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

– – –

THURSDAY, MARCH 19, 2015

United States Senate,

Committee on the Judiciary,

Subcommittee on Oversight, Agency Action,

Federal Rights and Federal Courts,

Washington, DC

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

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

OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS, COMMITTEE ON THE JUDICIARY

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

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

It is no secret that I and many members of the Senate are frustrated with the President's continued disregard for the Constitution and the rule of law.

The Administration has over and over again refused to follow Federal law, refused to follow the Constitution, whether with regard to Obamacare, whether with regard to the work requirements in our welfare programs, or whether with regard to amnesty.

Twenty-two times President Obama admitted to the American people he had no legal authority to grant amnesty to those who are here illegally. Indeed, one of those 22 times, he put it this way: "I am not an

emperor." And then, sadly, after the last election, apparently things changed and the legal authority, the constitutional authority he lacked those preceding 22 time suddenly miraculously appeared and I guess, using the President's own formulations, he achieved the power of an emperor.

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

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

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

I am very proud that my home State of Texas is taking

the lead litigating against the lawlessness of President Obama's executive amnesty.

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

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

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

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

[The prepared statement of Chairman Cruz appears in the appendix.]

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

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

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

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

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

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

I recognize there is a great deal of debate and division in this country over immigration. Such issues, however, are typically played out in the political branches, not in the Judicial. A key reason for this, of

course, is the constitutional requirement that the Judiciary be empowered to decide cases and controversies rather than purely political disputes.

Political disagreements are first hashed out within the Legislative Branch and between the Legislative and Executive Branches, and those are then routinely subjected to review by the courts.

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

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

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

The Court's opinion on this point seems well

supported and that should have been the end of the case, as it was when a DC District Court threw out a very similar lawsuit on the basis of standing.

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

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

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

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

decisions, clemency decisions, decisions to defer prosecutions.

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

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

The government is confident that this decision will ultimately be reversed and if I were a betting man, I would wager they are right. At the end of this case, both the APA and the judge's recent ruling may be viewed in sharply different focus.

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

[The prepared statement of Senator Coons appears in the appendix.]

Chairman Cruz. I thank the Ranking Member and I look forward to serving together on this committee for the next 2 years and to having hopefully a productive collaboration and vigorous oversight carrying out our constitutional responsibilities in that regard.

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

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

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

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

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

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

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

[Laughter]

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

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

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

I would now ask each of the witnesses to rise and be sworn in.

[Witnesses sworn.]

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

TESTIMONY OF DAVID B. RIVKIN, JR., PARTNER, BAKERHOSTETLER, WASHINGTON, DC

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

I am going to focus briefly and solely on the legality of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents, DAPA, since DAPA's policy merits may not be not relevant to its legality.

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

The Supreme Court decisively rejected this argument,

calling the suspension and dispensing powers utterly alien to our constitutional tradition.

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

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

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

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

By contrast, the Immigration and Nationality Act,

INA, indicates that whoever enters the country illegally is a deportable alien who shall, upon the order of the Attorney General, be removed.

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

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

Now, the Administration argues that this is not the case, that there are really are no removable aliens because removal cannot be pursued under any circumstances and, therefore, there is still an opportunity to exercise enforcement discretion in the context of processing individual applications.

But the mere possibility that a small percentage of 4-plus million applicants may be rejected does not a meaningful enforcement discretion make. And numbers aside, since the millions of applicants will be applying by mail, the very context for implementing DAPA is inherently unsusceptible to the use of case-by-case discretion.

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

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

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

All of the States, of course, exercise their sovereignty in the shadow of the Constitution supremacy clause. But the framers who drafted the Constitution in Philadelphia and the citizens of the 13 States who

ratified have agreed to these arrangement to be subject to be preempted by Federal legislation because they were given a formidable set of tools to shape this preemptive legislation primarily through the States' representation in the Senate.

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

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

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

Thank you.

[The prepared testimony of Mr. Rivkin appears in the appendix.]

Chairman Cruz. Thank you, Mr. Rivkin.

I now recognize Secretary Kobach.

TESTIMONY OF KRIS W. KOBACH, SECRETARY OF STATE, STATE OF KANSAS

Mr. Kobach. Thank you, Mr. Chairman and members of the committee.

