

The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action

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INTRODUCTION

On November 19, 2014, the Department of Justice's Office of Legal Counsel issued an opinion entitled "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others."¹ The opinion justified two new initiatives by the Department of Homeland Security. The first initiative dealt with the prioritization of removal of certain categories of aliens unlawfully present in the United States. The second initiative established a deferred action program for the parents of children categorized as U.S. citizens or lawful permanent residents (LPRs).²

OLC's opinion is of great practical importance for both general and specific reasons. As a general matter, the framework it instituted for gauging whether a particular exercise of enforcement discretion is consistent with relevant constitutional principles is likely to have continuing importance in all areas where administrative agencies exercise discretion.³ As a specific matter, it seeks to place the Obama Administration's immigration initiatives on firm legal footing by justifying those broad programs as valid exercises of enforcement discretion.

The opinion founders, however, on the complexities of immigration law, and thus its specific application of the opinion's framework to the Executive's initiatives is ultimately unconvincing.⁴ The opinion overstates the degree to which the Immigration and Nationality Act (INA)⁵ is concerned with family unification, misapprehends the extraordinarily narrow scope of relief provided to the parents of U.S. citizen and LPR children under existing law, and misstates the limited scope of prior congressional acquiescence to deferred action programs. These flaws undermine the opinion's key conclusion that DHS's

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1. The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter OLC Opinion].

2. The statutory term "alien" will be used in this article, and is defined to include "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

3. U.S. CONST. art. II, § 3.

4. Cf. Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1310 (2006) ("OLC is staffed with legal generalists, not individual-rights experts, and they typically lack particular familiarity with the institutional conditions that foster or, alternatively, help to prevent rights violations.").

5. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.).

deferred action programs are consistent with congressional policy, and thus also call into question the ultimate judgment that these initiatives are permissible exercises of enforcement discretion.

This Article's scope is narrow and addresses only the question of whether or to what extent deferred action for the parents of U.S. citizen and LPR children is consistent with congressional policy as currently embodied by the INA.⁶ Part I reviews the two most recent deferred action programs, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA).

Part II turns to OLC's opinion on the legality of DAPA, analyzing its conclusion that DAPA is consistent with congressional policy. First, OLC contends that DAPA is an extension of congressional policy favoring family unity. Second, OLC explains that Congress's past acquiescence in or extension of administrative deferred action initiatives supports DAPA.⁷ Both propositions are premised on misleadingly superficial readings of congressional policy in this realm, and fail to justify DAPA.

Part III critiques OLC's conclusions on these points, while placing the all-important flesh on the skeletal version of immigration law presented in that opinion. Previous instances of deferred action afforded relief only in two situations: either (1) the alien had an *existing* lawful presence, or (2) the alien had the *immediate prospect* of lawful residence or presence. In each case, deferred action acted as a temporary bridge from one status to another, where benefits were construed as arising immediately post-deferred action. These qualifications bring the deferred action within the ambit of congressional policy embodied in the INA. However, DAPA incorporates neither qualification. With DAPA, deferred action serves not as a bridge for beneficiaries between two approved statuses, but as a tunnel to dig under and through the INA.

DAPA represents a fundamental rewrite of the immigration laws that is inconsistent with the congressional policy currently embodied in the INA. To the extent that DAPA's constitutionality rests on congressional acquiescence, the administration has failed to make its case.

I. DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY

On November 20, 2014, the Department of Homeland Security (DHS), through memos by Secretary Jeh Johnson, announced two related prosecutorial discretion initiatives. The first, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," set out a system of enforcement prioritization and explained how Immigration

6. Part II of this series will address the constitutionality of DAPA with respect to the Take Care Clause. See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. OF LAW & POL. 199 (2015).

7. Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014), <http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> ("The appeal of this approach is that Congress, not the President, appears to make the tough value judgments. The President simply extracts those underlying value judgments out of the statute through sophisticated legal analysis.").

and Customs Enforcement officials should exercise their discretion in the pursuit of these priorities.⁸ The memo established a three-tier priority system. Aliens who constitute threats to national security, border security, and public safety—including aggravated felons, gang members, and aliens attempting to enter the United States illegally—were placed in the first priority category.⁹ Certain misdemeanants, serial immigration violators, and a narrow class of others with immigration violations were placed in the second priority category.¹⁰ In the last priority category, DHS placed those whose final orders of removal were issued on or after January 1, 2014.¹¹ Despite establishing this prioritization scheme, the memo also indicated that discretion may be exercised to deprioritize an alien’s removal based on the conclusion that he or she, considering the totality of relevant factors, should not be deemed an enforcement priority.¹² This discrete prioritization policy is outside the scope of the present article, but is important because falling outside of DHS’s stated enforcement priorities constitutes one of the eligibility factors for relief under the second initiative, Deferred Action for Parental Accountability (DAPA).¹³

Through its memo concerning DAPA, DHS attempted to place the program in historical and legal context based on its 2012 deferred action program, Deferred Action for Childhood Arrivals (DACA).¹⁴ Like DACA before it, the DAPA memo asserts that “[a]s an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency’s discretion.”¹⁵ The memo stresses that “[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specific period of time, an individual is permitted to be lawfully present in the United States.”¹⁶

The DAPA memo first expanded operation of DACA, removing the prior age ceiling (thirty years of age under the 2012 memo), extending the authorized period of a DACA

8. Memorandum from Jeh Johnson, Sec’y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Prosecutorial Discretion Memo].

9. *Id.* at 3.

10. *Id.* at 3–4.

11. *Id.* at 4.

12. *See id.* at 3–4 (noting considerations that should govern an exercise of discretion to deprioritize removal in each of the three priority categories).

13. Memorandum from Jeh Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo].

14. *Id.* at 2. For legal criticism of the earlier policy, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (arguing that DACA runs afoul of the Take Care Clause’s requirement that the President faithfully execute the laws), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014) (“However attractive it might be as a matter of policy, the DACA program appears to violate the proper respect for congressional primacy in lawmaking that should guide executive action, even when substantial exercises of prosecutorial discretion are inevitable.”).

15. DAPA Memo, *supra* note 13, at 2.

16. *Id.*

grant from two to three years, and moving the date-of-entry requirement forward from June 2007 to January 1, 2010.¹⁷ Second, DAPA established a new class of eligible beneficiaries for deferred action. DACA was limited to the so-called “Dreamers”—certain minors who entered the country without authorization, regardless of whether the child was related to a citizen. DAPA expanded coverage to the parents of minor children¹⁸ who are U.S. citizens or lawful permanent residents. Such individuals will be eligible for deferred action if they

have continuously resided in the United States since before January 1, 2010; are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with [United States Citizenship and Immigration Services]; have no lawful status on the date of this memorandum; are not an enforcement priority as reflected in the November 20, 2014 [prosecutorial discretion memorandum], and present no other factors that, in the exercise of discretion, makes [sic] the grant of deferred action inappropriate.¹⁹

The memorandum also indicated that DHS officers have discretion to grant deferred action upon consideration of all relevant factors, including the eligibility criteria: “Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”²⁰

II. THE OFFICE OF LEGAL COUNSEL’S OPINION ON THE LEGALITY OF DAPA

In advance of its announcement of the two new initiatives, the Obama Administration made public a legal opinion from the Office of Legal Counsel. The opinion concluded, “DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS’s discretion to enforce the immigration laws.”²¹ Extrapolating from Supreme Court

17. *See id.* at 3–4.

18. “Child” is a term of art under the INA and is narrower than its colloquial definition. With certain qualifications that are irrelevant to the scope of this article, “[t]he term ‘child’ [as used in the family-based immigration system] means an unmarried person under twenty-one years of age.” 8 U.S.C. § 1101(b)(1) (2012). Biological children over twenty-one years of age are termed “sons” or “daughters” for the purposes of the family-based immigration system. *See, e.g.*, 8 U.S.C. § 1153(a)(1) (2012) (visa preference category for the “[u]nmarried sons and daughters of citizens”).

19. DAPA Memo, *supra* note 13, at 4.

20. *Id.* at 5.

21. OLC Opinion, *supra* note 1, at 2. The opinion also concluded that the Administration’s proposed extension of deferred action to the parents of those granted deferred action under DACA “would not be a permissible exercise of enforcement discretion.” *Id.*

and courts of appeals precedent regarding the scope of enforcement discretion countenanced by the Take Care Clause, the opinion established a four-factor inquiry to ascertain whether a particular discretionary initiative comports with relevant constitutional and legal principles. “First, enforcement decisions should reflect ‘factors which are peculiarly within [the enforcing agency’s] expertise.’”²² Second, the exercise of discretion cannot “effectively rewrite the laws to match [the Executive’s] policy preferences.”²³ Practically, this means that “an agency’s enforcement decisions should be *consonant with, rather than contrary to*, the congressional policy underlying the statutes the agency is charged with administering.”²⁴ Third, and as an effective corollary to the second factor, the Executive “cannot . . . ‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”²⁵ Fourth, “non-enforcement decisions are most comfortably characterized as [proper] exercises of enforcement discretion when they are made on a case-by-case basis.”²⁶ The first factor is not in dispute, and Part II of this series analyzes the third and fourth elements with respect to the Take Care Clause.²⁷ This article will focus primarily on the second factor.

After reviewing the history of deferred action, including its extra-statutory genesis and incidences of congressional acquiescence in or extension of deferred action initiatives, the OLC opinion attempted to strike a middle course in its assessment of the constitutionality of such programs. Deferred action programs cannot be deemed per se impermissible, the opinion stated, because congressional authorization and recognition of such programs indicate *some* level of consistency with extant congressional immigration policy.²⁸ But despite the permissibility of such programs at a certain level of generality, the Executive does not possess a blank check to promulgate deferred action initiatives.²⁹ The OLC opinion acknowledged that “deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion.”³⁰ Acknowledging the tenuous ground on which these policies rest, the opinion stressed that a “particularly careful examination is needed to ensure that any proposed expansion of deferred action” beyond that which was done by previous executive actions “complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it.”³¹

DHS offered two justifications for DAPA: (1) that “severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully pre-

22. *Id.* at 6 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (alteration in original).

23. *Id.*

24. *Id.* (emphasis added).

25. *Id.* at 7 (quoting *Chaney*, 470 U.S. at 833 n.4) (alteration in original).

