the parents and families of these immigrant youth, and the millions of undocumented workers who are now living in the shadows.

###

http://aflcionc.org/statement-by-nc-state-afl-cios-president-james-andrews-on-president-obamas-announcement-on-deferred-action-for-immigrant-youth/

For Immediate Release

Contact: Elana Guiney – AFL CIO – 503-803-3151
Erik Sorenson – CAUSA – 503-488-0263

Joint Statement from Fransisco Lopez, Executive Director, CAUSA Oregon, and Tom Chamberlain, President, Oregon AFL-CIO, on President Obama's Restoration of the American Dream for Hundreds of Thousands of Americans

"Our organizations work to protect, for all Oregonians, the opportunity to find a good job, in a strong community, where you can raise a family. Today, President Obama made that opportunity a little closer to a reality for thousands of Oregonians.

President Obama's new policy is an important first step to helping ensure that all Oregonians can find a good job. It is an important first step to ensuring that all Oregonians have security. True, it is only a first step; we remain committed to working with the President, and at the state level with our Governor and Oregon's Legislature, to find a more permanent solution that ensures that Oregonians who attend school with our children, grow up in our state, and are ready to give back to our communities, are able to do so – no matter how, when, or why they came to Oregon.

The people Obama is helping are Oregonians we already work side by side with – except right now they work in fear, sometimes under different conditions and without the same protections we do. That puts us all at risk for exploitation. Oregon is better than that, and our country is better than that. That is why we stand together in support of President Obama's new policy, and proud, today, for the progress we are making for all Americans."

###

CAUSA and the Oregon AFL-CIO collectively represent over 235,000 Oregonians. We work together on issues related to immigrant rights, rights at work and ensuring that all Oregonians have safe, secure, workplaces and can earn enough to support their families. Through a new partnership our organizations are working more closely than ever, and we will continue to do so until all Oregonians are guaranteed these rights.

Letter from Dennis Van Roekel on Dream Act

June 15, 2012

Dear President Obama and Secretary Napolitano:

On behalf of over 3 million public education employees, I would like to commend you for keeping the dreams of over 800,000 young Americans alive with your Administration's announcement today. Adjusting the Department of Homeland Security's deportation practices will allow so many talented young Americans to live with the peace of mind that they will be able to fulfill their dreams, thus enriching the nation culturally and economically.

As you are well aware, thousands of undocumented students each year graduate from U.S. high schools. NEA members work with these students every day – among them are class valedictorians, straight-A students, and idealistic youth committed to bettering their communities. Yet, because of enormous barriers created by their lack of legal status, many such students are unable to pursue higher education and live in constant fear that they will be taken away from their homes and the country they love. For many of these young Americans, the United States is the only home they've ever known.

As educators we spend our careers inspiring students to dream. We encourage students to nurture their talents. We spend extra hours helping students access academic supports, mentors, materials, applications for college and more. We celebrate our students' triumphs and provide support to them to overcome challenges. This is why we often refer to our students as "our kids." And when any one of "our kids" cannot pursue his or her dream due to circumstances that our elected leaders in Congress could easily change, we share our students' sense of loss, fear, and frustration.

Thank you for taking a bold step to ensure that students can pursue their dreams with the knowledge that their country's highest leaders, their educators, and their families support them and are counting on them to continue to enrich this nation with their many talents. Congratulations and well done.

With deep gratitude,

Dennis Van Roekel
President

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SEIU Applauds President Obama's Decision For DREAMers

FOR IMMEDIATE RELEASE
Published 10:40 AM Eastern - Friday, June 15, 2012
Gebe Martinez, gebe.martinez@seiu.org, 202-714-2136

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Following is a statement from SEIU Secretary Treasurer Eliseo Medina regarding President Obama's announcement today that the administration will stop deporting young illegal immigrants who came to the Unites States as children and have since led law-abiding lives.

"Today, President Obama showed leadership and courage by granting administrative relief to eligible DREAMers.

"This common sense move is fiscally responsible and widely supported. The idea to grant legal relief to young people who were brought to the U.S. as children as long as they meet tough qualifications has long been advocated by educators, the military, small business and organized labor as well as religious leaders from various faiths. Why? Because it is also about our nation's future economic and national security.

"DREAMERs are disproportionately high achieving young students with good moral character -- valedictorians, athletes, cheerleaders, J-ROTC members, future scientists, nurses and technology developers -- who grew up in the United States and consider themselves Americans but are not citizens because they were brought to our country without documents.

"They want to serve the country that is their home and we will benefit from their contributions. This administrative relief should be followed with congressional enactment of the DREAM Act.

"President Obama is showing great courage in taking this action, and it presents a stark contrast with the GOP's presumptive presidential nominee who has vowed to stop the DREAM Act if elected. In Congress, polarizing partisan politics kept the DREAM Act from becoming law in 2010.

"Through President Obama's courageous leadership, DREAM eligible students can get relief from the immediate threat of deportation. The president has now done all he can do, but the kind of relief he is able to grant is temporary. It is now up to Congress to pass the DREAM Act and comprehensive immigration reform, which is the only way that the dreams of these productive Americans can be realized."

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For Immediate Release
June 15, 2012

Contact:
Carolyn Fiddler
202/393-6355
cfiddler@aft.org
www.aft.org

Landmark Immigration Action Expands Opportunities for Students

"All children deserve access to a quality public education and a fair shot at realizing their dreams"

WASHINGTON—American Federation of Teachers President Randi Weingarten released the following statement on President Obama's executive action halting the deportation of hardworking, law-abiding immigrant youth.

"All children deserve access to a quality public education and a fair shot at realizing their dreams. President Obama has given hope to young people who have demonstrated good citizenship by pursuing college or protecting our nation. The nearly 1 million youths affected by this decision have done everything our society has asked them to do. They have worked hard, studied hard, and are pursuing college educations. These young immigrants are our students, and they deserve a chance to become productive members of our society without living with constant fear and uncertainty.

"It is certainly appropriate that the president's action comes on the 30th anniversary of the historic *Plyler v. Doe* decision, in which the U.S. Supreme Court ruled it was against the law to deny children access to public education, regardless of their citizenship or that of their parents.

"Now more than ever, Congress needs to pass the DREAM Act and give hardworking students a path toward legal permanent status and, eventually, citizenship. Maintaining barriers to their success does nothing to benefit our economy, our national security or our collective well-being."

###

Follow AFT President Randi Weingarten: http://twitter.com/rweingarten

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The AFT represents 1.5 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare workers; and early childhood educators.

American Federation of Teachers, AFL-CIO
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AFT Teachers • AFT PSRP • AFT Higher Education • AFT Public Employees • AFT Healthcare

For Immediate Release
June 15, 2012

Contact: Nick Kaleba: 312-222-1000 office;
773-458-0958 cell

Statement by Chicago Federation of Labor's Jorge Ramirez on President Obama's Announcement on Deferred Action for Immigrant Youth

"Working families in Chicago applaud the Obama Administration's announcement to provide relief from deportation to immigrant youth brought to this country by their parents at a young age. The President's actions bring much-needed security and encouragement to the youth throughout the Chicago area who can finally live without fear of separation from their families and deportation to a country they barely remember. This talented group of young Americans was educated here and should be permitted to pursue their dreams where they call home. Beginning today, Chicago's best and brightest can finally contribute to our nation's economy and help our communities prosper. The Chicago Federation of Labor and the AFL-CIO commend the Administration for its courage and leadership in taking an important step towards a more just America.