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

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

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

Specifically, the President's directives order ICE agents to break the law. The law requires ICE agents to put certain aliens into removal proceedings and the

directives say no, do not follow the law, do not put them into removal proceedings.

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

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

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

Second, even if they did not violate the APA, they violate substantive provisions of Federal law, which I just mentioned. And third, even if they did not violate Federal law, they would still violate the Constitution

because they constitute an executive exercise of legislative power, which violates the separation of powers.

The APA argument is laid out best by Judge Hanen in the *Texas* case. Judge O'Connor lays out the statutory violations very well in the *Crane* case.

The APA arguments have already been touched upon. S let me jump straight to the violations of the substantive provisions of Federal law.

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

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

In other words, shall. Congress specifically said you have to place these aliens in removal proceedings.

Shall has a very specific meaning, as I am sure the members of the committee know.

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

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

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

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

Finally, consider the third argument and that is the separation of powers argument. Even if there were not a Federal statute that says quite clearly you must remove

these aliens, and Congress had a very clear intent, the legislative record supports that meaning, it is a violation of the separation of powers.

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

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

So it is illegal on three levels. Indeed, it is also unconstitutional.

I would be happy to answer your questions.

[The prepared testimony of Mr. Kobach appears in the appendix.]

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

I now recognize Professor Family.

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

Ms. Family. Thank you. Mr. Chairman and honorable members of the Subcommittee, thank you so much for the opportunity to testify before you.

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

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

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

DAPA does not provide legal immigration status. Instead, it allows individuals to request deferred action, which simply is a signal that the individual is a low priority for deportation.

Deferred action gives revokable permission for an individual to be present in the United States for a

certain period of time. It does not provide the same security as a legal immigration status.

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

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

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

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

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

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

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

That interpretation looks at certain statutory sections in a vacuum and would create absurd effects.

As I stated, I do not believe that Judge Hanen should have exercised judicial review under the APA.

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

I strongly disagree with Judge Hanen's conclusion that DHS was required to use notice and comment rulemaking. The Department of Homeland Security issued a memorandum from the Secretary of Homeland Security to announce the new immigration policies. This type of memorandum is called a policy statement.

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

The question then is whether the DAPA memo really is a policy statement or whether it does not fit into that

category. The applicable test is whether the memorandum is binding on its face or as applied.

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

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

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

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

I welcome the opportunity to discuss these matters more thoroughly.

[The prepared testimony of Ms. Family appears in the appendix.]

Chairman Cruz. Thank you very much, Professor

Family.

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

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

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

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

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

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

daylight.

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

So the notion that there is giong to be a meaningful exercise at the field director office is -- well, to put it gently, is risible.

We also have a little bit of experience with the predecessor of DAPA, called DACA, where, out of hundreds of thousands of applicants, less than 3 percent, Mr. Chairman, were rejected. To me, that pretty clearly demonstrates that this is a wholesale dispensation of the law relative to a particular category of individuals, which is, of course, utterly unconstitutional and violates the President's faithful execution duty.

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

It has, first, rewritten the law. It then did not bestir itself to comply -- let us call them structuring statutes, like APA, because the whole purpose of APA, for respect, and Article I delegates some authority to Article II, which the courts have upheld since the New

Deal, it wants to cabin, to discipline that exercise by having statutes like APA that provide for a structured approach to decision-making -- notice, comment, judicial review.

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

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

So it is a horrible situation.

Chairman Cruz. Thank you, Mr. Rivkin.

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

The Federal court in ***Texas*** heard evidence that if the President's amnesty program went into effect, that just in the State of Texas, it would apply to at least 500,000

people who were here illegally and that as a consequence, when you add up the personnel costs, the facilities costs, the costs of driver's license production and all of the other costs, the 2-year price tag to the taxpayers and the citizens of Texas for the President's illegal amnesty was in excess of $103 million.

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

[The information referred to follows:]

**********COMMITTEE INSERT**********

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

Mr. Kobach. Yes. We do face similar costs and one of the reasons we cannot give you an exact number is because the Federal Government, the Obama Administration will not give us the exact names and dates of birth of the amnesty recipients. If we had those names we could ten see if these individuals are receiving leave benefits, X number of people have received a driver's license.