26. *Id.*

27. *See* Blackman, *supra* note 6.

28. OLC Opinion, *supra* note 1, at 23.

29. *Id.* at 24 (“Congress’s apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented.”).

30. *Id.*

31. *Id.*

sent in the United States”;³² and (2) that “the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country.”³³ DHS’s first proffered justification, “the need to efficiently allocate scarce enforcement resources,” was deemed by OLC to be “a quintessential basis for an agency’s exercise of enforcement discretion.”³⁴

OLC also found the second justification compelling. First, it concluded that “determining how to address such ‘human concerns’ in the immigration context is a consideration that is generally understood to fall within DHS’s expertise.”³⁵ Second, and more fundamentally, OLC found that the “second justification . . . also appears consonant with congressional policy embodied in the INA.”³⁶ The opinion referenced numerous provisions concerned with family unity. Through (1) the family-based immigrant visa system and (2) cancellation of removal (a form of relief available to certain non-lawful permanent residents), Congress chose, in certain cases, to permit aliens to remain in the United States where they can demonstrate a qualifying family relationship with a U.S. citizen or lawful permanent resident.³⁷

Additionally, OLC reasoned that “because the temporary relief DHS’s proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS’s proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits.”³⁸ Regardless, the opinion also put great weight on the fact that the INA *does* offer avenues to residency and citizenship through (1) the visa-preference system and (2) cancellation of removal. The opinion stressed that those covered by DHS’s proposed program would have the possibility of pursuing avenues expressly authorized by the INA at a future date. In other words, there would be a *prospective possibility* of legalizing the status of the class covered by DAPA if an applicant received a family-based visa or had her removal cancelled.³⁹ (As discussed *infra*, OLC grossly overstates the probability of these unlikely extraordinary remedies.)

Last, and most importantly, OLC looked to consistency with congressional policy as a significant touchstone of the program’s legality. “[T]he proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has

32. *Id.* at 25.

33. *Id.*

34. *Id.*

35. *Id.* at 26.

36. *Id.*

37. *Id.* at 26–27. There is also a form of cancellation of removal for lawful permanent residents, but this relief has no relevance to the questions posed by DAPA and its eligibility criteria are, in any event, materially different from those governing cancellation of removal for non-lawful permanent residents. Compare 8 U.S.C. § 1229b(a) (2012) (providing for cancellation of removal for “certain permanent residents”), with 8 U.S.C. § 1229b(b) (2012) (providing for cancellation of removal for “certain nonpermanent residents”).

38. OLC Opinion, *supra* note 1, at 27.

39. *See id.* at 27–28.

implicitly approved in the past”⁴⁰ OLC thus recognized that there has not been explicit approval, so it must look to implicit approval. This acquiescence, the opinion continued, “provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.”⁴¹ In effect, OLC argued, DAPA would comport with other forms of deferred action to which Congress has acquiesced.

Based on these considerations, the opinion concluded that DAPA “is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process.”⁴² This conclusion, coupled with the expertise DHS possesses in relation to resource allocation, led OLC to opine that DAPA represents “a permissible exercise of DHS’s enforcement discretion under the INA.”⁴³

III. DAPA IS INCONSISTENT WITH CONGRESSIONAL INTENT AND POLICY EMBODIED IN THE INA

OLC’s conclusion that DAPA is consistent with congressional policy embodied in the INA is premised on two fundamental errors. First, its review of existing statutory law regarding the relief available to the parents of U.S. citizen and lawful permanent residents is superficial and ignores the very limited nature of any “family unity” policy present in the INA. Congress has not treated all family relationships as equally important for purposes of unification. Specifically, the parents of U.S. citizens and lawful permanent residents historically have not been beneficiaries of congressional largesse in the allocation of visas or the granting of relief under the INA.

Second, OLC’s conclusion that Congress has acquiesced in similar deferred action programs in the past is demonstrably false. The programs cited all countenanced some form of immediate relief, with deferred action serving as a temporary bridge to permanent residence or lawful presence. In contrast, any permanent relief that a DAPA-eligible alien might receive will be, under existing law, based on contingencies and the mere passage of time; many will never become eligible for relief, while others will be no more eligible at the expiration of DAPA than they were on the day they applied.

A. THE INA’S POLICY TOWARD FAMILY UNIFICATION FOR PARENTS OF CITIZENS AND LAWFUL PERMANENT RESIDENTS

1. Congressional Text and History Regarding Family Unity

There is no question that a policy of family unification runs throughout many provisions of the INA. Family-based immigration is perhaps the primary route to legal resi-

40. *Id.* at 29 (emphasis added).

41. *Id.* at 29.

42. *Id.* at 31.

43. *Id.*

dency for intending immigrants. Under this system, a finite number of visas are allocated annually to four preference categories: (1) the unmarried sons and daughters of citizens; (2) the spouses and children of lawful permanent residents and the unmarried sons and daughters of lawful permanent residents; (3) the married sons and daughters of citizens; and (4) the brothers and sisters of citizens.⁴⁴ The immediate relatives of citizens, defined as the “children, spouses, and parents of a citizen”⁴⁵—the traditional nuclear family—are treated even more favorably, as these individuals are not subject to the yearly numerical limitations on visas issued.⁴⁶

Beyond family-based immigrant visas, the INA also contemplates many forms of relief from removal, or waivers of removability, based on the alien having a qualifying family relationship. For instance, cancellation of removal is available to certain non-lawful permanent residents who have a spouse, parent, or child who is a citizen or lawful permanent resident.⁴⁷ Inadmissibility under 8 U.S.C. § 1182(a)(6)(C)(i) for seeking to procure or procuring a visa or immigrant admission “by fraud or willfully misrepresenting a material fact” may be waived by the Attorney General if the alien is “the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence.”⁴⁸ An alien’s inadmissibility based on membership in or affiliation with a totalitarian party or having “a communicable disease of public health significance” can also be waived by the Attorney General if, *inter alia*, a qualifying family relationship is established.⁴⁹ Congress even vested the Attorney General with the discretion to waive some criminal grounds of removability “in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States.”⁵⁰

The policy of family unity even extends to individuals who would not otherwise be eligible for any immigrant status or admission on their own. A spouse or child who is not independently entitled to issuance of a visa is nonetheless entitled to the same status as the primary visa beneficiary spouse or parent, “if accompanying or following to join, the spouse or parent.”⁵¹ Similar derivative beneficiary status is provided to the spouses and children of aliens who are granted asylum, even if they would not be eligible for any re-

44. 8 U.S.C. § 1153(a)(1)–(4) (2012).

45. 8 U.S.C. § 1151(b), (b)(2)(A)(i) (2012).

46. *See id.*

47. *See* 8 U.S.C. § 1229b(b)(1)(D) (2012) (removal can be cancelled where “removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” (emphasis added)).

48. 8 U.S.C. § 1182(i)(1) (2012).

49. *See* 8 U.S.C. § 1182(a)(3)(D)(iv) (2012) (providing that “[t]he Attorney General may, in the Attorney General's discretion, waive the application” of 8 U.S.C. § 1182(a)(3)(D)(i) (declaring immigrants affiliated with any totalitarian party inadmissible) if the alien “is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States . . . for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States”); 8 U.S.C. § 1182(g)(1)(B) (2012) (providing for a waiver of the ground of inadmissibility at 8 U.S.C. § 1182(a)(1)(A)(i) (immigrants determined to have a communicable disease of public health significance) “in the case of an alien who . . . has a son or daughter who is a United States citizen”).

50. 8 U.S.C. § 1182(h)(1)(B) (2012).

51. *See* 8 U.S.C. § 1153(d) (2012).

lief under the INA.⁵² Neither of these provisions, however, provides derivative beneficiary status to the *parent* of an alien, where the child has qualified as the primary beneficiary of relief or obtained a visa.⁵³

Generally speaking, the INA contemplates many avenues of relief for those with qualifying family relationships. However, the law does not extend nearly as far as OLC stated. Consider the family-based immigrant visa system. It is true that the spouses and children of citizens are treated preferentially, as no limits are placed on the allocation of visas to this class of intending immigrant. However, Congress has imposed strict limits on the allocation of visas to the *parents* of U.S. citizens—the very people that fall within the ambit of DAPA. Specifically, the INA prevents a citizen child from petitioning for a visa on the parent’s behalf until the child turns 21.⁵⁴ This is a significant statutory bar that severely undercuts OLC’s assertion that the statute takes an unbounded view of family unity as a policy. This gap period of 21 years means that the parents of U.S. citizen children may be, and often are, removed from the United States. In addition, aliens unlawfully present for more than a year are subject to a ten-year bar before applying for an adjustment of status.⁵⁵ Further, they may need to leave the country in order to obtain consular visa processing abroad.⁵⁶ These all-too-common outcomes are at odds with OLC’s all-too-rosy and overbroad vision of family unity.

Similar restrictions exist for the family-based visa preference categories. Family unity is reflected to a degree in these categories—but to a relatively narrow degree. First, as noted earlier, only certain qualifying relationships are countenanced.⁵⁷ Those that fall outside the statutory categories, including the parents of lawful permanent residents (also DAPA beneficiaries), have no right to obtain a visa based on the asserted family relation-

52. See 8 U.S.C. § 1158(b)(3) (2012) (“A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join such alien.”).

53. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 523 (2009) (“As a matter of law, the immigration agencies are not authorized to grant a visa to a person who does not satisfy the admissions criteria or who is subject to one of the grounds of inadmissibility.”).

54. 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (“[T]he term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.”).

55. 8 USC § 1182(a)(9)(B)(i)(II) (“Any alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s departure or removal from the United States, is inadmissible.”).

56. Pursuant to 8 U.S.C. § 1225(a), “[a]n alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission.” If the alien is an applicant for admission—has not been lawfully “admitted” to the United States—he or she would first have to pursue consular processing abroad. See *Consular Processing*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> (last visited Apr. 22, 2015).