"President Obama's announcement is a critical step to beginning to address our nation's dire need for comprehensive immigration reform. We call on Illinois's elected officials to work with the President towards a legislative solution that will address the parents and families of these immigrant youth, and the millions of undocumented workers who are now living in the shadows."

###

Rebekah Friend
Secretary-Treasurer
Executive Director

Dean Wine
President

Jim McLaughlin
Executive Vice-President

For Immediate Release

Contact: Rebekah Friend
602-631-4488

Statement by Arizona AFL-CIO's Executive Director Rebekah Friend on President Obama's Announcement on Deferred Action for Immigrant Youth
June 15, 2012

Working families in Arizona applaud the Obama Administration's announcement to provide relief from deportation to immigrant youth brought to this country by their parents at a young age. The President's actions bring much-needed security and encouragement to Arizona's youth who can finally live without fear of separation from their families and deportation to a country they barely remember. This talented group of young Americans was educated here and should be permitted to pursue their dreams where they call home. Beginning today, Arizona's best and brightest can finally contribute to our nation's economy and help our communities prosper. The AFL-CIO commends the Administration for its courage and leadership in taking an important step towards a more just America.

President Obama's announcement is a critical step to beginning to address our nation's dire need for comprehensive immigration reform. We call on Arizona's elected officials to work with the President towards a legislative solution that will address the parents and families of these immigrant youth, and the millions of undocumented workers who are now living in the shadows.

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UNITE HERE Statement on Deferred Action for DREAMers

June 15, 2012

Today the Department of Homeland Security announced a new immigration policy that will allow an estimated 1 million students an opportunity to avoid deportation and to receive authorization to work. These young people are a bright part of America's national fabric. Students who might otherwise find themselves in deportation proceedings, or who would qualify for the DREAM Act under better circumstances, will not be deported, and will be allowed to work and make a contribution to this nation. They will not need to live in the shadows anymore.

This action brings hope to more than a million students and their families. It is clearly in the nation's best interest. While the House of Representatives seems to be moving backwards on relief for these students, and the U.S. Senate seems to be in paralysis on the issue, today DHS acted to do the right thing. UNITE HERE International Union and its 250,000 members applaud President Obama and his Administration for taking this much needed and courageous step.

Immigrant Workers Freedom Ride, 2003

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For Immediate Release **Contact:** Gonzalo Salvador 202-637-5018

Statement by AFL-CIO President Richard Trumka
On President Obama's Announcement on Deferred Action for Immigrant Youth
June 15, 2012

We are thrilled by the Obama Administration's announcement to provide relief from deportation to immigrant youth brought to this country by their parents at a young age. The President's actions bring much-needed security and encouragement to our nation's youth who can finally live without fear of separation from their families and deportation to a country they barely remember. This talented group of young Americans was educated here and should be permitted to pursue their dreams where they call home. Beginning today, America's best and brightest can finally contribute to our nation's economy and help our communities prosper. The AFL-CIO commends the Administration for its courage and leadership in taking an important step towards a more just America.

President Obama's announcement is a critical step that begins to address our nation's dire need for comprehensive immigration reform. We call on both parties to work with the President towards a legislative solution that will address the parents and families of these immigrant youth, and the millions of undocumented workers who are now living in the shadows

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For immediate release
June 15, 2012

Contact: Caroline O'Connor, 213-400-8401, coconnor@launionaflcio.org

Statement by Los Angeles labor leader Maria Elena Durazo on President Obama's Policy on Deferred Action for America's DREAMers

The Los Angeles labor movement praises the courage of America's DREAMers and the leadership of President Obama for working together to provide security and opportunity for almost 1 million young people in America who will no longer live in fear. These young DREAMers, who know America as their home, will finally be able to come out of the shadows, pursue their dreams, and most importantly make tremendous contributions through their talent and hard work to our communities, our economy and our nation.

DREAMers have done the right thing, worked hard, gone to school, and in many cases served in the military. They have done what America expects of our young people. President Obama has delivered on his promise of hope and change.

The hundreds of thousands of working men and women of the Los Angeles labor movement want to thank President Obama, the Department of Homeland Security and all of the DREAMers for working together to find an effective and common sense solution to keep families together. We are a stronger and better country when we come together.

This policy is a critical first step toward fixing our broken immigration system. We call on Los Angeles elected officials to work with the President towards achieving comprehensive immigration reform for millions of undocumented workers who continue to live in the shadows.

Maria Elena Durazo is the leader of the Los Angeles County Federation of Labor, AFL-CIO and serves as a National Co-Chair for Re-election Campaign of President Obama.

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Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Member, Committee on the Judiciary

October 19, 2011

The Honorable John Brennan
Assistant to the President for Homeland Security and
Counterterrorism and Deputy National Security Advisor
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Brennan,

The undersigned Muslim, Arab, and South Asian organizations write regarding the federal government's use of biased, false and highly offensive training materials about Muslims and Islam. The seriousness of this issue cannot be overstated, and we request that the White House immediately create an interagency task force to address this problem, with a fair and transparent mechanism for input from the Muslim, Arab, and South Asian communities, including civil rights lawyers, religious leaders, and law enforcement experts.

While recent news reports have highlighted the FBI's use of biased experts and training materials, we have learned that this problem extends far beyond the FBI and has infected other government agencies, including the U.S. Attorney's Anti-Terrorism Advisory Councils, the U.S. Department of Homeland Security, and the U.S. Army. Furthermore, by the FBI's own admission, the use of bigoted and distorted materials in its trainings has not been an isolated occurrence. Since last year, reports have surfaced that the FBI, and other federal agencies, are using or supporting the use of biased trainers and materials in presentations to law enforcement officials. Disclosures of materials through a Freedom of Information Act request by civil rights organizations and in-depth reporting by *Wired* magazine show just how prevalent this issue is throughout the federal government.

Recently disclosed materials, include:

- A 2006 FBI intelligence report stating that individuals who convert to Islam are on the path to becoming "Homegrown Islamic Extremists," if they exhibit any of the following behavior:[1]
  - "Wearing traditional Muslim attire"
  - "Growing facial hair"
  - "Frequent attendance at a mosque or a prayer group"
  - "Travel to a Muslim country"
  - "Increased activity in a pro-Muslim social group or political cause"

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[1] Spencer Ackerman, *New Evidence of Anti-Islam Bias Underscores Deep Challenges for FBI's Reform Pledge*, WIRED MAGAZINE, Sept. 23, 2011, *available at* http://www.wired.com/dangerroom/2011/09/fbi-islam-domination/all/1.

- In 2007, William Gawthrop, a FBI intelligence analyst who has stated that the Prophet "Muhammad's mindset is a source for terrorism" taught a class at the National Defense Intelligence College, the professional education institution run by the Defense Intelligence Agency.[2]

- A January 2009 powerpoint presentation by the FBI's Law Enforcement Communications Unit, which trains new recruits, states that Islam is a religion that "transforms [a] country's culture into 7th-century Arabian ways."[3] A reading list accompanying the presentation includes books such as:
  - *The Truth About Mohammed: Founder of the World's Most Intolerant Religion*, by Robert Spencer, the co-founder of a group called Stop Islamicization of America—designated a hate group by the Southern Poverty Law Center—and a well-known Muslim-basher who was cited by the Oslo, Norway terrorist 65+ times in his manifesto "justifying" his attack.
  - *The Arab Mind*, by Raphael Patai (which contains such quotes as "In the Arab view of human nature, no person is supposed to be able to maintain incessant, uninterrupted control over himself. Any event that is outside routine everyday occurrence can trigger such a loss of control . . . Once aroused, Arab hostility will vent itself indiscriminately on all outsiders")

- A report, authored by Army Command and General Staff at the Fort Leavenworth School of Advanced Military Studies, dated May 21, 2009, includes statements such as:[4]
  - "Moderate Muslims are not exercising moderation; they are simply applying other means to accomplish the same goal of establishing global Islamic dominance."