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

Assuming two-thirds of them get a driver's license, you are roughly talking about -- and, again, assuming agency costs, it is conservatively about $150 a driver's license, you are talking about $600,000 on drivers' licenses alone. But then if you add all of the other

services and benefits that the person can avail himself of once he has that deferred action. Then the price looks much later, I would say approximately 38 million.

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

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

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

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

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

will ask the same question and people accidentally get on the voter rolls this way.

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

Chairman Cruz. Thank you, Mr. Secretary.

Senator Coons?

Senator Coons. Thank you, Chairman Cruz.

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

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

Senator Coons. Is your mic on, Professor Family?

Ms. Family. Sorry. I thought it was.

Senator Coons. Start again, if you would.

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

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

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

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

And I just want to mention -- since Mr. Rivkin mentioned the 3 percent rejection rate. I have seen

different numbers for the DACA rejection rate. But I also want to point out that that is a rate for a different program. We do not know how the Department of Homeland Security will implement DAPA yet.

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

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

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

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

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

DAPA appears to be guidance, but the judge ruled that

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

Ms. Family. No. They have discretion. And it is tricky because if you think just from an administrative law perspective of how you would want to an agency to operate, we want to have these policy statements because we want agencies to be able to give some direction to lower level agency officials. Otherwise, the alternative option would be sort of supervisory officials would say we will give you some sort of idea of what we would like to see happen, but we have no way of transmitting that or making sure that our lower level adjudicators understand and we will just totally leave it up to each individual adjudicator to decide what they maybe think is best.

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

Senator Coons. And so to the specific point about whether individuals operating at the front line are able

to exercise discretion and whether the discretion that is legally at issue here is by those agents or by the agency as a whole, what is your answer to the latter?

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

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

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

And the agency could look at how the policy is being

implemented and decide -- they might decide to change the way that they are enforcing the law. And so I think that a policy statement leaves the agency with a lot of flexibility. And again, if we sort of take this discussion out of immigration law and just look at sort of good governance generally, policy statements serve a very important and useful purpose.

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

Chairman Cruz. Thank you.

Senator Durbin?

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

The argument they are making is there is no damage. They believe that the President's executive orders, in fact, will enhance the collection of revenue. One of the requirements of President Obama's executive order is that people come forward, register, submit themselves to a criminal background check, which, of course, would make them subject to deportation if there is a finding of

wrongdoing of a serious nature and then be given a temporary work permit.

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

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

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

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

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

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

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

This what Justice Kennedy said: "A principal feature of the removal system is the broad discretion exercised by immigration officials. Discretion in the enforcement of immigration law embraces immediate human concerns, unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime."

So if we only appropriate enough money, Ms. Family, to our agencies to, at least theoretically, deport 4 percent of the undocumented from the United States each year, does it not stand to reason that they must use discretion in choosing those who are most likely to be a harm to the United States or a threat to the United States?

Ms. Family. Yes. I think that prosecutorial discretion is inevitable in immigration law. I think we

also have to remember here that we are talking about the regulation of people. That is something that drew me to the field of immigration law. I actually practiced immigration law before I became a law professor.

And I think we need to remember that we are talking about the regulation of people here and prosecutorial discretion is always going to be necessary and humane. I think we do not want to lose sight of that, as well. And I think we also need to remember that if you are talking about prosecutorial discretion in terms of the regulation of people and where they can be, an intrinsic part of that is always going to be sanctioning someone's presence; not giving them a legal status, but sanctioning their presence.

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

Senator Durbin. Not only limited resources, but limited action by Congress, having passed a bipartisan comprehensive immigration bill in the Senate with 68 votes, sent to the House where it languished for a 1 year and a half with no action at all. And the President's response by executive order was only after the House of

Representatives and Congress had been given ample opportunity to exercise their own power under our Constitution.

And what the President is clearly attempting to do is to bring in those people, no threat to the United States, who will register, subject themselves to a criminal background check, pay taxes, and for that receive a temporary work permit.

That, to me, is not even close to amnesty.

Thank you.

Chairman Cruz. Thank you, Senator Durbin.

Senator Lee?

Senator Lee. Thank you, Mr. Chairman.