57. 8 U.S.C. § 1153(a)(1)–(4) (2012) (listing qualifying family relationships for purposes of the family-based immigration system, as well as the annual allocation of visas available to each category).

ship—ever. The Supreme Court recently reaffirmed this conclusion.⁵⁸

Second, even when an alien can establish that he falls within the bounds of a preference category, only a limited number of visas are available each year. Further, wait times for specific nationalities in certain of the four preference categories can stretch for decades.⁵⁹ DAPA, in contrast, operates equally, without regard for the nationality of the alien.⁶⁰ These twin limitations mean that family unity through the immigrant visa system will be an impossibility for most, a dream for some, and likely a prolonged slog for the remainder.

A broad conception of family unity is even less consistent with the relief provisions of the INA. Cancellation of removal requires that the non-lawful permanent resident establish that his removal “would result in exceptional and extremely unusual hardship” to his qualifying citizen or permanent resident relative.⁶¹ This is an onerous burden that is rarely met in practice. As a point of comparison, DACA and DAPA require *no* showing of any hardship. Moreover, Congress has explicitly capped annual grants of cancellation of removal at four thousand, meaning that many aliens may not obtain relief even if otherwise statutorily eligible.⁶² Millions of potential DAPA beneficiaries could never realistically seek relief within these strict statutory caps.⁶³

58. *See* *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (rejecting expansive construction of 8 U.S.C. § 1153(h)(3) because it would include relationships that Congress has never recognized “as warranting a family preference”).

59. *See, e.g.*, U.S. DEP’T OF STATE, VISA BULLETIN FOR DECEMBER 2014 (2014), *available at* <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-december-2014.html>. For example, visas are immediately available for the unmarried sons and daughters of Mexican lawful permanent residents only for those with a priority date (the date a petition was filed with USCIS) of October 1, 1994 or earlier, whereas for most other nationalities the priority date that confers immediate visa availability is February 22, 2008. In other words, immigrants from certain countries will have to wait significantly longer for a visa than will immigrants from other countries.

60. That DAPA applies equally to all nations makes it more difficult to square with the President’s broad powers over foreign affairs. *See* U.S. CONST. art. II, § 2; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936) (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”). Previous presidents have used deferred action for humanitarian purposes, targeting aliens from specific countries for specific foreign policy goals. For example, in 1990, following the Tiananmen Square massacre, President George H.W. Bush deferred the prosecution of Chinese nationals who were in the United States at the time of the massacre in Beijing. *See* Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990). Two years later, Congress ratified that order with the Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 (1992). These and other similar exercises of executive action are bolstered by the President’s foreign affairs powers. In contrast, DAPA, which treats unlawful aliens from Mexico and Canada alike, makes no pretense of relying on the President’s constitutional authority over foreign affairs. The entirety of the OLC opinion is based on domestic authority.

61. 8 U.S.C. § 1229b(b)(1)(D) (2012).

62. 8 U.S.C. § 1229b(e)(1) (2012) (“[T]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.”).

63. *Cf.* David A. Martin, *Concerns About a Troubling Presidential Precedent and OLC’s Review of Its Validity*, BALKINZATION (Nov. 25, 2014, 9:30 AM), <http://balkin.blogspot.com/2014/11/concerns-about->

Other waivers of removability also require a showing of “extreme hardship” to the qualifying relative.⁶⁴ This standard, a significant statutory stumbling block, carries a burden nearly as onerous as the statutory requirements for establishing eligibility for cancellation of removal. And even if the statutory eligibility criteria can be met, these forms of relief also require a favorable exercise of the agency’s discretion; a waiver could be denied for any number of reasons, including past immigration violations, non-disqualifying criminal convictions, or poor moral character.⁶⁵

This is, again, not to say that the INA does not embody a certain policy of family unity. The provisions reviewed here all indicate congressional intent to extend benefits to aliens with certain qualifying family relationships, while withholding those benefits from other aliens who lack such relationships. But this policy is quite limited in scope, and places several statutory hurdles before aliens who seek to obtain benefits pursuant to these provisions. These include a statutory cap on the allocation of visas under the preference categories and the statutorily imposed high burden of establishing exceptional and extremely unusual hardship to a qualifying relative before removal will be cancelled. The bottom line is that congressional policy regarding family unity is narrow and circumscribed by onerous eligibility criteria. The reality of congressional policy on this point is not consistent with OLC’s appeal to a broad conception of family unity.⁶⁶ DAPA’s policy of immediate relief for parents of citizens or LPRs without *any* showing of hardship cannot be squared with the labyrinth Congress designed for other attempts to unify families.

2. Deferred Action for Parents of U.S. Citizens

Despite Congress’s decision to create this distinct scheme for parents of citizens seeking to immigrate based on the citizenship of their child, DAPA facilely grants deferred

troubling-presidential.html (“The [OLC] opinion also finds justification in a form of relief from deportation called cancellation of removal, which OLC says ‘offers the prospect of receiving [LPR] status immediately’ (pp. 27-28). This is remarkably misleading. In 1996 Congress greatly tightened the standards for cancellation, which, with minor exceptions, is available only from an immigration judge in removal proceedings. Mere relationship to a US citizen or LPR family member is not enough. The applicant has to prove that removal would cause ‘exceptional and extremely unusual hardship’ to the family member (OLC even misstates and softens this test, p. 27). Congress also capped grants of cancellation at four thousand a year. A large backlog has developed. By congressional design, there is nothing immediate about cancellation relief.”)

64. *See, e.g.*, 8 U.S.C. § 1182(h)(1)(B) (2012) (authorizing waiver “if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien”); 8 U.S.C. § 1182(i)(1) (2012) (requiring a showing of “extreme hardship to the citizen or lawfully resident spouse or parent of such alien”).

65. *Matter of Mendez*, 21 I. & N. Dec. 296, 299–301 (B.I.A. 1996) (en banc) (listing factors to be considered in the exercise of discretion).

66. *See* Peter Margulies, President Obama’s Immigration Plan: Rewriting the Law, LAWFARE BLOG (Nov. 23, 2014, 4:15 PM), <http://www.lawfareblog.com/2014/11/president-obamas-immigration-plan-rewriting-the-law> (“Effective legal guidance would have acknowledged Congress’s painstaking efforts to deter undocumented folks from leveraging post-entry US citizen children. Instead, OLC breezily justifies the award of precious benefits like work authorization by touting undocumented parents’ ‘prospective entitlement to lawful immigration status.’”).

action to this disfavored class of aliens. In this sense, DAPA vitiates Congress's stated preference for parents of citizens to wait for their relief. To be sure, the parent will not receive any technical legal status until the point contemplated by the statute. Yet DAPA acts to circumvent the consequences of this statutory provision. Ensuring that citizen children cannot petition for their parents until they reach the age of majority serves Congress's end. DAPA frustrates this purpose.

Perversely, OLC specifically referenced the desire to evade operation of this statutory provision as a point *in favor* of the program: "The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period"—that is, the period until the citizen child turns 21 years of age.⁶⁷ While keeping families together appeals to humanitarian concerns, DAPA is at odds with the limited policy Congress deliberately designed.⁶⁸ The statute not only contemplates possible separation during the minority of the citizen child, it may even require it before a visa is granted, as most parents would likely have to depart and proceed through consular visa processing abroad. Accordingly, the operation of the statute is in tension with DAPA's intent to eliminate *any* possible separation in the interim between the birth of a citizen child and the point at which that child may file an immediate relative petition on behalf of the parent.

On this point, DAPA is also contrary to congressional intent. In 1965, parents of citizens were added to the category of "immediate relatives."⁶⁹ Prior to the enactment of the 1965 Act,⁷⁰ parents were subject to strict numerical limitations regarding visa availabil-

67. OLC Opinion, *supra* note 1, at 29.

68. OLC's view of DAPA's operation resembles the operation of the classic property topic, the Rule Against Perpetuities. As canonically expressed by Professor John Chipman Gray, the Rule provides that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (Roland Gray ed., 4th ed. 1942). In short, the Rule prevents the transfer of property interests to people too far into the future. Between the grant of the property in the present and the vesting of the interest in the future, a lot of things can happen in between. Many of the problems inherent with the Rule Against Perpetuities exist for DAPA with respect to the parents of citizens. First, the parent needs to wait until the child reaches twenty-one years of age, which is not guaranteed. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes.") (quoting Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789)). Second, the child needs to petition for a visa for the parent. There can be many unpredictable factors that counsel against granting such a visa. Third, the parent will likely need to leave the United States and apply at the consulate in his or her home country for re-entry. Finally, there is no guarantee that even after all of these steps happen, the parent will receive a visa—and if she does it will take many years, potentially spent apart from the child. A lot of things can happen to prevent the interest from vesting. A rule similar to the Rule Against Perpetuities could be stated to assess the validity of OLC's reasoning: "The deferred action is not valid unless a visa must vest, if at all, not later than twenty-one years after a citizen in being at the creation of the deferred action." Under this rule, DAPA fails, as there is hardly any guarantee that the parent of a citizen will eventually be able to receive a visa.

69. *See* S. REP. NO. 89-748, at 3329 (1965) (noting that one purpose of the 1965 Act is to provide for the immigration of the parents of adult U.S. citizens without numerical limitation).

70. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (current version in scattered sections of 8 U.S.C.).

ity,⁷¹ just like the current preference categories, providing some indication of the lower priority parents have traditionally received under the INA. Nonetheless, in shifting parents into the immediate relative category, Congress explicitly *rejected* a draft that would have permitted a petition to be filed regardless of the age of the citizen child.⁷² Instead, Congress enacted the current provision that disallows petitioning by a minor child.⁷³ In fact, both the House and Senate reports indicate an intent to permit only *adult* citizen children to petition on behalf of the citizen parent.⁷⁴

Congress could have permitted the filing of a visa petition on behalf of a parent regardless of the age of the child. Such a statute would have avoided the possibility that a citizen child would be separated from his or her parents or forced to return with the parent to the parent's country of nationality. As the text of the statute indicates, it did not do so. But further, Congress also *rejected* a provision that would permit a petition to be filed by a minor child on behalf of an alien parent.⁷⁵ The operation of DAPA is thus contrary not only to the text of the statute, which contemplates only a limited petitioning mechanism for the parents of citizen children, but also to congressional intent, as evidenced by Congress's explicit rejection of the exact type of expansive family unity principle that DAPA implements administratively.