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[2] Spencer Ackerman, *Justice Department Official: Muslim 'Juries' Threaten 'Our Values'*, WIRED MAGAZINE, Oct. 5, 2011, *available at* http://www.wired.com/dangerroom/2011/10/islamophobia-beyond-fbi/2/; *see also Ex-official: Muhammad Reveals Key to Overcoming Jihadists*, WorldNetDaily, Oct. 31, 2006, *available at* http://www.wnd.com/?pageId=38575.

[3] Spencer Ackerman, *FBI 'Islam 101' Guide Depicted Muslims as 7th-Century Simpletons*, WIRED MAGAZINE, July 27, 2011, *available at* http://www.wired.com/dangerroom/2011/07/fbi-islam-101-guide/.

[4] *See* Major David A. Strauss, *Global Insurgency to Reestablish the Caliphate; Identifying and Understanding the Enemy*, School of Advanced Military Studies, United States Army Command and General Staff College, Fort Leavenworth, Kansas, 2009, *available at* http://handle.dtic.mil/100.2/ADA506224.

- "Islamic doctrine is based upon the establishment of its culture in dominance of all others. In essence, all other cultures must not only accept, but convert or submit, to Islam."

❖ A May 19, 2010, powerpoint presentation prepared by the U.S. Attorney's Office for the Middle District of Pennsylvania, and delivered at a Defense Department conference, states that "Internal Islamic Failures/Collapse . . . Did NOT Start on 9/11," but instead date back "~1400 years" (to the birth of Islam and the death of the Prophet Muhammad)[5].

❖ In July 2010, Robert Spencer presented a two-hour seminar on "the belief system of Islamic jihadists" to the Joint Terrorism Task Force (JTTF) in Tidewater, Virginia. He presented a similar lecture to the U.S. Attorney's Anti-Terrorism Advisory Council, which is co-hosted by the FBI's Norfolk Field Office.[6]

❖ In January 2011, Stephen Coughlin, a former consultant on Islamic law for the Joint Chiefs of Staff who criticized ex-President George W. Bush's assurances that the U.S. is not at war with Islam for having a "chilling effect" on intelligence analysis, gave a presentation to the FBI's D.C. field office, during which, according to attendees, he claimed that Islamic law was incompatible with the U.S. Constitution and that there is no such thing as a loyal American Muslim.[7]

❖ A power point presentation from a March 21, 2011, FBI training, "Strategic Themes and Drivers in Islamic Law," included statements such as:[8]

- "Accommodation and compromise between [Islam and the West] are impermissible and fighting [for Muslims] is obligatory"
- "There may not be a 'radical' threat as much as it is simply a normal assertion of the orthodox ideology . . . [t]he strategic themes animating these Islamic values are not fringe; they are main stream"
- The Islamic practice of *zakat*, alms-giving, is characterized as a "funding mechanism for combat"

❖ An undated FBI powerpoint presentation titled "Militancy Considerations" shows a comparative line graph where the Torah, Bible, and Quran are charted on an axis showing a trajectory of the sacred texts from "violent" to "non-violent." The Torah and Bible are graphed until 2010, reaching the zenith of "non-violent," while the line

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[5] Ackerman, *supra* note 2.
[6] Ackerman, *supra* note 1.
[7] *Id.*
[8] Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical,'* WIRED MAGAZINE, Sept. 14, 2011, *available at* http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/.

for the Quran stops at 622 AD and remains at the "violent" stage, with a parenthetical that "this moderating process has not happened."[9]

- During a June 8, 2011, presentation by FBI analyst William Gawthrop to Infragard, a partnership organization between the FBI and the private sector, Gawthrop stated that al-Qaida was "irrelevant" compared to the threat of Islam itself. He also compared Islam to the Death Star and stated that it needs to be shot with a "torpedo."10

- As recently as September 1, 2011, mandatory orientation material for all 4,400 members of the FBI's JTTF's stated:[11]

  > "Sunni Muslims have been prolific in spawning numerous and varied fundamentalist extremist terrorist organizations. Sunni core doctrine and end state have remained the same and they continue to strive for Sunni Islamic domination of the world to prove a key Quranic assertion that no system of government or religion on earth can match the Quran's purity and effectiveness for paving the road to God."

- The FBI's intranet features antiquated and offensive documents about Muslims and Islam, including:[12]

  - "The Personal Law of The Mahommedans." (19th Century text)
  - "Mohammed Or Christ: An Account Of The Rapid Spread of Islam In All Parts of The Globe, The Methods Employed to Obtain Proselytes, Its Immense Press, Its Strongholds, & Suggested Means to be Adopted to Counteract the Evil." (1915 text)

- The FBI's library at the FBI training academy in Quantico, Virginia holds books from a number of authors who have publicly defiled and maligned Islam and Muslims, including:[13]

  - *Militant Islam Reaches America*, by Daniel Pipes
  - *Islamikaze: Manifestations of Islamic Martyrology*, by Raphael Israeli, who equated "normative Islam" to "horrendous cruelty and inhumanity"

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[9] *Id.*
[10] Spencer Ackerman and Noah Shachtman, *Video: FBI Trainer Says Forget 'Irrelevant' al-Qaida, Target Islam,* ' WIRED MAGAZINE, Sept. 20, 2011, *available at* http://www.wired.com/dangerroom/2011/09/fbi-islam-qaida-irrelevant/.
[11] Ackerman, *supra* note 1.
[12] *Id.*
[13] *Id.*

- *Muhammad's Monsters*, by David Bukay, who wrote "Islam and democracy are totally incompatible, and are mutually inconclusive"
- *Onward Muslim Soldiers*, by Robert Spencer

The use of bigoted trainers and materials like those above is not only highly offensive, disparaging the faith of millions of Americans, but leads to biased policing that targets individuals and communities based on religion, not evidence of wrongdoing. Inaccurate and bigoted training materials also foster fear and suspicion of American Muslims amongst law enforcement and the general public, increasing discrimination, bullying, harassment and anti-Muslim violence.

In response to these recent disclosures, federal officials across the country—particularly FBI field offices—have been reaching out to local Muslim communities to state that the offensive training materials do not reflect the opinion of the FBI, its field offices or the federal government. Until the following steps are taken to remedy this problem and to prevent it from recurring, we will not be confident in these assertions. We urge you to create an interagency task force, led by the White House, tasked with the following responsibilities:

1. Review *all* trainers and training materials at government agencies, including all FBI intelligence products used such as the FBI intranet, FBI library and JTTF training programs; US Attorney training programs; U.S. Department of Homeland Security, U.S. Department of Defense, and US military intranet, libraries and training materials, resources and experts;
2. Purge *all* federal government training materials of biased materials;
3. Implement a mandatory re-training program for FBI agents, U.S. Army officers, and all federal, state and local law enforcement who have been subjected to biased training;
4. Ensure that personnel reviews are conducted and all trainers and other government employees who promoted biased trainers and training materials are effectively disciplined;
5. Implement quality control processes to ensure that bigoted trainers and biased materials are not developed or utilized in the future; and
6. Issue guidance clearly stating that religious practice and political advocacy are protected activities under the First Amendment, not indicators of violence, and shall not be the basis for surveillance or investigation.