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

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

In the case of executive amnesty, of course, the Administration has gone beyond that,

beyond *Heckler*, but it does cause me to worry about whether the *Heckler* rule has come to serve as sort of a

shield, a shield behind which in any presidential administration from here forward could shield, could hide unconstitutional or illegal executive policies and hope that those policies could never be reviewed in the same way that they could otherwise if they involved not inaction, but action.

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

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

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

And the reason it is not what it is -- and if I may

briefly comment on the question of discretion here, because Judge Hanen walks through it very carefully, particularly on pages 75 and 76 of his opinion.

Look, it cannot be a sham. We have a decision by the Secretary of Homeland Security that is written in pretty mandatory terms, from an agency that staffed itself up to implement the flood of applications, where the President of the United States who says that 4 million-plus people are going to come out of the shadows.

We have 4 million-plus applications, Senator, who are going to come in to be processed by roughly 50-plus field officers. And in this situation, unlike granting of consular visas where you can look at the applicant, a very discretionary decision, you can satisfy all the criteria. You can have a return ticket, you have ties to the country you come from, the consular officer does not like the fact that you look shifty, you are sweating, or he may just think you are not trustworthy.

How is it possible to exercise meaningful discretion when 50-plus people are going to get 4 million-plus applications, knowing full well that their political masters expect virtually all of those applications to be granted?

So the problem is not with *Heckler v. Chaney*. The problem is the Administration using it incorrectly. I

have every confidence that Article III courts would look for it.

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

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

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

Senator Lee: So this, in your opinion, moves far

outside of calculated discretionary inaction contemplated under *Heckler v. Chaney*. This is calculated action in the opposite direction of the statute.

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

Ms. Family: May I add something real quick?

Senator Lee: Sure.

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

And I think if we look at this situation, I think we have got some of that going on here. We have got disagreements about how the Department of Homeland Security should be enforcing the immigration laws and that is exactly what *Heckler* wanted to protect against.

Senator Lee. Thank you, Mr. Chairman.

Chairman Cruz. Thank you, Senator Lee.

Senator Tillis?

Senator Tillis. Thank you, Mr. Chairman. I was largely planning on being here to learn amongst the

lawyers on this panel. I am the only non-lawyer you will be dealing with.

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

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

Ms. Family, you can start.

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

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

Senator Tillis. Mr. Secretary?

Mr. Kobach. Yes, thank you. I can speak directly

to this. First of all, the cases before 1996 are largely irrelevant because in 1996 Congress very specifically said that ICE agents shall place these people into removal proceedings.

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

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

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

Senator Tillis. Kuwait being another example.

Mr. Kobach. Exactly. Exactly. There is another

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

And one other point about discretion. It has been falsely -- well, I should not say falsely. Ms. Family said that there is still discretion being exercised and I do not know which agency she was talking about, but the ICE agents I represent have told a very different story in testimony before the courts.

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

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

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

fee.

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

Senator Tillis. Mr. Rivkin?

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

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

It engaged in actions that were specifically authorized by Congress, the most notable which is the extended voluntary departure. There is a fundamental difference between extended voluntary departure, which basically said you are being deported, but we are not

going to do it forcefully, you have a certain period of time to do that, and saying you can stay here and you can work.

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

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

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

But as the Senator from North Carolina and 25 minutes form my home, I think the families of the victims of three people who were murdered recently by somebody who was granted deferred action, that there is some risk and

we need to be sensible to that.

Thank you.

Chairman Cruz. Thank you, Senator Tillis.

Senator Blumenthal?

Senator Blumenthal. Thanks, Mr. Chairman.

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

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

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

arbitrary and maybe even unfair.

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

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

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

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

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

But I think we cannot lose wight of the fact that a

policy statement is an authorized procedural mechanism for an agency and quite necessary, as well. Agencies need policy statement sin order to move more nimbly and more flexibly.

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

Like anything, they may have drawbacks and there may be things about them that people do not like as much as something else, but I think that they very important and a very necessary part of the administrative process. And I think we need to think very carefully about how we are treating them.

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

In fact, I spend a lot of time explaining to immigration attorneys that they cannot expect USCIS

adjudicators to follow everything that is in a policy statement because it is a policy statement and that is what it is supposed to do.