3. Deferred Action for Parents of Lawful Permanent Residents

The same inconsistency in DAPA is implicated even more strongly by permitting broad deferred action for the parents of lawful permanent resident children. Unlike the

71. See S. REP. NO. 89-748, at 3332 (1965) ("It is to be noted that parents of U.S. citizens are presently eligible for second preference status under the quotas, but will hereafter be permitted to enter without numerical limitation.").

72. *Faustino v. INS*, 302 F. Supp. 212, 215–16 (S.D.N.Y. 1969) (reviewing hearing colloquy between Senators Ervin (NC) and Kennedy (NY) rejecting a draft provision that would have included parents of U.S. citizens as "immediate relatives" regardless of the age of the citizen child); *id.* at 216 ("Senator ERVIN. I agree with you, because I think that this provision is unwise. Foreigners can come as visitors and then have child [sic] born here, and they would become immediately eligible for admission would they not, as parents of this child as now worded? Senator KENNEDY of New York. That is right. I think it should go back as it was."); *id.* at 215 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 74–75 (1957) ("Absent this classification, wholesale avoidance of the established limitations would be possible by means of the very device employed in this case (whether unwittingly or not), i.e., an alien expectant mother arrives in this country as a visitor, during her stay the 'citizen' is born, and shortly thereafter, a petition by the new citizen for permanent resident status of the mother and other 'immediate relatives.' To grant * * * this form of relief upon the accident of birth in the United States of their son would be to deprive others, who are patiently awaiting visas under their already oversubscribed quotas.")). Senator Robert Kennedy would later become the Attorney General. Senator Sam Ervin would later chair the Senate Watergate Committee. Assistant Attorney General Norbert Schlei suggested an amendment that restored the language, pronouncing the change necessary "to preclude an inadvertent grant of . . . immigrant status to aliens to whom a child is born while in the United States." *Hearings Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary on S. 500*, 89th Cong. 270 (Feb. 10, 1965).

73. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (permitting only citizen children over the age of twenty-one to petition on behalf of their parents).

74. See S. REP. NO. 89-748, at 3332 (1965) ("In order that the family unity may be preserved as much as possible, parents of adult U.S. citizens, as well as spouses and children, may enter the United States without numerical limitation.").

75. See *Faustino*, 302 F. Supp. at 215–16.

parents of citizens, however, the parents of LPRs are a class of alien to which Congress has *never* contemplated providing special preference under the INA. They have not been included as one of the visa preference categories under the family-based immigration system, and thus they are not eligible to obtain visas as primary beneficiaries under that system.⁷⁶

These omissions are important; the Supreme Court has placed significant weight on the fact that a relationship that has not been recognized by Congress does not warrant preferential treatment under the INA.⁷⁷ Congress's non-recognition of parents of LPR children reveals a chasm between the avenues of relief Congress has provided and the deferred action program the Executive has promulgated. Even if the parent of a citizen can eventually be the beneficiary of a visa petition when the child reaches twenty-one years of age, the parent of an LPR can *never* be the primary beneficiary of a visa petition based on that relationship, unless the status of the child changes.

OLC attempts to sidestep these concerns in two unconvincing ways. First, it notes the possibility that the permanent resident child *could* eventually obtain citizenship and then petition for their parent as an immediate relative, assuming the citizen child had reached the age of twenty-one.⁷⁸ But the contingent possibility that at some future point an alien in this class *might* be eligible to obtain an immigrant visa is a weak basis on which to rest a claim of consistency.⁷⁹ This eventuality is too far attenuated from Congress's policy embodied in the INA. Moreover, it is difficult to envision the logical stopping point of this argument. There are countless other classes of alien that are only one or two steps removed from possible eligibility to obtain a visa. Anything could happen; but it cannot be the case that a simple contingent future possibility of relief is enough to engage deferred action until that contingency occurs.

As an alternate rationale, OLC notes the provision of cancellation of removal and argues that this also indicates a viable avenue to relief and legalization.⁸⁰ Yet this argument is remarkably disingenuous for two important reasons. First, statutory eligibility criteria are onerous and rarely met in practice. In 2013, the last full year for which statistics are currently available, only 3,625 applications for cancellation of removal were granted for those non-lawful permanent residents subject to the annual cap.⁸¹ Only the most compelling cases of aliens will be able to establish *statutory* eligibility for this form of relief. This must be contrasted with a virtually automatic relief based on *executive* eligibility factors. The replacement of these statutory stumbling blocks with a presidential rubber stamp is inconsistent with congressional design. And even the individuals who can overcome those stumbling blocks must still receive leniency from the Executive Branch in the form of a favorable exercise of the Attorney General's discretion. Second, even assuming

76. See 8 U.S.C. § 1153(a)(1)–(4) (defining visa preference categories, which include no category for the parents of lawful permanent residents).

77. See *Cuellar de Osorio*, 134 S. Ct. at 2207.

78. See OLC Opinion, *supra* note 1 at 27.

79. Under the adapted Rule Against Perpetuities, *supra* note 68, this deferral is void, as the interest will *never* vest—parents of LPRs will never be eligible for a visa, unless the LPR first becomes a citizen.

80. See OLC Opinion, *supra* note 1, at 27.

81. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK, at N1 (2014), available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

an alien manages to overcome the statutory stumbling blocks, Congress has capped the number of cancellations of removal annually at four thousand.⁸²

Thus, statutory eligibility alone might not be sufficient for an alien to obtain relief; her relief is contingent on a favorable exercise of the Attorney General's discretion, and she also must be one of only four thousand grants each year. Again, as noted in the preceding section, the limited remedy of cancellation of removal simply does not indicate any broad Congressional policy or intent to provide relief to the parents of lawful permanent residents. It cuts in just the opposite direction. Congress makes the exercise of discretion with respect to cancellation of removal very, very narrow. Here, the Attorney General's discretion is severely limited by a cap of four thousand—which is several orders of magnitude smaller than the four million or more aliens potentially covered by DAPA. With the limits under current law, virtually none of the parents of LPRs could ever obtain cancellation of removal.

OLC's justification ultimately boils down to this: "Removing the parents of U.S. citizens and LPRs . . . would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided."⁸³ This harsh reality is a feature, not a bug, of our immigration system. Congress has provided only limited avenues for visa availability and relief, and, for the most part, the classes of alien contemplated by DAPA fall outside the bounds of these provisions. DAPA is meant to mitigate operation of the statute by effectively nullifying statutory provisions with which the Executive does not agree, thereby rewriting the law in a way that better comports with this Administration's policy preferences.⁸⁴ This action is not a faithful execution of the law.⁸⁵

Absent future comprehensive immigration legislation, which the author supports, the aliens covered by DAPA will only obtain permanent legal relief—if at all—that is consistent with the terms of the INA. But for now, DAPA acts to override Congress's intent that the parents of citizen and LPR children should receive no more special treatment than the limited forms that Congress has sought fit to enact.

In the case of family-based immigrant visas, the parents of U.S. citizens do not have any immediate prospect of relief or a visa available to them. They must wait until the child turns twenty-one, and only then can they petition for a visa. This process will likely entail leaving the country, applying at a consulate in their home country, and then re-entering, if they are not otherwise barred from doing so. This process is hardly consistent with deferred action to maintain family unity. Further, the parents of lawful permanent residents cannot pursue a visa through this system at all. Although there are other forms of relief available, including cancellation of removal, the prospects of obtaining that relief and thereby pursuing adjustment of status are slim.

82. 8 U.S.C. § 1229b(e)(1) (2012) ("[T]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.").

83. OLC Opinion, *supra* note 1, at 30.

84. See Josh Blackman, Gridlock and Executive Power 40–42 (July 15, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466707.

85. See *id.* at 41–52.

B. CONGRESS'S ACQUIESCENCE TO DEFERRED ACTION HAS BEEN NARROWLY CIRCUM-
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OLC's second justification for finding DAPA consistent with congressional policy is the assertion that Congress has acquiesced to the existence of deferred action. Specifically, OLC argues, this round of deferred action is substantially similar to prior instances where Congress has sanctioned or extended deferred action.

The origin of deferred action is nebulous. Deferred action was conceived as an administrative measure without explicit congressional authorization. Although Congress has not specifically granted the Secretary of Homeland Security the power to defer deportations, it has been understood to stem from two provisions: 6 U.S.C. § 202(5)⁸⁶ and 8 U.S.C. § 1103(a).⁸⁷ Over the last four decades, Congress has given its implied and express

86. 6 U.S.C. § 202, 202(5) (2012) ("The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for . . . Establishing national immigration enforcement policies and priorities.").

87. 8 U.S.C. § 1103(a)(3) (2012) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for *carrying out his authority under the provisions of this chapter.*" (emphasis added)). I emphasize the last portion, because the Secretary's discretion exists only so long as he is "carrying out his authority under the provisions of" the INA. Authority beyond the scope of the INA would not fall under § 1103's grant of discretion. Reading this provision to grant the Secretary the significant residual power to confer benefits on millions that Congress deemed unworthy of such benefits would render much of the INA superfluous. Further, reading § 1103 to give the Secretary the authority, by himself, to implement DAPA would raise serious constitutional concerns. If a single provision affording the Secretary the authority to do what "he deems necessary" provides the authority to bypass congressional policy embodied in the INA, it would almost certainly lack an "intelligible principle," violating the non-delegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–76 (2001); *see also Delahunty & Yoo, supra* note 14, at 853 ("Even by the extremely permissive standards of the nondelegation doctrine, however, this would be an extraordinary delegation. It has no 'intelligible standard' whatsoever to guide and limit administrative discretion. It would allow an administration lawfully to subvert the very laws that it was charged with enforcing. And it would permit an administration to decide unilaterally, and without regard to standing immigration law, what the nation's demography was to be." (footnote omitted)). With the voluminous INA providing specific limits and caps on the Secretary's discretion, Congress did not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. To avoid these constitutional doubts, the provision should be read as it is written—to permit only authority within "the provisions of this chapter." *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."). Accordingly, OLC adopted this refined understanding of § 1103(a), even though a purely textual argument could vest the Secretary with far more power. *See OLC Opinion, supra* note 1, at 3–4. However, the Department of Justice changed its tact during the course of litigation and cited § 1103 as the basis for DAPA. *See Sur-Reply of United States at 21, Texas v. United States*, No. 1:14-cv-254 (S.D. Tex. Jan. 30, 2015), *available at* <https://www.scribd.com/doc/254323502/Texas-v-United-States-Government-Surreply> ("Specifically, Congress has afforded the Secretary broad discretion to take necessary actions to carry out his authority, *see* 8 U.S.C. § 1103(a), and directed him to '[e]stablish[] national immigration enforcement policies and priorities,' 6 U.S.C. § 202(5). That is precisely what the Secretary has done with the 2014 Deferred Action Guidance, which is part of a series of interrelated memoranda that set Department-wide enforcement priorities and allow resources to be deployed most effectively in support of those priorities.").

approval of deferred action by including provisions related to the practice in the INA, and by statutorily extending deferred action programs. There is little question today that deferred action is a permissible manifestation of immigration enforcement discretion.⁸⁸

As OLC correctly noted, one of the best measures of the lawfulness of DAPA is its consistency with prior incidences of congressional acquiescence in deferred action programs. OLC identified five prior exercises of deferred action for “certain classes of aliens” that had been supported by Congress: deferred action for (1) self-petitioners under the Violence Against Women Act, (2) T and U visa applicants, (3) foreign students affected by Hurricane Katrina, (4) widows and widowers of U.S. citizens, and (5) Deferred Action for Childhood Arrivals (DACA).⁸⁹ Based on this history, OLC opined that DAPA is consistent with the scope and intent of these prior programs.