The interagency task force should include a fair and transparent mechanism for input from the Muslim, Arab, and South Asian communities, including civil rights lawyers, religious leaders, and law enforcement experts.

The gravity of this issue and the need for an independent, effective investigation into the federal government's training of its agents and other law enforcement is imperative. We appreciate your attention to this matter and look forward to your response.

Sincerely,

AlMaghrib Institute
American Coalition for Good Government
American Muslim Association of Lawyers
American Muslim Voice
American Pakistan Foundation
American-Arab Anti-Discrimination Committee (ADC)
Arab American Association of New York
Arab American Institute (AAI)
Arab Community Center for Economic and Social Services (ACCESS)
Arab Muslim American Federation (AMAF)
Bay Area Association of Muslim Lawyers (BAAML)
Capitol Area Muslim Bar Association
Council of Islamic Organizations of Greater Chicago (CIOGC)
Council of Islamic Organizations of Michigan (CIOM)
Council on American-Islamic Relations (CAIR)
DRUM - Desis Rising Up and Moving
EMERGE-USA
Florida Muslim Bar Association
Georgia Association of Muslim Lawyers
Houston Shifa Services Foundation
Indian Muslim Relief & Charities (IMRC)
Islamic Circle of North America (ICNA)
Islamic Information Center
Islamic Medical Association of North America (IMANA)
Islamic Networks Group (ING)
Islamic Relief USA
Islamic Shura Council of Southern California
Islamic Society of Greater Houston (ISGH)
Islamic Society of North America (ISNA)
KARAMAH: Muslim Women Lawyers for Human Rights
Majlis Ash-Shura (Islamic Leadership Council) of Metropolitan NY
Michigan Muslim Bar Association
Muslim Advocates
Muslim American Civil Liberties Coalition (MACLC)
Muslim American Society (MAS)
Muslim Bar Association of Chicago
Muslim Bar Association of New York
Muslim Bar Association of Southern California

Muslim Congress/Justice360
Muslim Consultative Network (MCN)
Muslim Lawyers Association of Houston
Muslim Legal Fund of America (MLFA)
Muslim Peace Coalition USA
Muslim Progressive Traditionalist Alliance
Muslim Public Affairs Council (MPAC)
National Muslim Law Students Association
National Network for Arab American Communities (NNAAC)
New England Muslim Bar Association
Northern California Islamic Council
Ohio Muslim Bar Association
Pakistani American Bar Association (PABA)
Pakistani American Leadership Center (PAL-C)
Pakistani American Public Affairs Committee
Somali Action Alliance
South Asian Americans Leading Together (SAALT)
South Asian Network (SAN)
Women in Islam, Inc.

cc: The Honorable Eric Holder, Jr., U.S. Attorney General
The Honorable Leon Panetta, Secretary of Defense
The Honorable Janet Napolitano, Secretary of Homeland Security
The Honorable Robert Mueller, Director, Federal Bureau of Investigations
The Honorable Thomas E. Donilon, National Security Advisor
The Honorable Denis McDonough, Deputy National Security Advisor

Response to Questions for the Record from the Honorable Janet Napolitano, Secretary, U.S. Department of Homeland Security

Question#:	1
Topic:	active shooter 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Sandy Adams
Committee:	JUDICIARY (HOUSE)

Question: Does the Active Shooter Pocket Card guidance apply to only civilian employees of DHS or to all DHS employees including law enforcement personnel?

Response: The Active Shooter guidance is primarily targeted to general staff that are not otherwise trained or equipped as Law Enforcement Officers. The DHS Use of Force Policy supersedes this guidance for properly trained and equipped Law Enforcement Officers.

Question#:	2
Topic:	gunman
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Sandy Adams
Committee:	JUDICIARY (HOUSE)

Question: Would a CBP or other law enforcement officer under the umbrella of DHS be disciplined for protecting the public by taking down a gunman in a hostile situation as a result of the Active Shooter guidance?

Response: The DHS Use of Force policy provides guidance for DHS Law Enforcement officials on the appropriate response in an active shooter scenario. Properly trained and equipped DHS component law enforcement Officers are expected to employ force consistent with their agency policies and the DHS Use of Force Policy, which states law enforcement officers and agents of the Department of Homeland Security may use deadly force "when the officer has a reasonable belief that there is an imminent threat of death or serious physical injury to the officer or others." Law Enforcement Officers would not be subject to disciplinary action if they comply with all applicable component policies and the DHS Use of Deadly Force Policy.

Question#:	3
Topic:	force policy
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Sandy Adams
Committee:	JUDICIARY (HOUSE)

Question: What is DHS's Use of Force Policy for law enforcement?

Does the Active Shooter guidance supersede DHS's Use of Force Policy for law enforcement?

Response: The Active Shooter guidance is primarily designed for staff that are not otherwise trained or equipped as Law Enforcement Officers. The DHS Use of Force Policy supersedes this guidance for properly trained and equipped Law Enforcement Officers.

Question#:	4
Topic:	Agent Brian Terry
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Sandy Adams
Committee:	JUDICIARY (HOUSE)

Question: Was CBP Agent Brian Terry shooting a bean bag gun on the day he was killed?

Response: The Federal Bureau of Investigation is currently investigating the murder of Agent Terry. As a matter of policy, DHS does not comment on ongoing investigations.

Question#:	5
Topic:	criminal alien
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Sandy Adams
Committee:	JUDICIARY (HOUSE)

Question: Has DHS submitted recommendations for any criminal alien to the Department of State for removal in accordance to Section 243(d) of the INA?

Response: Yes, the Department of Homeland Security (DHS) has worked closely with the Department of State (DOS) to encourage foreign countries to accept the return of their nationals. Because section 243(d) sanctions have foreign policy implications and are imposed on an entire nation, as opposed to an individual alien, only countries that systematically refuse or delay the repatriation of their nationals are deemed to be recalcitrant. DHS has not requested that the DOS impose visa sanctions on another country since 2001 when section 243(d) sanctions were imposed on the nation of Guyana.

Question#:	6
Topic:	History
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

Question: While Governor of Arizona, you were very outspoken that the federal government had abandoned your state in its efforts to combat illegal immigration and drug smuggling. Specifically, you decried the refusal of ICE to allow Arizona highway patrol officers to work in concert with federal law enforcement to enforce federal immigration laws.

Since becoming Homeland Security Secretary, you have done exactly what you previously complained of. You have suspended 287(g) agreements with Arizona law enforcement, have supported the Department of Justice's efforts to stop and have taken your own actions to end Arizona's cooperative work with federal officials to support immigration law enforcement, and have told federal officials under your authority to decline many of the phone calls from Arizona police who report illegal immigrants in their communities.

How do you justify your Department's current actions and attitude toward Arizona, particularly your suspension of 287(g) agreements with Arizona law enforcement, in light of this prior gubernatorial experience? Would you have supported as Governor the kind of actions that you are taking as DHS Secretary?