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

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

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

Secondly, the other reason you should not -- I do not think it is correct to describe this as a guidance document because it sets up entirely new criteria. When the document -- when the directive creates a criteria

that you must be here for 5 years, these are arbitrary numbers, not necessarily bad numbers, but creating a number out of whole cloth that is not found in statute, 5 years, you have to have arrived before the age of 16. Your maximum age has to be no higher than 30. That is a policymaking document that is a directive to these people.

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

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

Mr. Rivkin. If I may briefly comment. Long ago when I practiced administrative law for a living, although not an immigration lawyer, I can assure you that

there are other venues for an agency like ICE to proceed with dispatch. They could have done an emergency final rule which would have been subject to judicial review.

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

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

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

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

because you wanted people, citizens, to have their voice.

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

Thank you.

Senator Blumenthal. What is the experience -- I presume there is experience with the November 20 memo showing how it would be implemented. And does not the policy, by its own terms, include discretion?

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

But that information is very new information. We have not seen much about it. So much of the statements we have made -- the statements we have been making about implementation have been based on the 2 years-plus of implementation of DACA.

Senator Blumenthal. But by its own terms, it

permits discretion. In fact, it virtually mandates discretion.

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

Mr. Rivkin. If I can just weigh in for 10 seconds, Senator. If we had a situation where the agency was mandated to do something, very specific criteria, and Secretary Kobach mentions, then there is completely undetermined basis for discretion.

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

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

Senator Blumenthal. Thank you very much.

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

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

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

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

And indeed I would note that, as you described the experience of your clients, the ICE agents, it brought to mind what President Obama said on February 25 when he was doing an interview with MSNBC and Telemundo, and the President said, quote, "There may be individual officers or border patrol who aren't paying attention to our new directives, but they're going to be answerable to the head of the Department of Homeland Security because he

has been very clear about what our priorities should be. If somebody is working for ICE and there is a policy and they don't follow the policy, there are going to be consequences for it."

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

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

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

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

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

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

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

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

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

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

Chairman Cruz. So am I understanding you correctly that the President's executive amnesty program is so inflexible that a violent criminal who has committed three acts of assault, two of which are against Federal law enforcement officers, has fled law enforcement, is

nonetheless forced to remain free and potentially commit more assaults?

Mr. Kobach. He was ordered, let him -- they were ordered to let him go and they were absolutely shocked.

Chairman Cruz. I think that speaks for itself.

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

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

Work authorizations can be printed only pursuant to Federal law and when Federal law prohibits someone here illegally from working, the President's order directs that work authorizations be printed nonetheless.

All of this is hinged on this wonderfully flexible

theory of prosecutorial discretion.

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

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

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

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

Ms. Family. Well -- and that is where I think we have to respectfully disagree about what the statute says. And so I -- the statute gives the Department of Homeland Security some delegated authority to decide who will get work authorization and then the Department of Homeland Security is utilizing that delegation through a

regulation to say people who get deferred action can get work authorization.

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

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

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

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

Ms. Family. So let me tell you what I would think about. I would think about -- I would look to the statute to see what the statute says in terms of what Congress has delegated to the Executive Branch.

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

going to be.

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

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

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

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

Ms. Family. Sure.

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

Ms. Family. Sure.

Chairman Cruz. Senator Coons?

Senator Coons. Thank you, Mr. Chairman. I have another commitment, so I will be fairly brief and just thank the panel of witnesses and suggest that we have had a persistent disagreement about some of the critical facts, whether there is discretion being exercised in DACA cases.

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

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

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

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

So thank you to the members of the panel and thank you, Chairman, for the opportunity.

Chairman Cruz. Thank you, Senator Coons.

Senator Blumenthal?

Senator Blumenthal. Thanks, Mr. Chairman. And thank you for giving us the opportunity to question again.

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

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

So I am having trouble understanding how that policy guidance from the Secretary of Homeland Security, the cabinet secretary responsible for this policy for the

exercise of prosecutorial discretion, is not, in effect, a mandate for discretion.

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

So maybe you can address that issue. Mr. Kobach?

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

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

And so I think the use of the word discretion repeatedly in the DAPA memo was an attempt to force the

word in there, but for -- meaning --

Senator Blumenthal. And the way that they forced the word in there artfully, that is often the way we obey the law.