The facts do not support this conclusion. The scope of Congress’s acquiescence in the Executive’s use of deferred action is far more constrained than the OLC opinion suggests. In the first four incidences of deferred action, all of which were sanctioned in one way or another by Congress, one of two qualifications existed: (1) the alien had an *existing* lawful presence in the U.S., or (2) the alien had the *immediate prospect* of lawful residence or presence in the U.S. In either circumstance, deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as immediately arising post-deferred action. These conditions bring the deferred action within the scope of congressional policy. However, neither limiting principle exists for the fifth instance of deferred action, DACA, or its close cousin, DAPA.

1. Deferred Action for VAWA Self-Petitioners

To justify congressional acquiescence to DAPA, the OLC opinion first reviewed the “class-based deferred action” program for abused aliens under the Violence Against Women Act (VAWA). This program granted deferred action⁹⁰ for VAWA self-

88. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (describing the INS’s “regular practice (which had come to be known as ‘deferred action’) of exercising [deportation] discretion for humanitarian reasons or simply for its own convenience”); *id.* (quoting 6 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 72.03[2][h] (1998)) (“This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action.”); Cox & Rodriguez, *supra* note 53, at 510 (“In immigration law, there exists a broader basis than in many other areas of law for defending inherent authority as a matter of constitutional design. This possibility stems from many sources: from the immigration power’s ephemeral origins; from the nexus between immigration law and foreign affairs; from the uneasy relationship between the immigration power and administrative law over the last century; and from the ambiguity regarding legal authority that often arises during times of perceived crisis.”).

89. See OLC Opinion, *supra* note 1, at 15–20.

90. Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm’r, Immigration and Naturalization Serv., to Reg’l Dirs. et al., Immigration and Naturalization Serv., Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues 3 (May 6, 1997), available at <https://www.scribd.com/doc/251876850/Memorandum-for-Regional-Directors-et-al-INS-from-Paul-W-Virtue-Acting-Executive-Associate-Commissioner-INS-Re-Supplemental-Guidance-on-Battered>.

petitioners⁹¹ where the visa petition had been approved but a visa was not immediately available.

This deferred action adheres to the second qualification: applicants had the immediate prospect of lawful presence. The VAWA self-petitioners who benefitted from deferred action had already had their visa petitions approved and were simply waiting for visas to become available. In other words, their lawful permanent residency was simply a matter of visa allocation, not some eligibility contingency. In this sense, deferred action was executed within the framework of discretion granted by Congress pursuant to the Violence Against Women Act. As the OLC opinion noted, “In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country.”⁹² Here, the deferred action served as a temporary bridge for those who would soon receive permanent status according to the laws of Congress.

2. Deferred Action for T and U Visa Applicants

Second, the OLC opinion relied on the deferred action program⁹³ for T and U visa applicants.⁹⁴ This policy directed the former Immigration and Naturalization Service to actively seek out possible beneficiaries and to use existing administrative tools, including deferred action, to forestall removal of those whose applications were already deemed to be *bona fide*.⁹⁵ Through the Victims of Trafficking and Violence Protection Act (VTVPA), Congress imposed specific limits on the number of visas that could be granted.⁹⁶ The INS regulations provided that an applicant should receive deferred action if she presents “prima facie evidence” of eligibility under the provisions Congress had specified.⁹⁷ In the case of T and U visa applicants, deferred action was granted following a determination that the application was *bona fide* and the visa petition was likely to be approved based on the statute. The situation presented by T and U visa applicants thus is also consistent with the second qualification because deferred action served as a bridge—lawful admission was immediately available on the other side of the deferral.

91. Under VAWA, battered women are allowed to petition for a visa on their own, without having to rely on abusive family members to petition on their behalf. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(iii) (an alien can file his or her own petition if “during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien’s spouse”).

92. OLC Opinion, *supra* note 1, at 15.

93. Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm’r, Immigration and Naturalization Serv., to Michael A. Pearson, Exec. Assoc. Comm’r, Immigration and Naturalization Serv., Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – “T” and “U” Nonimmigrant Visas 2 (Aug. 30, 2001), *available at* <https://www.scribd.com/doc/251877266/Memo-INS-VTVPA>.

94. These visas are intended for victims of human trafficking and are named after their respective sections in the U.S. Code. *See* 8 U.S.C. § 1101(a)(15)(T), (U) (2012).

95. OLC Opinion, *supra* note 1, at 15–16.

96. Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.). *See* 8 U.S.C. § 1184(o)(2) (2012) (imposing an annual cap of 5,000 T visas); 8 U.S.C. § 1184(p)(2)(A) (2012) (imposing an annual cap of 10,000 U visas).

97. OLC Opinion, *supra* note 1, at 15.

It is noteworthy that OLC's analysis of deferred action for aliens eligible under VAWA and VTPVA⁹⁸ suggests a symbiotic relationship between Congress and the Executive, wherein Congress reacted favorably to specific grants of deferred action based on statutes it enacted. This is in stark contrast with the straws OLC must grasp at in order to justify DAPA, coupled with the present-day contentious relationship between the elected branches. The argument for acquiescence cannot be stretched from the healthy working relationship between Congress and the Executive under VAWA and VTPVA, where specific instances of deferred action were affirmed, and the dysfunctional situation today where Congress has specifically rejected the DREAM Act and further comprehensive immigration reform.⁹⁹ Gridlock does not license the unlawful expansion of executive power.¹⁰⁰

3. Deferred Action for Foreign Students Affected by Hurricane Katrina

The third example cited by OLC concerned one of the worst natural disasters of the twenty-first century. Following the tragedy inflicted by Hurricane Katrina, the Executive Branch granted deferred action for foreign students who attended schools in the Gulf Coast area.¹⁰¹ This action provided temporary relief—from November 2005 through February 2006—to those unable to fulfill the educational requirements of their nonimmigrant admission.¹⁰² Students affected by Katrina who benefitted from this deferred action program were previously in the country lawfully and had a valid status. They would have remained in compliance with the conditions of their non-immigrant status but for the hurricane that wreaked havoc on the Gulf Coast and its schools.

Deferred action simply provided a mechanism to permit sufficient time for affected students to get back into compliance with the conditions of their initial admission. This process was as simple as enrolling at another school to pursue a “full course of study,” which could be done within a single semester. No action of Congress was necessary. Further, the relief was limited to “several thousand foreign students,”¹⁰³ whose present stay in the United States would be limited by the duration of their “full course of study.” This deferral of any immigration action embodies the first qualification: applicants already possessed an existing lawful status.

98. OLC Opinion, *supra* note 1, at 18–19.

99. See President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (“Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.”).

100. See generally Blackman, *supra* note 84. As Justice Kennedy recently testified before Congress, “gridlock” should not affect the way the Supreme Court “interprets” the law. See Josh Blackman, *Justice Kennedy Discusses Gridlock During Hill Testimony. Yes, There Is a King v. Burwell Connection*, JOSH BLACKMAN’S BLOG (Mar. 23, 2015), <http://joshblackman.com/blog/2015/03/23/justice-kennedy-discusses-gridlock-during-hill-testimony-yes-there-is-a-king-v-burwell-connection>.

101. See Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

102. *Id.*; see also OLC Opinion, *supra* note 1, at 16–17.

103. OLC Opinion, *supra* note 1, at 16.

4. Deferred Action for Widows and Widowers of U.S. Citizens

Fourth, OLC justifies DAPA by looking to a deferred action policy for widows and widowers of U.S. citizens who were on the precipice of receiving a visa. Under the INA, an alien who marries a citizen is entitled to be the primary beneficiary on a visa petition filed by the citizen spouse. Because the spouse is an “immediate relative,” a visa is immediately available. However, a problem arose under a prior version of the statute, which seemed to provide immediate relative status to widows and widowers only “[i]n the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen’s death.”¹⁰⁴ In cases where the alien had not been married at least two years prior to the passing of the citizen-spouse, the alien was construed to fall outside the category of “spouse.”¹⁰⁵

This circumstance specifically affected the widows and widowers of U.S. citizens who were beneficiaries of visa petitions that had been filed, but not completely adjudicated because of administrative delays, as well as those who had not filed a visa petition at the time of the citizen-spouse’s passing. Under USCIS’s interpretation at the time of the then-existing statute, these aliens were no longer eligible for visas as immediate relatives—although they would have been if the process had been completed more quickly.¹⁰⁶ As a result, the aliens were here without lawful status, and were subject to removal.

To remedy this gap, the Executive provided deferred action to those spouses married less than two years at the time of the passing of the U.S. citizen-spouse.¹⁰⁷ This deferral comports with the second qualification: prior to the death of the citizen-spouse, the alien already had lawful status. However, this status was vitiated by the untimely death of the citizen-spouse. Further, under the statute, they would have been entitled to a visa without regard to any numerical limitation had the petition been completely and timely adjudicated. In several respects, this deferred action was consonant with congressional policy embodied in the INA.