Are you planning to treat other states the way you have treated Arizona going forward? Can Nevada, one of Arizona's neighbors, expect such treatment next?

Response: In its approach to immigration enforcement, DHS has established as a top priority the identification and removal of public safety and national security threats, and the removal of criminal aliens has consistently increased over the past four years. Due in part to the efforts and those of the Border Patrol, violent crime in U.S. border communities, including Arizona, has remained flat or fallen over the past decade.

As part of its focus on criminal aliens and other public safety threats, ICE has expanded the use and frequency of investigations and tools like Secure Communities that identify criminals and other aliens that fall within an ICE priority category on our streets and in our jails. The Secure Communities screening process, which is fully deployed in the State of Arizona, coupled with federal officers, has proven to be more consistent and cost effective in identifying and removing criminal and other priority aliens compared with the state's 287(g) task force programs. ICE's review of the enforcement statistics for 287(g) programs operating in the State of Arizona demonstrated that, over time, these 287(g) programs became less efficient than other ICE programs. As a result, ICE

Question#:	6
Topic:	History
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

terminated four Arizona 287(g) agreements in their entirety, and terminated the task force models of three others, leaving the jail enforcement models in place.

The evaluation of a jurisdiction for participation or continuation in the 287(g) program is a detailed process involving an in-depth review of various factors, including cost, performance, logistics, and operational benefits. Consideration must be given to each 287(g) agreement to ensure that its continued 287(g) participation results in operational efficiencies for ICE.

Currently, ICE has 63 active 287(g) MOAs in place nationwide. Due to efficiency considerations outlined in the proposed fiscal year (FY) 2013 Budget, ICE will no longer consider 287(g) task force model requests from state and local jurisdictions and will continue to review whether existing task force model agreements are an effective use of resources. However, ICE will still consider requests to participate in the more cost effective and efficient 287(g) jail enforcement model.

Question#:	7
Topic:	prosecutorial discretion
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

Question: Is the Department planning to exercise "prosecutorial discretion" for other groups of illegal aliens? If so, which groups? On what basis do you offer this discretion?

What limits are there on the Department's "discretion" or decision to "defer action" on those who should be deported?

Response: The ability to exercise prosecutorial discretion has long been recognized as a valid, and important, part of the Executive Branch's authority, particularly in the immigration context, by the U.S. Supreme Court. Most recently, the Court recognized this authority in *Arizona v. United States.*

The exercise of prosecutorial discretion ensures that the Department of Homeland Security's (DHS) makes the best use of its resources, and allows U.S. Immigration and Customs Enforcement (ICE) to prioritize the identification and removal of criminal aliens, repeat immigration law violators, recent border entrants, and those who otherwise pose a threat to public safety or national security. In determining whether an exercise of prosecutorial discretion is appropriate in any given case, ICE officers, special agents, and attorneys review each case on its own merits based on the ICE priorities described in ICE Director John Morton's March 2, 2011 memorandum titled "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Director Morton's June 17, 2011 memoranda titled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," and "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs." ICE attorneys received additional guidance in ICE Principal Legal Advisor Peter S. Vincent's November 17, 2011 memorandum titled "Case-by-Case Review of Incoming and Certain Pending Cases." Finally, Secretary Napolitano's June 15, 2012 memorandum titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" clarified that certain individuals who came to the United States as children are generally low enforcement priorities for DHS. Pursuant to that memorandum, ICE and U.S. Citizenship and Immigration Services (USCIS) developed a process to consider, on a case-by-case basis, such individuals for deferred action.

Question#:	8
Topic:	ICE alien database
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

Question: How often does ICE update its database of "known" aliens? What is the Department doing to ensure that it is capturing more "unknown" aliens? What else can be done to ensure that more aliens are "known" to the Department, thus ensuring more SCAAP reimbursement funds are available to localities?

Response: DHS defers to the Department of Justice regarding SCAAP. As part of the State Criminal Alien Assistance Program (SCAAP) data validation process, U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) query several databases to identify the alienage of subjects whose information was submitted by state and local law enforcement agencies as part of the SCAAP submission. These databases are updated daily, as aliens are encountered by immigration officials and older records are amended.

Question: Are you aware of any issues local law enforcement may have in accessing the ICE database? If so, what can be done to improve this access?

Response: No, DHS is not aware of any issues that local law enforcement may have in accessing the ICE database.

Question#:	9
Topic:	body scanner 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

Question: How do you justify the body scanners in use at airports nationwide as a "reasonable search" consistent with the Fourth Amendment? How are the pat-downs, implemented in alternative to or in conjunction with these scans, consistent with the Constitution's "reasonable search" requirement?

Response: Screening conducted through use of Advanced Imaging Technology (AIT) and through pat-downs meets the reasonableness test established by the Supreme Court by balancing the governmental interest in conducting the search against the intrusion on an individual's rights. The government's interest is to address a substantial and real risk to public safety. These measures are reasonable within the meaning of the Fourth Amendment and are within the administrative search category, which is a recognized exception to the general requirements of a warrant and probable cause.

With respect to the public interest involved, as courts have noted, "there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance." *United States v. Hartwell*, 436 F.3d 174, 179 (3rd Cir. 2006) (Alito, J.) Second, although the specific detection capabilities of AIT cannot be discussed publicly, its effectiveness has been well-established. AIT is the best technology currently available for detecting metallic, as well as non-metallic, threats concealed under a person's clothing. For example, using AIT, Transportation Security Officers (TSO) have found weapons made of composite, non-metallic materials concealed under clothing, as well as small packages of powder-based drugs. This is significant because the same methods that are used to conceal powder-based drugs can also be used to conceal powder-based explosives.

With respect to protecting individual rights, the Transportation Security Administration (TSA) has worked to minimize the intrusiveness of AIT by safeguarding personal privacy. The individual receives notice of the AIT and may opt to have a physical search instead. The AIT scan lasts only seconds and is conducted in a machine that is in the open and manned by uniformed personnel. The officer exercises no arbitrary discretion in selecting who to search. Most AIT equipment is now equipped with automatic target recognition (ATR) software that indicates any anomalies on a generic human form. Images are not saved, stored or transmitted.

The United States Court of Appeals for the District of Columbia Circuit recently affirmed TSA's use of AIT as reasonable under the Fourth Amendment noting that measures taken by the TSA to safeguard personal privacy. *Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Security*, 653 F.3d 1, 10 (D.C. Cir. 2011). With respect to pat-downs,

Question#:	9
Topic:	body scanner 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

courts have evaluated them in several cases involving airport security screening and have routinely held that such pat-downs are minimally intrusive searches within the meaning of the Fourth Amendment. *See*, *e.g.*, *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*).

Question#:	10
Topic:	body scanner 2
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Mark Amodei
Committee:	JUDICIARY (HOUSE)

Question: A year ago this week, the D.C. Circuit ruled that the TSA violated the Administrative Procedure Act in 2009 when it made body scanners the primary method of screening passengers at airports without first submitting the change for a public notice and comment period. The Court ordered TSA promptly to proceed in a manner consistent with that opinion. But TSA still has not opened the rule up for public comment. Why hasn't TSA held a public comment period on the change? Does TSA plan to hold a public comment period on the change, and if not, why not?

