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To the United States House of Representatives, Committee on the Judiciary

For A Hearing Titled:

"Protecting Dreamers and TPS Recipients"

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Chairman Nadler, Ranking Member Collins, and Members of the Committee, I thank you for inviting me here today to discuss this important issue.

Temporary Protected Status

As U.S. Citizenship and Immigration Services (USCIS) has explained:

> *The Secretary of Homeland Security may designate a foreign country for [Temporary Protected Status(TPS)] due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. USCIS may grant TPS to eligible nationals of certain countries (or parts of countries), who are already in the United States. Eligible individuals without nationality who last resided in the designated country may also be granted TPS.*[1]

My colleague Mark Krikorian provided a historical background for TPS in 2016:

> *Congress in 1990 created [TPS] in an attempt to hem in unilateral executive actions on immigration. The law created a framework for presidents to let illegal aliens from a country stay here for a limited period of time if there was a natural disaster or civil violence back home that made the country "unable, temporarily,*

[1] *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status.

to adequately handle the return of its nationals." The point was to prevent presidential freelancing.[2]

Section 244 of the Immigration and Nationality Act (INA) provides authority to the Secretary of Homeland Security to designate a country for TPS. That authority is extremely circumscribed, however. Specifically, section 244(b)(1) of the INA[3], which grants that authority as an initial matter, states:

> *In general.-The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection* ***only if-***
>
> *(A) the Attorney General finds that there is an* ***ongoing armed conflict*** *within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;*
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> *(B) the Attorney General finds that-*
>
> *(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial,* ***but temporary****, disruption of living conditions in the area affected,*
>
> *(ii) the foreign state is unable,* ***temporarily****, to handle adequately the return to the state of aliens who are nationals of the state,* ***and***
>
> *(iii) the foreign state* ***officially has requested designation*** *under this subparagraph; or*
>
> *(C) the Attorney General finds that there exist* ***extraordinary and temporary conditions in the foreign state*** *that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.*

(Emphasis added). The Congressional Research Service (CRS)[4] has explained that this authority now rests with the Secretary of Homeland Security.

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[2] Mark Krikorian, *Temporary Protected Status Means Never Having to Go Home*, NATIONAL REVIEW, May 16, 2016, *available at*: https://www.nationalreview.com/corner/temporary-amnesty-never-ends/.

[3] Section 244(b)(1) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1254a&num=0&edition=prelim

[4] Lisa Seghetti, Karma Ester, and Ruth Ellen Wasem, *Temporary Protected Status:*

Section 244(b)(3) of the INA[5] deals with the review of TPS designations, as well as TPS extensions and terminations. It states:

> *(A) Periodic review.-At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and* ***shall determine whether the conditions for such designation under this subsection continue to be met****. The Attorney General shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.*
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> *(B) Termination of designation.-* ***If the Attorney General determines under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under [section 244(b)(1) of the INA], the Attorney General shall terminate the designation*** *by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C).*
>
> *(C) Extension of designation.-If the Attorney General does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).*

(Emphasis added).

I have previously explained the benefits of TPS status:

> *By law, aliens granted TPS are eligible for employment authorization, may apply for travel authorization, and may not be removed from the United States, so long as TPS for that country is in effect. An alien granted TPS may not be detained "on the basis of the alien's immigration status."*[6]

Current Immigration Policy and Issues, CONGRESSIONAL RESEARCH SERVICE, Jan. 12, 2015, *available at*: https://trac.syr.edu/immigration/library/P10206.pdf.

[5] Section 244(b)(3) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1254a&num=0&edition=prelim

[6] Andrew Arthur, *'Temporary' Protected Status: The Biggest Misnomer in Immigration*, CENTER FOR IMMIGRATION STUDIES, Oct. 31, 2017, *available at*: https://cis.org/Arthur/Temporary-Protected-Status-Biggest-Misnomer-Immigration.

There are currently 10 countries designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.[7] As of October 2018, approximately 437,000 foreign nationals from those 10 countries have TPS.[8]

Despite the nomenclature "*Temporary* Protected Status," many of those designations have been in place for several years. For example, Haiti was designated for TPS on Jan. 21, 2010.[9] El Salvador was designated for TPS on March 9, 2001.[10] Honduras was designated on January 5, 1999[11], Nepal on June 24, 2015[12], Nicaragua on January 5, 1999[13], Somalia on

[7] *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status.
[8] Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERVICE, Oct. 10, 2018, at 5, *available at*: https://fas.org/sgp/crs/homesec/RS20844.pdf.
[9] *Temporary Protected Status Designated Country: Haiti*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti.
[10] *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador.
[11] *Temporary Protected Status Designated Country: Honduras*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 7, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras.
[12] *Temporary Protected Status Designated Country: Nepal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Oct. 11, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nepal.
[13] *Temporary Protected Status Designated Country: Nicaragua*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua.