Further, this deferral could also be viewed as consistent with the first qualification, as the action partially bridged two different statuses. Deferred action seems to have been employed as a temporary adjustment in status as the agency determined how to proceed while conditions were in flux. It represents an attempt at uniformity, since aliens in at least two circuits were eligible for a visa and thus were not in need of deferred action at all.¹⁰⁸ The agency interpretation might already have shifted prior to the deletion of the

104. See 8 U.S.C. § 1151(a)(2)(A)(i) (2006).

105. See, e.g., *Lockhart v. Napolitano*, 573 F.3d 251, 255–62 (6th Cir. 2009) (interpreting the relevant statutory language and reviewing the government’s defense of the narrow interpretation).

106. OLC Opinion, *supra* note 1, at 17.

107. Memorandum from Donald Neufeld, Acting Assoc. Dir., U.S. Citizenship and Immigration Servs., et al., to Field Leadership, U.S. Citizenship and Immigration Servs., Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009).

108. See *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (holding that an alien whose citizen-spouse died while his immediate relative visa application was pending remained an immediate relative for the purpose of adjudicating the visa application); *Lockhart v. Napolitano*, 573 F.3d 251, 255–62 (6th Cir. 2009) (“[W]e conclude that a ‘surviving alien-spouse’ is a ‘spouse’ within the meaning of the ‘immediate rela-

problematic language in the INA. In this light, deferred action ensured the ability of a small, afflicted class of aliens to remain in the United States as the government and Congress worked on enacting a definitive statutory fix to the issue. And a few months after the deferred action program was announced, Congress ratified this understanding,¹⁰⁹ placing the President and the legislature in agreement. This species of deferred action is perhaps at its constitutional zenith, as the courts, and ultimately Congress, ratified the Executive's interpretation.¹¹⁰ In light of subsequent events, the utility of this program as a basis for an expansive interpretation of executive authority in this domain is minimal.

In contrast to the widows and widowers of citizens, DAPA beneficiaries are not lawfully present, and Congress does not support the President's reading of the law.¹¹¹ There is no immediate prospect of a visa for DAPA beneficiaries. Rather, Congress has specifically rejected the type of comprehensive immigration reform that would be necessary to provide these people a quick and sure pathway to citizenship. DAPA is a bridge to nowhere.

In short, the four programs OLC cites do not demonstrate that Congress has acquiesced to the scope of deferred action at play in DAPA.

5. Deferred Action for Childhood Arrivals

In addition to the four previously mentioned programs, the OLC opinion also referenced DACA as a comparable initiative. This program granted deferred action to approximately one million "young people who were brought to this country as children" unlawfully.¹¹² However, DACA stands on an even shakier footing than DAPA does, and serves as a very weak precedent for this expansion of deferred action.

In a cryptic footnote, the opinion explained that OLC "orally advised" DHS that granting deferred action on a "class-wide basis would raise distinct questions not impli-

tive' provision of the INA."); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) (same). Other courts agreed with USCIS's interpretation, and found that an alien was not an "immediate relative" upon the citizen-spouse's death. *See, e.g., Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009), *cert. denied*, 558 U.S. 1103 (2009).

109. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009) ("The second sentence of section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)) is amended by striking 'for at least 2 years at the time of the citizen's death.'").

110. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

111. In November 2014, the House passed a measure to stop DAPA. *See* Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO (Dec. 4, 2014, 2:39 PM), <http://www.politico.com/story/2014/12/house-immigration-vote-obama-113327.html>. In August 2014, the House passed a measure that would defund DACA. *See* Susan Ferrechio, *House Votes to End Obama's Deferred Deportation Program*, WASH. EXAMINER (Aug. 1, 2014, 10:42 PM), <http://washingtonexaminer.com/house-votes-to-end-obamas-deferred-deportation-program/article/2551601>.

112. OLC Opinion, *supra* note 1, at 17.

cated by ad hoc grants of deferred action.”¹¹³ Specifically, the memo recognized that DACA “was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs.”¹¹⁴ Yet it went on to state that the action was lawful because “the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.”¹¹⁵ This is simply not correct—reading the footnote closely suggests that even OLC was not comfortable with this conclusion. The humanitarian concerns underlying the four previous deferred action programs were consistent with congressional policy, but, in contrast, Congress has explicitly and repeatedly rejected providing a path to citizenship for the so-called “Dreamers.”¹¹⁶ On March 28, 2011—eight months before DACA was announced—President Obama accurately explained this dynamic in response to a question about whether he could stop deportation of undocumented students with an executive order:

Well, first of all, temporary protective status historically has been used for special circumstances where you have immigrants to this country who are fleeing persecution in their countries, or there is some *emergency situation* in their native land that required them to come to the United States. So it would not be appropriate to use that just for a particular group that came here primarily, for example, because they were looking for *economic opportunity*.

With respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed.

. . .

There are enough laws on the books by Congress that

113. *Id.* at 18 n.8.

114. *Id.* Further, unlike past deferred actions for residents of specific countries, DACA is “not nation-specific or even region-specific: it applies to all removable aliens in the DREAM Act category, regardless of national origin. It is hardly credible, therefore, to argue that the policy is designed to defuse some diplomatic tension or win other nations’ good will. In these respects, the Administration’s nonenforcement decision contrasts sharply with other cases in which an executive decision with respect to large-scale immigration was triggered by foreign policy issues.” Delahunty & Yoo, *supra* note 14, at 840. The same is true of DAPA. Additionally, past humanitarian exercises of deferred action may implicate the President’s foreign affairs powers. *See, e.g., Arizona v. United States*, 132 S. Ct 2492, 2499 (2012) (“Some discretionary decisions involve policy choices that bear on this Nation’s international relations.”); Memorandum from Theodore B. Olsen, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney General, Proposed Interdiction of Haitian Flag Vessels at 242 (Aug. 11, 1981), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/1981/08/31/op-olc-v005-p0242.pdf> (invoking “the President’s inherent constitutional power to protect the Nation and to conduct foreign relations”). None of these concerns are present here.

115. OLC Opinion, *supra* note 1, at 18 n.8.

116. *See* Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 632–37 (2011) (describing failed attempts to enact various versions of the DREAM Act in 2006, 2007, 2009, and 2010).

are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.¹¹⁷

The President was correct in 2011. The “concerns animating DACA” were *not* consistent with previous class-wide deferred action programs, as OLC claimed.¹¹⁸

Although this footnote casts serious doubt on DAPA’s legitimacy—as Congress arguably has not looked favorably on the status of parents of citizens and LPRs—it is devastating for the legality of DACA. First, DAPA beneficiaries at least have a close kinship with a citizen or LPR child. In contrast, DACA beneficiaries need not have *any* familial relationship with *any* citizen or lawful resident.¹¹⁹ Second, there have been active congressional attempts to defeat DACA, and the program remains controversial over two years after its institution, making it a weak basis for a claim of congressional acquiescence in deferred action.¹²⁰ This is especially true because DACA was based largely on a bill that was defeated in Congress and never became law.¹²¹

Remarkably, the OLC opinion would not “draw any inference regarding congressional policy from . . . unenacted bills” that would have “limit[ed] the practice of granting deferred action,”¹²² even though DACA, like the mythical phoenix, arose from the ashes of the failed DREAM Act.¹²³ DAPA was occasioned on the failure of comprehensive

117. President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011) (emphasis added), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

118. *See supra* note 115 and accompanying text.

119. *See* Steve Legomsky, *Why Can't Deferred Action Be Given to Parents of the Dreamers?*, BALKINIZATION (Nov. 25, 2014, 6:30 PM), *available at* <http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html> (“First, OLC approved DACA itself, a program that doesn’t require *any* family ties at all, much less ties to family with LPR paths. How can it be that it’s legal to grant deferred action to those with no family ties, but illegal to grant it to those with family ties to people who live in the U.S., are now lawfully present, and for all practical purposes are likely to remain for the long haul, but who have no path to LPR status? One can certainly make a convincing *policy* argument that the DACA recipients—brought here as children—have a stronger case for discretionary relief than their parents do. But if OLC truly means to suggest that a family relationship to an LPR-path family member is a *legal* prerequisite to deferred action, then how does it explain its recent approval of DACA itself? And if such a relationship is not a prerequisite, then what, exactly, is the problem? Is it simply OLC’s policy view that keeping parents and children together is not a strong enough humanitarian concern to justify deferred action when the children lack an LPR path? Is that really their call?”).

120. *See* Alexander Bolton, *Senate Rejects DREAM Act, Closing Door on Immigration Reform*, THE HILL (Dec. 18, 2010, 4:31 PM), <http://thehill.com/homenews/senate/134351-dream-act-defeated-in-senate> (describing how the DREAM Act was blocked by a GOP-led filibuster).

121. *See* Obama, *supra* note 99.

122. OLC Opinion, *supra* note 1, at 18 n.9.

123. *See* Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR (Jun. 15, 2012, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2012/06/15/155106744/with-dream-order-obama-did-what-presidents-do-act-without-congress> (“And like the other actions the president has increasingly taken as part of his “We Can’t Wait” initiative, the decision announced Friday was characterized by Obama’s political opponents as an abuse of power and violation of congressional prerogatives.”).

immigration reform.¹²⁴ The President cited the failure of both bills in justifying his executive action.¹²⁵ Rather than justifying DAPA based on DACA, OLC should have attempted to justify DACA. It did so only feebly, in a cryptic footnote, without the benefit of a written opinion, suggesting that the legality of that program is in serious doubt.

C. PREVIOUS INCIDENCES OF DEFERRED ACTION WERE BRIDGES, NOT TUNNELS

Deferred action in the first three cases cited by OLC acted as a temporary bridge from one status to another, where benefits were construed as arising immediately post-deferred action. For VAWA self-petitioners, deferred action was the bridge between the approval of the visa petition and the availability of the visa. For students impacted by Hurricane Katrina, deferred action was the bridge between two periods of lawful presence as a student, where classes had been temporarily interrupted on account of the natural disaster. For the T and U visa beneficiaries, deferred action was a bridge from likely unlawful presence to lawful admission pursuant to these visa categories as victims of human trafficking. For widows and widowers, the case is more complicated, but as immediate relatives of U.S. citizens, these aliens were presumptively entitled to a visa and on a short pathway to obtaining one.