Response: In response to the Court's directive, the Transportation Security Administration (TSA) has committed significant resources to develop a rulemaking on passenger screening using advanced imaging technology and has placed this rulemaking among its highest priorities. TSA is developing a Notice of Proposed Rulemaking (NPRM) for publication in the Federal Register, and both TSA and DHS have committed to expediting the rulemaking. The NPRM will contain a public comment period, through which members of the public will have an opportunity to comment on the proposed rule.

Question#:	11
Topic:	advanced imaging
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Jason Chaffetz
Committee:	JUDICIARY (HOUSE)

Question: In July, 2011, a federal appeals court ruled that the Transportation Security Administration had to conduct a notice-and-comment rulemaking on its policy of using "Advanced Imaging Technology" for primary screening at airports. TSA was supposed to publish the policy in the Federal Register, take comments from the public, and justify its policy based on public input. The court told TSA to do all of this "promptly." A year later, TSA has not even started that public process. Defying the court, the TSA has not satisfied public concerns about privacy, costs and delays, security weaknesses, and the potential health effects of these machines.

Why has the TSA not complied with this court order?

Response: In response to the Court's directive, the Transportation Security Administration (TSA) has committed significant resources to develop a rulemaking on passenger screening using advanced imaging technology and has placed this rulemaking among its highest priorities. TSA is developing a Notice of Proposed Rulemaking (NPRM) for publication in the Federal Register, and both TSA and DHS have committed to expediting the rulemaking. The NPRM will contain a public comment period, through which members of the public will have an opportunity to comment on the proposed rule.

Question: Do you believe no action in over a year qualifies as "promptly"?

Response: The rulemaking process can take several years to complete; TSA and DHS have prioritized this rule and are expediting the process.

Question: Will you commit to instruct the TSA to immediately begin to comply with the court order?

Response: TSA is already far along in the process of producing a proposed rule for public comment, in compliance with the Court Order.

Question#:	12
Topic:	deferred deportation 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: How many people does DHS estimate may be eligible to apply for deferred deportation through your June 15th administrative order? Specifically, how did you arrive at that estimate?

Response: The volume of deferred action requests is largely unknown due to the nature of the population, and a number of variables inherent in this new process. DHS did not make an estimate but reviewed estimates published by third parties. These external sources estimate approximately 800,000 to 1 million individuals may initially fall within the guidelines set forth in the Secretary's June 15th Memorandum, and a total of approximately 1.7 million may fall within the guidelines over the course of the deferred action for childhood arrivals process.

Question#:	13
Topic:	deferred deportation 2
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: Is it true that after August 15, 2012, when Customs and Border Patrol officers encounter an individual who may be eligible for deferred deportation through your June 15th administrative order, the officer will provide a letter notifying them that they are eligible for deferred deportation and to contact U.S. Citizenship and Immigration Services in order to apply for benefits?

Response: U.S. Customs and Border Protection (CBP) officers and agents who encounter aliens who appear to meet the guidelines to be considered for deferred action under the June 15th memorandum will adhere to the direction provided in that memorandum regarding prosecutorial discretion and deferred action. Based on CBP's officers and agents individualized review of each case, this typically includes notification to individuals that appear that they may meet the guidelines that they may seek a review of their case by USCIS.

Question#:	14
Topic:	deferred deportation 3
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: Some gang members do not have criminal records. Please describe the steps being taken to the new deferred deportation policies outlined in your June 15 administrative order do not result in the release of immigrant gang members?

Response: Guidance from U.S. Immigration and Customs Enforcement (ICE) has made clear that aliens who pose a danger to national security or a risk to public safety – including gang members – are among ICE's highest civil enforcement priorities. *See* Memorandum entitled "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" dated March 2, 2011. This memorandum states that "the removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration enforcement priority," including, but not limited to, "aliens not younger than 16 years of age who participated in organized criminal gangs."

In a subsequent memorandum from ICE Director Morton to all Field Office Directors, Special Agents in Charge, and Chief Counsels entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" dated June 17, 2011, Director Morton identified factors to consider when determining whether prosecutorial discretion is appropriate in a given case. These factors include whether the alien is a known gang member or otherwise poses a clear danger to public safety, which indicates that prosecutorial discretion is not appropriate in that alien's case.

Question#:	15
Topic:	287 (g)
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: How many 287(g) applications have been approved by DHS in each of the last seven years?

Response: The following table lists the requests for participation (i.e., applications) in the 287(g) program by fiscal year that ICE approved.

Fiscal Year	Total Number of Approved Applications for Participation in the 287(g) Program	JEO Model Approved	TFO Model Approved	Jail Model Approved
2005	3	3	0	0
2006	3	3	0	0
2007	27	13	8	6
2008	34	14	12	8
2009	9	4	3	2
2010	1	1	0	0
2011	0	0	0	0
2012	2	2	0	0

Question#:	16
Topic:	MOU
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: The standard Memorandum of Agreement (MOU) requires that local law enforcement agencies track the nature of the offenses committed by criminal aliens who have been arrested. Please explain why the MOU prohibits local law enforcement from releasing this information to the public without ICE approval.

Response: The disclosure of information obtained from an U.S. Immigration and Customs Enforcement (ICE) system of records by a local law enforcement agency is prohibited by federal law.

Specifically, release of information about ICE detainees is prohibited by 8 C.F.R. § 236.6. This provision reads:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information.

Question#:	17
Topic:	E-Verify
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: E-Verify is a free, accurate, electronic program that immediately confirms that a new employee is eligible to work in this country. Is E-Verify the most effective way to help ensure that U.S. jobs go to legal workers?

Response: E-Verify is an important tool to help employers verify employment eligibility through multiple databases.

Within three to five seconds, E-Verify compares the information an employee provides on the Form I-9, Employment Eligibility Verification, against millions of government records to determine whether the information matches and whether the new hire is authorized to work in the United States. If there's a mismatch, E-Verify will alert the employer and the employee will be allowed to work while he or she resolves the problem.

Question: The State Department has given USCIS access to visa photos and passport photos for inclusion in the E-Verify photo tool. When does USCIS plan to incorporate the visa photos into the photo tool?

Response: At this time, U.S. visas are not considered valid documentation for establishing identification or work eligibility on the Form I-9. Therefore, USCIS cannot collect that information on the Form I-9 and cannot perform a visa photo check without a change to the Form I-9.

However, in October 2010, USCIS launched the E-Verify Passport Photo Check. This enhancement validates State Department passport information in E-Verify. Nearly 15 percent of E-Verify queries use a U.S. passport to establish work eligibility and identity.

Question: What is the status of incorporation of drivers' license photos into the E-Verify photo match tool?

Response: While there are currently no plans to add a driver's license photo check to E-Verify, the RIDE (Records and Information from DMVs for E-Verify) initiative allows E-Verify employers to validate drivers' licenses or state-issued IDs against the state data.

Question#:	18
Topic:	detain
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: Is it true that ICE agents have been instructed not to detain or remove illegal immigrants found during worksite enforcement actions?

Response: No, ICE agents have not been instructed to not administratively arrest illegal aliens during worksite enforcement (WSE) actions. In accordance with ICE's priorities, agents utilize prosecutorial discretion and prioritize administrative arrests on those aliens that pose a threat to national security and public safety, recent entrants and fugitives.