Mr. Kobach. Right. But if I say --

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

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

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

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

So the practice of DACA has been zero discretion.

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

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

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

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

I would submit to you it cannot possible be meaningful discretion. If that is meaningful discretion, then the prohibition against dispensing power means

nothing. You can easily say, for example, that because of limited resources, in a post-9/11 world, FBI is not going to prosecute bank robbery and we would have a nice set of criteria which says that if you robbed the bank, but got less than this much money, you shall not be prosecuted, except that, of course, you still have discretion.

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

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

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

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

Senator Blumenthal. But the overall context includes a factor that says present no other factors that in the exercise of discretion makes the grant of deferred action inappropriate -- no other factors in the exercise of discretion.

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

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

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

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

Senator Blumenthal. I apologize, I was not here.

Mr. Rivkin. But it does not work in a situation where people apply by mail and fill out the form, because the people processing the application -- leaving political pressures aside, let us say they do not exist -- would have no opportunity to discern any of the

factors that would disqualify the application of those three criteria unless they are mind readers.

Senator Blumenthal. This is an interesting conversation and I appreciate your indulging me and your thoughtful responses.

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

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

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

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

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

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

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

These officials in this area exercise the same kind

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

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

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

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

Now, we would laugh at that. We would say that is

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

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

Mr. Kobach. But the right to work is a very valuable -- it is an authorization that many people do not have.

Chairman Cruz. Thank you very much.

Senator Blumenthal. Thank you very much.

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

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

But there is a qualitative difference here. This is not simply saying where are we going to focus our

prosecution resources first. This is affirmatively printing authorizations to violate Federal statute.

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

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

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

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

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

So this is -- this gives a bad name to prosecutorial discretion.

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

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

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

that statute or their employer the authority to violate that statute.

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

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

Chairman Cruz. Well, you are referring to Section 1324(a), page 3. But at the same time -- so your argument, in order to be correct, is that by using the words "or by the Attorney General," that Congress has, in effect, given the Attorney General the authority to allow

any person on the face of the planet the ability to work in this country.

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

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

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

Ms. Family. Well, I mean, I guess we just disagree on the interpretation of the statute, because to me, that would make the language "or by the Attorney General" superfluous. I mean, why would we need that language if it was only -- if work authorization was only permitted

by how Congress had said it was permitted under the Act?

Chairman Cruz. So I want to make sure I understand your interpretation correctly then. You believe that that phrase "or by the Attorney General" gives today the Secretary of Homeland Security the authority to allow any one of the 7 billion people on the face of the planet the authority to work in this country.

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

Chairman Cruz. But you are saying that the Attorney General -- anyone the Attorney General chooses can be granted a work authorization.

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

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

Chairman Cruz. But with respect, you have not suggested any limitation that the Attorney General could only issue work authorizations to people in the United States. You have claimed the words "or by the Attorney

General" give the Attorney General unlimited discretion to choose anyone to grant a work authorization.

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

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

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

Ms. Family. No, because, again, I disagree with the underlying premise of your question in that --

Chairman Cruz. Which premise is that?

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

Chairman Cruz. But there is nothing in what you laid out that says legally admitted to the United States,

and indeed, Professor Family, if your qualification is that the Attorney General or the Secretary of DHS can only grant work authorizations to those legally admitted in the United States, then you have just admitted that the DAPA program is directly contrary to that statute, that the 4.5 million were not legally admitted.

Ms. Family. No, no, no. I was -- I was just -- Senator, respectfully speaking, I was just referring to your hypothetical about the --

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

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

Of course, those decisions have to be rational and I think if you look at the regulation, where the Secretary of Homeland Security has made those decisions, they have made some careful decisions about who is eligible for work authorization and who is not.

Mr. Kobach. Mr. Chairman, can I comment on this

very topic?

Chairman Cruz. Secretary Kobach, sure.

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

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

The second, I do not have the statutory cite memorized, but it is the unlawful presence 10-year bar statute. Most of these DAPA individuals, by being illegally in the United States the requisite amount of time, will have accumulated enough unlawful presence that there is a 10-year bar to them getting a visa to come into the United States and work.

So there are two statutory barriers to the Secretary of Homeland Security doing what Ms. Family suggests he

could do or she could do.