For DAPA, deferred action serves not as a bridge for beneficiaries to a visa, but as a tunnel to dig under and through the INA. Relief is not necessarily waiting on the other side of deferred action, as it was in the previous instances of deferred action cited by OLC. Although circumstances might arise during the period of deferral that would make the alien more likely to meet the hardship standards for relief, such as working lawfully and paying taxes, or the alien might have a child who reaches twenty-one years of age during the period of deferral, these possible occurrences are fundamentally different from those that led to eligibility for relief in prior instances of deferred action. VAWA self-petitioners already had approved visa petitions, but were subject to visa allocation caps. The visa petitions of T and U applicants were deemed *bona fide*, but were not yet approved. Foreign students enjoyed lawful status and were again seeking to comply with the conditions of that status post-Katrina. The widows and widowers were immediate relatives under the family-based immigration system and were presumptively entitled to visas, but had not received visas because of administrative delays or the failure to file the petition that would have entitled them to a visa. DAPA is not a bridge in this sense, but instead a detour that seeks to bypass the normal operation of the provisions Congress has enacted.

OLC is correct to note that “Congress has long been aware of the practice of granting

124. Following the announcement that the House would not consider an immigration bill in 2014, the President said, “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . I’m beginning a new effort to fix as much of our immigration system as I can on my own, without Congress.” *Transcript: President Obama’s June 30 Remarks on Immigration*, WASH. POST (Jun. 30 2014), http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

125. Blackman, *supra* note 84, at 45–52.

deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.”¹²⁶ But it is wrong to rely on DAPA’s superficial resemblance to these past programs of categorical deferred action. There is, again, no question that Congress has acquiesced in the existence of deferred action and in several categorical programs of deferred action. That acquiescence, however, should be deemed narrowly circumscribed by the nature of those prior programs.

Those programs were for the benefit of either individuals with *existing* lawful status in the U.S. or those who had the *immediate prospect* of such status. The deferred action was meant to act as a temporary bridge to relief for which the aliens had already established eligibility. DAPA, encompassing individuals with *no* lawful status in the U.S. and *no* prospect for such status in the near future, falls outside the scope of prior congressional acquiescence. Given this, as well as congressional reaction to both DACA and DAPA, it is incorrect to claim that these programs are “consonant . . . with congressional understandings about the permissible uses of deferred action.”¹²⁷ It is certainly true that “widespread nonenforcement in many areas of federal law is so inevitable that Congress must be understood to have acquiesced in it.”¹²⁸ However, DAPA does not fit into that mold—Congress has *not* acquiesced. To the extent that the constitutionality of DAPA hinges on congressional acquiescence, OLC has failed to carry its burden.¹²⁹

Professors Cox and Rodriguez have written that, although Congress still retains “a monopoly over the[] formal legal criteria . . . for admission and removal” of noncitizens, the President enjoys a “de facto delegation of power that serves as the functional equivalent to standard-setting authority.”¹³⁰ Through this power, the Executive Branch has the authority to “play[] a major role in shaping screening policy.”¹³¹ Specifically, this delegation “gives the President vast discretion to shape immigration policy by deciding how (and over which types of immigrants) to exercise the option to deport.”¹³² While it may be true that the President has acquired some broad de facto power beyond that delegated by Congress, OLC has not adopted such an expansive notion of executive power.¹³³ Nor

126. OLC Opinion, *supra* note 1, at 18.

127. *Id.* at 29.

128. Price, *supra* note 14, at 745-46.

129. The first federal district court to uphold DAPA cited the OLC opinion’s superficial analysis almost verbatim, without any discussion of what previous deferred action programs actually entailed and how DAPA differs from these programs. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 193-94 (D.D.C. 2014) (“The executive branch has previously implemented deferred action programs for certain limited categories of aliens, including: certain victims of domestic abuse committed by United States citizens and Lawful Permanent Residents; victims of human trafficking and certain other crimes; students affected by Hurricane Katrina; widows and widowers of U.S. citizens; and certain aliens brought to the United States as children.” (citations omitted)).

130. Cox & Rodriguez, *supra* note 53, at 511.

131. *Id.*

132. *Id.*; *see also id.* at 485 (“We show that the intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community.”).

133. In fact, Professors Cox and Rodriguez have faulted DAPA for not going far enough with respect to exercises of executive authority. Adam Cox & Cristina Rodriguez, *Executive Discretion and Congression-*

has the President attempted to rely on some form of inherent executive power.¹³⁴ Rather, the Administration has looked to whether DAPA is “consonant” with previous deferred action policies. This is an appropriate framework, but the factual predicates of how these four policies operated defeats claims of both “formal mechanisms of congressional delegation” and “de facto delegation.”¹³⁵ Congress has neither expressly nor tacitly granted the Executive the requisite authority to implement a program of the size and scale of DAPA.

D. THE 1990 “FAMILY FAIRNESS” POLICY DOES NOT SUPPORT DAPA

There is a sixth instance of deferred action on which OLC puts surprisingly little weight—the 1990 “Family Fairness” program instituted under President George H.W. Bush.¹³⁶ A brief history will explain why. In 1986, President Reagan signed into law the Immigration Reform and Control Act (IRCA).¹³⁷ This bipartisan act provided a path to citizenship for up to three million immigrants who had been continuously present in the United States since 1982. However, the law did not cover eligible immigrants’ spouses and children who did not themselves meet the residency requirement. This gap created so-called “split-eligibility” families. Generally, once a beneficiary of IRCA received LPR status, he or she could petition for a visa for a spouse or child.¹³⁸ Under the IRCA, however, during this potentially lengthy and cumbersome process to obtain a visa—roughly

al Priorities, BALKINIZATION (Nov. 21, 2014, 2:05 PM), <http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> (“But for now we’ll just emphasize that the history of the inter-branch interaction in immigration law consists not of the Executive attempting to mold its discretion to fit Congress’s objectives, but rather of the Executive testing the limits of legislation in ways that have prompted Congress to react, either to validate the Executive’s actions or to create a framework to channel executive action through a set of legislatively defined standards and structures of adjudication. This is the story of the rise of our asylum system and many other aspects of modern immigration law that we have told in other work.”).

134. Cox & Rodriguez, *supra* note 53, at 540. (“Though the question of inherent authority has never been definitely resolved, we are fairly confident that this option would not be viable in the contemporary political environment. The assertion of inherent authority would be too disruptive to the conventions that have evolved over time regarding Congress’s leadership in this arena (and in administrative law generally).”).

135. *Id.* at 462.

136. The Family Fairness program is mentioned only twice in the memo. OLC Opinion, *supra* note 1, at 14–15, 30–31. However, the program is cited extensively in the government’s defense of DAPA in federal court. Sur-Reply of United States at 29, *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex. Jan. 30, 2015), available at <https://www.scribd.com/doc/254323502/Texas-v-United-States-Government-Surreply> (“Although Plaintiffs contend that prior deferred action programs were limited to providing a ‘temporary bridge’ to lawful status for which recipients were already eligible by statute, that was true of neither the 1990 Family Fairness Program nor 2012 DACA (which Plaintiffs are not challenging here).”); see also Josh Blackman, *Government Sur-Reply Part 6: How Big was President Bush’s Family Fairness Program of 1990?*, JOSH BLACKMAN’S BLOG (Feb. 4, 2015), <http://joshblackman.com/blog/2015/02/04/government-sur-reply-part-6-how-big-was-president-bushs-family-fairness-program-of-1990> (discussing the government’s treatment of the Family Fairness program in its filings in *Texas v. United States*).

137. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

138. See 8 U.S.C. § 1153(a)(2) (2012) (authorizing immigrant visas for “spouses or children” of LPRs).

three-and-a-half years after status was approved¹³⁹—these immediate family members without legal status would be subject to deportation.¹⁴⁰

In 1987, the INS put on hold deportations of children under the age of 18 that were living with a parent covered by the IRCA.¹⁴¹ Attorney General Edwin Meese's policy focused on circumstances where there were "compelling or humanitarian factors" that counseled against deportations.¹⁴² This temporary deferral of deportations was meant to give the parent the appropriate time to complete the process, and then allow the parent to petition for a visa for the child. It made little sense to deport children whose parents would, in due time, receive lawful status, and by extension petition for a visa for their children.¹⁴³ On the other side of this deferral, a legal status awaited the child. In this sense, the deferral of deportations served as a bridge.

In July of 1989, the Senate passed what would become the Immigration Act of 1990. This bill, among other provisions, provided relief for the children and spouses of IRCA beneficiaries. The Senate bill was not brought up for a vote in the House until October 1990, though, as the *New York Times* reported at the time, "passage of the new legislation seemed almost certain."¹⁴⁴ It ultimately passed by a vote of 231 to 192, with 45 Republicans voting yea and 65 Democrats voting nay.¹⁴⁵ Despite disagreements about the economics of the bill, the *Times* reported, "few dispute the humanitarian aim of uniting families."¹⁴⁶

In the interim, between the Senate vote in July of 1989 and the House vote in October of 1990, spouses and children of IRCA beneficiaries, who would soon be provided with a

139. Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, AM. UNIV. L. REV. (forthcoming 2015) (manuscript at 23), available at <http://ssrn.com/abstract=2559836>.

140. See S. REP. NO. 99-132, at 16 ("It is the intent of the Committee that the families of legalized aliens . . . will be required to 'wait in line' in the same manner as immediate family members of other new resident aliens.")

141. Alan C. Nelson, Comm'r, Immigration and Naturalization Serv., *Legalization and Family Fairness—An Analysis*, 64 INTERPRETER RELEASES 1190, 1203 ("INS district directors may exercise the Attorney General's authority to indefinitely defer deportation of anyone for specific humanitarian reasons. . . . In general, indefinite voluntary departure shall be granted to unmarried children under the age of eighteen (18) years . . . residing with their parents[,] . . . conditioned on the fact that both parents . . . have achieved lawful temporary resident status.").

142. See Memorandum from Andorra Bruno, Cong. Research Serv., to Multiple Cong. Requesters, Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 10 (July 13, 2012), available at <http://edsources.org/wp-content/uploads/Deferred-Action-Congressional-Research-Service-Report.pdf>.

143. See *Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary on the Immigration Reform and Control Act of 1986*, 101st Cong. 459 (May 10 & 17, 1989) (statement of Alan C. Nelson, Comm'r, Immigration and Naturalization Serv.) (providing relief for "young children" of IRCA beneficiaries).