Question#:	19
Topic:	high-risk posts
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Elton Gallegly
Committee:	JUDICIARY (HOUSE)

Question: ICE has identified over fifty "high-risk" posts. If this program is not fully funded, please explain how ICE intends to ensure visas are not improperly issued to individuals who pose a threat to the security of the United States and its citizens

Response: The U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) are committed to the visa security process and its modernization. We will prioritize the expansion of our screening and vetting efforts through a collaborative information technology modernization process involving the U.S. Department of State and multiple DHS components. This will allow us to focus our non-immigrant visa screening and vetting efforts in a pre-adjudicative timeframe targeting first those locations deemed to pose the greatest risk and expanding, as resources permit, to other non-immigrant visa applications. This process involves greater coordination with the intelligence community and rules-based automated initial screening, allowing ICE agents abroad to focus their efforts on identified threats.

Question#:	20
Topic:	deferred action
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Steve King
Committee:	JUDICIARY (HOUSE)

Question: What fees will be associated with an application for deferred action under the June 15 DHS memorandum?

Response: To request deferred action for childhood arrivals, an individual must file Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*, together with Form I-765, *Application for Employment Authorization*, and Form I-765WS, *Form I-765 Worksheet*. There is no filing fee for Form I-821D. However, persons requesting consideration of deferred action for childhood arrivals must submit both the filing and biometrics services fees with Form I-765. These fees total $465.

Question: Who will pay these fees?

Response: All individuals who submit a request for consideration of deferred action for childhood arrivals and form requesting an employment authorization document must pay the filing and biometric services fees associated with Form I-765 unless the individual is determined to be exempt from paying these fees (as explained in more detail in the next answer).

Question: Who will be exempt from paying these fees?

Response: Fee exemptions are available for employment authorization applications connected to the deferred action for childhood arrivals process in very limited circumstances. Requests for fee exemptions must be filed and approved before an individual files his/her request for consideration of deferred action for childhood arrivals package without a fee. In order to be considered for a fee exemption, an individual must submit a letter and supporting documentation to USCIS demonstrating that he or she meets one of the following conditions:

- Is under 18 years of age, homeless, in foster care or under 18 years of age and otherwise lacking any parental or other familial support, and has income less than 150% of the U.S. poverty level.
- Cannot care for him or herself due to suffering from a serious, chronic disability and has an income less than 150% of the U.S. poverty level.
- Has, at the time of the request, accumulated $25,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for him or herself or an immediate family member, and has an income less than 150% of the U.S. poverty level.

Question#:	20
Topic:	deferred action
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Steve King
Committee:	JUDICIARY (HOUSE)

Question: Who will pay for the applications when applicants are exempt from the fees?

Response: The cost of processing the limited number requests for consideration of deferred action that have been determined to be exempt from the $465 total fee will be covered by the fees collected from other individuals requesting consideration of deferred action for childhood arrivals.

Question: How many applicants for deferred action does the DHS expect to apply in the first year? In the life of the program?

Response: The volume and pace of deferred action requests is largely unknown due to the nature of the population, and a number of variables inherent in this new process. External data sources estimate approximately 800,000 to 1 million individuals may initially fall within the guidelines set forth in the Secretary's June 15th Memorandum, and a total of approximately 1.7 million may fall within the guidelines throughout the deferred action for childhood arrivals process.

Question: How many applicants for deferred action does the DHS expect to process in the first year? In the life of the program?

Response: As discussed above, that number cannot be definitively determined at this time and will depend upon volume.

Question#:	21
Topic:	Visa Waiver Program
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Dennis Ross
Committee:	JUDICIARY (HOUSE)

Question: What is the primary reason countries like Croatia, Poland, and Brazil are being denied entry into the Visa Waiver Program?

Response: Croatia, Poland, and Brazil are currently ineligible for Visa Waiver Program (VWP) designation because they do not fulfill the requirements established by U.S. law. These countries do not currently meet the requirement for a low nonimmigrant visitor visa refusal rate of less than 3% for the previous fiscal year. In addition, neither Poland nor Brazil have yet signed all of the information sharing agreements required for VWP designation. DHS continues to work with these and other VWP aspirant countries on fulfillment of the requirements for designation.

Question: How is security compliance assessed during the review period for the Visa Waiver Program? Does the Department of Homeland Security send officials to the country in question?

Response: Compliance with the security standards of the VWP is assessed through the periodic reviews and intelligence community assessments prescribed by U.S. law. Every country in the VWP is reviewed at least once every two years to assess the impact of continuing designation on the security, law enforcement and immigration enforcement interests of the United States. All reviews include an assessment from the intelligence community. The results of all VWP reviews are transmitted to Congress.

In order to assess the security standards of VWP countries, information is gathered from U.S. government agencies, open source information, intelligence products, and in-country site visits. The security portion of the reviews take into account recent security-related incidents, threat assessments, risk of radicalization, legal powers of the host country security and intelligence services, and resources devoted to security agencies. Additionally, reviews assess the level of cooperation and communication between U.S. agencies and their overseas counterparts on security matters.

Question: Once in the program, what steps are taken to ensure compliance with the terms of the Visa Waiver Program?

Response: DHS rigorously enforces compliance with VWP designation requirements, both through the periodic reviews and through ongoing monitoring of open source, intelligence, and statistical information about VWP countries. DHS maintains frequent contact with U.S. Embassies abroad, U.S. government agencies, and foreign government

Question#:	21
Topic:	Visa Waiver Program
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Dennis Ross
Committee:	JUDICIARY (HOUSE)

officials to maintain awareness of the broad scope of issues which may impact a country's VWP designation.

A concrete example of this is monitoring of lost and stolen passport information. DHS receives regular reports from INTERPOL on reporting of lost and stolen passports. If countries fail to meet the minimum reporting standards or anomalies in reporting materialize, DHS works with counterparts in foreign governments and the Department of State to make sure that lost and stolen passport records are reported to INTERPOL (and subsequently made available to U.S. border personnel) in a timely and effective manner. Through this monitoring, DHS has successfully addressed issues with the quality and quantity of lost and stolen passport reporting in several VWP countries.

Question: If countries are found not in compliance, what actions are taken?

Response: If a country is found not to be in compliance with VWP standards, DHS attempts to address the issue directly with the country in conjunction with DOS. Most issues identified during the periodic review process are effectively handled in this manner.

The U.S. government may also create a formal engagement strategy, which can address an issue of concern over the next review cycle.

If an issue arises that calls into question the ability of a country to consistently meet the high standards required for VWP designation, the Secretary of Homeland Security is empowered to act through mitigating measures, probation, or even termination from the program. Two countries (Argentina in 2002 and Uruguay in 2003) were previously terminated from the program due to their inability to maintain the standards required for continuing designation. The Director of National Intelligence also has the authority to notify the Secretary of Homeland Security of any current and credible threat posing an imminent danger to the United States originating from a designated VWP country. Upon that notification, the Secretary of Homeland Security may suspend countries from the program.

Question#:	22
Topic:	EB-5 visas 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Judy Chu
Committee:	JUDICIARY (HOUSE)

Question: EB-5 visas are a great way to stimulate the U.S. economy through job creation and capital investment by foreign investors. In fact, GAO estimates that these investors invested approximately $1 billion cumulatively in the United States, most often in hotels/motels, manufacturing, real estate, or domestic sales.

The Investor and Regional Center Units are an effective way to bring foreign investment to specific geographic region, especially areas with high unemployment. These regional centers now bring in about 75-80% of EB-5 immigrant investors, proving how useful these centers are.