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

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

Ms. Family. Well, I think that prosecutorial discretion is always guided by statutory concerns. It is always guided by rationality. Right? It has to be rational. And I think we are certainly nowhere near the situation --

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

Ms. Family. Well, I think I would need to know more about the Administration's reasons why it was doing that.

Mr. Rivkin. If I can just add, for 30 seconds. Unfortunately, for Ms. Family, if it is truly prosecutorial discretion, rationality is irrelevant.

Maybe as a political accountability matter, but as a legal matter, it is irrelevant because it is not subject to judicial review.

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

It cannot possibly mean that.

Chairman Cruz. Professor Family, let me also understand the extent of prosecutorial discretion, because not only, under the Obama Administration's terms, would it apply to immigration law, would it allow the President to grant amnesty to all 12 million people here illegally or, for that matter, would allow the President to prospectively grant amnesty to any person on the face of the planet who came illegally to this country going forward.

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

Now, I will tell you, I happen to think that is a

terrific policy, as a matter of economic policy. But I also believe in rule of law and I do not believe the President can unilaterally decree that.

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

Ms. Family. Well, I think one of the things we would need to think about is what are the congressional policies underlying the statute that delegates the authority in the first place.

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

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

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

Ms. Family. Well, in my mind, that would fail the rationality test.

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

Ms. Family. But not the citizens of any other State?

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

Ms. Family. But that is not the situation that we have here. I mean, the Department of Homeland Security is still --

Chairman Cruz. I understand it is a hypothetical.

My question -- and as you well know, having been a litigator, courts will frequently ask hypotheticals to determine the extent of a legal theory you are proffering.

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

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

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

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

Chairman Cruz. Well, then let me tweak the hypothetical. Suppose a President Lee says I am hereby directing the enforcement priorities of the United States. We will prosecute every other Federal law before we enforce any Federal environmental law. And since there are limited resources, we are not going to have

time. And President Lee also goes on television, as President Obama did, and says any Federal official who violates it, there will be consequences and employment consequences.

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

Ms. Family. Well, you are talking -- are you asking about how the Executive Branch would -- how they would prioritize in terms of order of things?

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

Ms. Family. No. And I think I said earlier I do not think a President could just say I am never going to enforce environmental law or I am never going to enforce immigration law. But, again, I do not think that is what we have going on today.

Chairman Cruz. Well, how about could a President issue 4-year temporary permits to violate Federal environmental law, print it up, we are deferring enforcement of all of these, we are printing you an environmental polluter pass, you may use this -- now, this is temporary. It is purely deferred. We might one

day come back and enforce the law. But for the 4 years the President leads the Administration, you have this authorization to violate the law. Would that be permissible?

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

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

For my final set of questions, I would just like to ask Mr. Rivkin. You talked about the assertion of Federal power of this President and I am reminded of what President Obama said not too long ago when he was asked if he had the authority to grant amnesty and his response was "I am not an emperor." Those are not my words, those are Barack Obama's words.

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

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

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

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

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

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

appropriations rider or capping the budget overall.

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

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

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

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

So it is -- in my opinion, you cannot criticize this

enough. You cannot be alarmed about this enough no matter what your political philosophy, no matter what your ideology or party affiliation is.

Chairman Cruz. Thank you very much.

Senator Blumenthal, do you have any additional questions?

Senator Blumenthal. Yes. I would point out, I think the point has been made before that this exercise of discretion in applying the law dates back to I think the 1960s and deferred action itself goes back to 1975.

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

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

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

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

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

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

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

We will keep the record open for 1 week for any member who wishes to provide written questions. We would ask the witnesses to respond to those questions in a timely manner.

The hearing is now adjourned.

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

C O N T E N T S

PAGE

STATEMENT OF:

THE HONORABLE TED CRUZ
A United States Senator
from the State of Texas 2

THE HONORABLE CHRISTOPHER COONS
A United States Senator
from the State of Delaware 6

A Panel Consisting of:

DAVID B. RIVKIN, JR.
Partner
BakerHostetler
Washington, DC 12

KRIS W. KOBACH
Secretary of State
State of Kansas 18

JILL E. FAMILY
Professor of Law and Director of the
Law and Government Institute
Widener University School of Law
Harrisburg, Pennsylvania 23