144. Nathaniel C. Nash, *Immigration Bill Debated in House*, N.Y. TIMES (Oct. 3, 1990), <http://www.nytimes.com/1990/10/03/us/immigration-bill-debated-in-house.html>.

145. See *Final Results for Roll Call 406*, House of Representatives (Oct. 3, 1990, 12:32 PM), <http://clerk.house.gov/evs/1990/roll406.xml>.

146. Nathaniel C. Nash, *Immigration Bill Approved in House*, N.Y. TIMES (Oct. 4, 1990), <http://www.nytimes.com/1990/10/04/us/immigration-bill-approved-in-house.html?module=Search&mabReward=relbias%3As>.

process to obtain lawful status, were still subject to deportation. In response, in February of 1990, INS Commissioner Gene McNary announced a new policy¹⁴⁷ to expand the deferral of deportations of roughly one hundred thousand—not one and a half million (as reported in the OLC opinion)¹⁴⁸—spouses and children of IRCA beneficiaries. This was a temporary stopgap measure to protect those who would soon receive a lawful status after the legislation was enacted.

On November 29, 1990, President George H.W. Bush signed into law the Immigration Act of 1990. On signing the law, the President said it “accomplishes what this Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs.”¹⁴⁹ With the signing of the law, the Family Fairness policy immediately become moot—exactly what the President had in mind by temporarily putting on hold deportations until Congress could finish passing the bipartisan legislation.

Both Presidents Reagan and Bush used prosecutorial discretion to keep together families, in consonance with congressional policy. For the 40th President, the deferrals were used to afford time so that parents could petition for a visa for their children. For the 41st President, the deferrals were a temporary stopgap measure in the several months between votes in the Senate and the House. In both cases, it made little sense to rip apart families, when in due course the spouse and children could receive a visa, ancillary to statutory authorizations. As a 1990 article in the *New York Times* explained, a legal resident under the 1986 amnesty with lawful status “would [soon] be able to file a petition for his wife to be granted legal status, a process expected to take about two years.”¹⁵⁰ Protection was extended based on someone who already benefited from Congress’s naturalization laws.

147. Memorandum from Gene McNary, Comm’r, Immigration and Naturalization Serv., to Regional Comm’rs, Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990), available at <http://www.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf> [hereinafter Family Fairness Memorandum].

148. The OLC Opinion repeated an oft-cited, but incorrect statistic that President George H.W. Bush’s “Family Fairness” program deferred the deportation of 1.5 million aliens. See OLC Opinion, *supra* note 1, at 14. This statistic has been repeated by the President. *This Week Transcript: President Obama*, ABC NEWS (Nov. 23, 2014, 11:06 AM), <http://abcnews.go.com/ThisWeek/week-transcript-president-obama/story?id=27080731> (“If you look, every president—Democrat and Republican—over decades has done the same thing. George H W Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action.”). The actual estimate was roughly 100,000. See Glenn Kessler, *Obama’s Claim that George H.W. Bush Gave Relief to ‘40 percent’ of Undocumented Immigrants*, WASH. POST (Nov. 24, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope>. The origin of this false number is subject to some dispute and seems to be based on an error in congressional testimony. INS Commissioner Gene McNary himself told the *Washington Post*, “I was surprised it was 1.5 million when I read that. I would take issue with that. I don’t think that’s factual.” *Id.* Ultimately, by October 1 of 1990, INS had received only 46,821 applications. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary family fairness program. See Blackman, *supra* note 136.

149. President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117>.

150. Marvin Howe, *New Policy Aids Families of Aliens*, N.Y. TIMES (Mar. 5, 1990), <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>.

While the American Immigration Council calls President George H.W. Bush's policy a "striking historical parallel to today's immigration challenges,"¹⁵¹ the Family Fairness policy teaches just the opposite lesson. Presidents Reagan and Bush deferred deportations for family members who would shortly be able to receive a lawful status by virtue of the status of their spouse or child. In sharp contrast, DAPA defers deportations for parents of citizen children—who may need to wait up to twenty-one years to petition for a visa—and parents of LPRs—who will *never* be able to petition for a parental visa.

Perhaps recognizing this difference, the OLC opinion draws a distinction between the five previously discussed programs and the Family Fairness policy. OLC characterizes the Family Fairness policy not as a deferred action program, but a "voluntary departure program."¹⁵² Specifically, under the policy, aliens were "potentially eligible for discretionary extended voluntary departure relief,"¹⁵³ *not* deferred action. Voluntary departure allowed "an otherwise removable alien to depart the United States at his or her own personal expense and return to his or her home country."¹⁵⁴ Under the Family Fairness policy, the aliens were not required to actually depart during this interim period. Further, while OLC contended that Family Fairness and DAPA are on a similar scale, the opinion acknowledged that DAPA will "likely differ in size from these prior deferred action programs."¹⁵⁵ OLC did not consider Family Fairness a precedent with respect to deferred action.

Perhaps unwittingly, the OLC opinion makes clear that the Family Fairness program fits within the "bridge" construct: "INS implemented a 'Family Fairness' program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986."¹⁵⁶ Precisely! The temporary relief afforded to the beneficiaries of Family Fairness was connected to the 1986 IRCA.¹⁵⁷ The OLC opinion even makes clear that "Congress later implicitly approved" the Family Fairness policy.¹⁵⁸ Such acquiescence is lacking for DAPA: Congress has confronted it with open hostility and opposition.

151. American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present*, IMMIGRATION POLICY CENTER (Oct. 2, 2014), http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf

152. OLC Opinion, *supra* note 1, at 30.

153. *Id.* at 31.

154. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: FORMS OF RELIEF FROM REMOVAL (Aug. 3, 2004), *available at* <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm>.

155. OLC Opinion, *supra* note 1, at 30.

156. *Id.* at 14.

157. *See* Margulies, *supra* note 139 (manuscript 22) ("While proponents of DAPA sometimes cite the Family Fairness program implemented by immigration officials under Presidents Ronald Reagan and George H.W. Bush as precedent for DAPA, this analogy is inapposite. Family Fairness was ancillary to enumerated grants of status and far smaller than DAPA. Moreover, Family Fairness was within a short period ratified by Congress in the Immigration Act of 1990—a prospect that is almost certain to elude DAPA, which has already generated substantial congressional opposition.").

158. OLC Opinion, *supra* note 1, at 31.

In short, Family Fairness served as a bridge—a very temporary one—until Congress could complete the legislative process. President George H.W. Bush’s short-lived voluntary departure program was connected to the IRCA and sandwiched between the Senate and House voting on a bipartisan bill. As Professor Margulies explains, “All of the relief provided under both Family Fairness and the 1990 Act was ancillary to legal status that would be available within a discrete and reasonably short period to recipients of that relief.”¹⁵⁹

DAPA, in contrast, is not meant as a temporary stopgap measure while Congress finishes a bill in the works. It imposes a not-too-veiled quasi-permanent status, in the hope that a future Congress affords these aliens permanent status. Though it is not binding on the winner of the 2016 election, as a practical matter, those given deferred prosecution and work permits will be effectively untouchable.¹⁶⁰ The President has admitted as much, explaining that future presidents may “theoretically” remove DAPA beneficiaries, but “it’s not likely.”¹⁶¹ Call it lawful status by estoppel.

CONCLUSION

Upon a full consideration of the relevant provisions of the INA, DAPA is inconsistent with congressional policy. Congress has instituted a complex scheme for the conferring benefits on aliens, including the unlawfully present parents of U.S. citizen and lawful permanent resident children. Although this scheme indicates congressional intent to favor family unification, it represents a narrow policy in furtherance of this goal. The family unification scheme is limited in terms of (1) who can obtain relief, (2) what must be demonstrated in order to establish statutory eligibility, and (3) the potentially lengthy wait one must endure before a visa or other relief may be available.

DAPA undercuts all three goals. Specifically, it effectively negates Congress’s considered judgment to disallow relief to the parents of minor citizen children, while extending relief to the parents of lawful permanent residents—a class that has *never* been entitled to preferential treatment under the immigration laws. DAPA is an executive rewrite of immigration policy. Its intent is to effectuate the Executive’s conception of what the

159. Margulies, *supra* note 139 (manuscript 24).

160. See Byron York, *Has Rubio Learned His Lesson?*, WASH. EXAMINER (Apr. 13, 2014, 6:49 PM), <http://www.washingtonexaminer.com/has-rubio-learned-his-immigration-lesson/article/2562979>. In 2013, Senator Marco Rubio (R-Fla) explained that if the President takes executive action on immigration, it will be virtually impossible for the next President to reverse it. He observed, “I cannot imagine a scenario where a future president is going to take away the status they’re going to get.” *Id.* (Rubio incorrectly labeled the action as “amnesty.” This is wrong, as only Congress can offer amnesty.).

161. President Barack Obama, Remarks by the President in Immigration Town Hall – Nashville, Tennessee (Dec. 9, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/12/09/remarks-president-immigration-town-hall-nashville-tennessee> (“It’s true that a future administration might try to reverse some of our policies. But I’ll be honest with you, I think that the American people basically have a good heart and want to treat people fairly. And every survey shows that if, in fact, somebody has come out and subjected themselves to a background check, registered, paid their taxes, that the American people support allowing them to stay. So I think any future administration that tried to punish people for doing the right thing I think would not have the support of the American people.”).

best policy is, as opposed to the policies actually enacted by the body entrusted with developing immigration law: the Congress.

DAPA's inconsistency with congressional policy is a strong indication that the program is not lawful. As OLC explained, "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering."¹⁶² DAPA is contrary to, rather than consonant with, the congressional policies underlying the INA. It is in palpable tension with the statute and the intent Congress evinced in enacting the relevant provisions.

To justify this policy, the government must advance more than the superficial defenses that have thus far been mounted. The United States bears the burden of justifying this unprecedented expansion of executive power. It has not done so through the OLC opinion. If DAPA is lawful, that fact must be established through consideration of all relevant provisions of the INA, their history, and the congressional intent behind their enactment. While there may indeed be light at the end of this tunnel in the form of comprehensive immigration reform—which the author supports—the Executive cannot simply drill through the constrained framework that Congress has designed.

162. OLC Opinion, *supra* note 1, at 6.