I want to commend you for the new creation of a dedicated office to oversee the administration of the EB-5 Immigrant Investor program at USCIS. This will go a long way toward improving and streamlining this critical program.

However, I am concerned that USCIS recently re- interpreted how they are counting job creation under these regional centers, which many believe will make it more difficult to bring in these investors to the United States, at a time when we need it most. In my home city of Los Angeles, over 300 investors are developing a $160 million hotel near the Staples Center, but several of the investors are having their EB-5 visas held up, and also their financial investment in the project, because of this new re-interpretation.

Can you please explain this change and what you hope to achieve with it?

What do you say to the argument that this could have a chilling effect on investment through the EB-5 program?

Response: USCIS has not reinterpreted the statute or regulations governing credit for job creation in the EB-5 Immigrant Investor program. In February, USCIS did address an issue relating to the way that certain EB-5 applicants were attempting to demonstrate estimated job creation. USCIS issued requests for evidence asking certain regional center applicants to provide an economic analysis establishing why they should be permitted credit for jobs created not by their EB-5 businesses, but instead by independent real estate tenants of EB-5 businesses. USCIS economists assisted in the preparation of these requests. Regional center applicants have begun submitting the requested evidence, and USCIS is reviewing each application to determine, on a case-by-case basis, whether granting EB-5 investment credit for "tenant-occupant" jobs is economically reasonable, as the regulations require. Ensuring that jobs are credited to EB-5 investors where the

Question#:	22
Topic:	EB-5 visas 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Judy Chu
Committee:	JUDICIARY (HOUSE)

EB-5 project is actually responsible for the creation of those jobs is a critical part of ensuring that the EB-5 program serves the job creation function that Congress envisioned.

Question#:	23
Topic:	EB-5 visas 2
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Judy Chu
Committee:	JUDICIARY (HOUSE)

Question: EB-5 visas are a great way to stimulate the U.S. economy through job creation and capital investment by foreign investors. In fact, GAO estimates that these investors invested approximately $1 billion cumulatively in the United States, most often in hotels/motels, manufacturing, real estate, or domestic sales.

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However, I am concerned that USCIS recently re- interpreted how they are counting job creation under these regional centers, which many believe will make it more difficult to bring in these investors to the United States, at a time when we need it most. In my home city of Los Angeles, over 300 investors are developing a $160 million hotel near the Staples Center, but several of the investors are having their EB-5 visas held up, and also their financial investment in the project, because of this new re-interpretation.

Can you please explain this change and what you hope to achieve with it?

What do you say to the argument that this could have a chilling effect on investment through the EB-5 program?

Response: This QFR is answered in question #22.

Question#:	24
Topic:	DOMA 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Jerrold Nadler
Committee:	JUDICIARY (HOUSE)

Question: A number of Members, including myself, and led by one of the Judiciary Committee's immigration experts, Representative Zoe Lofgren, sent you a letter in April 2011 asking the Department of Homeland Security (DHS) to hold applications, like those for green cards, that could be approved but for the Defense of Marriage Act (DOMA) in abeyance or suspension. DHS said no.

Since, that time, the Obama Administration has argued in court that DOMA is unconstitutional. I led two amicus briefs, signed by the House Democratic Leadership and a total of over 130 Members of the House, in support of overturning DOMA. Multiple courts, including just recently the Court of Appeals for the First Circuit, have agreed that DOMA is unconstitutional. In early July, the Department of Justice asked the Supreme Court to hear challenges to DOMA and decide its constitutionality once at for all. If it takes the case, it could issue a decision on DOMA next year. Therefore, any abeyances granted likely would only be for a relatively short time before applications could be decided.

On the legislative front, the bill I introduced, H.R. 1116, the Respect for Marriage Act, to repeal DOMA has acquired 151 Members as cosponsors. The Senate Judiciary Committee held a hearing on the Senate companion to my bill and later voted to approve it.

Given these developments, will DHS now reconsider and create a process by which it could hold in abeyance green card or other immigration applications by legally married same-sex spouses that could be approved but for DOMA? If not, why not?

Response: Pursuant to the President's direction, the Department of Homeland Security (DHS), like other components of the Executive Branch, is continuing to enforce the Defense of Marriage Act (DOMA) until the law is repealed by Congress or the judicial branch renders a definitive verdict on the law's constitutionality. Holding these cases in abeyance would be inconsistent with the President's directive.

However, in the context of prosecutorial discretion related to removal proceedings, where DHS has greater flexibility, DHS considers long-term same-sex relationships as "family relationships" weighing in favor of discretion, as part of its individualized review of such cases. USCIS and other DHS agencies have deferred action or otherwise exercised prosecutorial discretion in some cases involving same-sex partners based on urgent humanitarian considerations or other compelling and unique factors. In addition,

Question#:	24
Topic:	DOMA 1
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Jerrold Nadler
Committee:	JUDICIARY (HOUSE)

individuals whose petitions and applications are denied solely on the basis of DOMA typically are not individuals who will receive a Notice to Appear (NTA) under USCIS's revised NTA policy.

Question#:	25
Topic:	DOMA 2
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Jerrold Nadler
Committee:	JUDICIARY (HOUSE)

Question: In its May 2011 response from DHS to our April 2011 letter, one of the objections DHS seems to have had to an abeyance policy is the requirement that the Executive Branch continue to enforce DOMA. I do not disagree that the Executive Branch is bound to enforce DOMA. But, not denying applications of lawfully married same-sex couples and simply suspending their consideration would not give anyone any rights or legal relief. This is consistent with the requirement that DOMA is still the law and must be followed. It would, however, be an appropriate exercise of discretion until the issue of DOMA is settled by Congress or the courts.

Moreover, DHS has done this in the past. For example, when there was litigation moving through Congress and court challenges to the problem colloquially referred to as the "window penalty," in which spouses were not able to complete green card applications when the U.S. citizen sponsor died during the process, DHS adopted a policy by which certain affected persons could have their green card applications held in abeyance.

Please explain why DHS so far has refused to adopt the same policy for lawfully married same-sex couples that it has used in the past when there was a chance a law was going to be changed – such as that which existed in the example provided for spouses affected by the widow penalty.

Response: Pursuant to the President's direction, the Department of Homeland Security, like other components of the Executive Branch, is continuing to enforce DOMA until the law is repealed or the judicial branch renders a definitive verdict on the law's constitutionality. Holding these cases in abeyance would be inconsistent with the President's directive.

However, in certain cases involving same-sex partners, USCIS has granted deferred action based on urgent humanitarian considerations or other compelling and unique factors. In addition, individuals whose petitions and applications are denied solely on the basis of DOMA typically are not individuals who will receive a Notice to Appear (NTA) under USCIS's revised NTA policy.

Question#:	26
Topic:	minority procurement
Hearing:	Oversight of the Department of Homeland Security
Primary:	The Honorable Robert C. Scott
Committee:	JUDICIARY (HOUSE)

Question: What are the Department's current goals and accomplishments on minority procurement?

Response: In fiscal year (FY) 2012, the DHS goal for small minority-owned business procurement is five percent of the total prime contracting dollars expended, which is the same percentage as the Federal Government-wide statutory goal. For the first 10 ½ months of FY 2012 (October 1, 2011 through August 17, 2012), DHS has awarded $1,195,461,858 in contracts to small minority-owned businesses out of a total pool of $9,339,791,467, representing 12.8 percent of the total and exceeding the goal by a wide margin.

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