September 16, 1991[14], South Sudan on November 3, 2011[15], Sudan on November 4, 1997[16], Syria on March 29, 2012[17], and Yemen on September 3, 2015[18].

The Trump Administration, however, has attempted to end certain of those designations. CRS has summarized those efforts:

> *Beginning in late 2017, the Trump Administration announced decisions to terminate TPS for Nicaragua and El Salvador and to put on hold a decision about Honduras. In November 2017, DHS announced that TPS for Nicaragua would end on January 5, 2019—12 months after its last designation would have expired—due to nearly completed recovery efforts following Hurricane Mitch. On the same day, DHS announced that more information was necessary to make a determination about TPS for Honduras; as a result, statute dictates that its status be extended for six months. On January 8, 2018, DHS announced the decision to terminate TPS for El Salvador—whose nationals account for about 60% of TPS recipients—after an 18-month transition period. El Salvador's TPS designation is scheduled to end on September 9, 2019. On May 4, 2018, DHS announced the decision to terminate the TPS designation for Honduras, with an 18-month delay (until January 5, 2020) to allow for an orderly transition.*

The Department of Homeland Security (DHS) announced on November 20, 2017 that it would terminate TPS for Haiti.[19] Similarly, Secretary Nielsen announced on April 26, 2018 that the TPS designation for Nepal would be terminated effective June 24, 2019.[20] In September

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[14] *Temporary Protected Status Designated Country: Somalia*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-somalia.

[15] *Temporary Protected Status Designated Country: South Sudan*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Oct. 11, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-south-sudan.

[16] *Temporary Protected Status Designated Country: Sudan*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan.

[17] *Temporary Protected Status Designated Country: Syria*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 7, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-syria.

[18] *Temporary Protected Status Designated Country: Yemen*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 21, 2018, *available at*: https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen.

[19] Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERVICE, Oct. 10, 2018, at 8, *available at*: https://fas.org/sgp/crs/homesec/RS20844.pdf.

[20] *Id*. at 9-10.

2017, then-Acting Homeland Security Secretary Elaine Duke had previously announced that TPS for Sudan would expire on November 2, 2018.[21]

On October 3, 2018, Judge Edward M. Chen of the U.S. District Court for the Northern District of California enjoined the termination of TPS for Sudan, Haiti, El Salvador, and Nicaragua, pending a final decision on a case challenging those terminations.[22] Therefore, those designations will continue indefinitely.

As an aside, that decision itself demonstrates how pro forma a process extensions have become for countries granted TPS, hardly the outcome that Congress envisioned when it gave the executive branch that authority.

The conditions in many of those countries have changed significantly since their initial designation for TPS. For example, then-Attorney General (AG) Janet Reno had originally designated Honduras and Nicaragua for TPS more than 19 years ago "due to extraordinary displacement and damage from Hurricane Mitch."[23] I noted in October 2017[24]:

> *Honduras was designated for TPS due to the effects of Hurricane Mitch, which occurred in October 1998. As USCIS stated in its last extension of TPS designation:*
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> > *Since the last extension of Honduras' TPS designation, Honduras has experienced a series of environmental disasters that have exacerbated the persisting disruptions caused by Hurricane Mitch and significantly compromised the Honduran state's ability to adequately handle the return of its nationals. Additionally, climate fluctuations between heavy rainfall*

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[21] *Id*. at 10.

[22] *Ramos v..Nielsen*, Case No. 18-cv-01554-EMC, *Order Granting Plaintiffs' Motion for Temporary Injunction* (N.D. Cal. Oct.3, 2018), *available at*: https://www.uscis.gov/sites/default/files/USCIS/Laws/ramos-v-nielsen-order-granting-preliminary-injunction-case-18-cv-01554-emc.pdf.

[23] Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERVICE, Oct. 10, 2018, at 6, *available at*: https://fas.org/sgp/crs/homesec/RS20844.pdf.

[24] Andrew Arthur, *'Temporary' Protected Status: The Biggest Misnomer in Immigration*, CENTER FOR IMMIGRATION STUDIES, Oct. 31, 2017, *available at*: https://cis.org/Arthur/Temporary-Protected-Status-Biggest-Misnomer-Immigration.

> *and prolonged drought continue to challenge recovery efforts. Toward the end of 2014, Honduras suffered damage from severe rains, landslides, and flooding, as well as from the heavy winds associated with Tropical Storm Hanna. Partially due to the heavy rainfall, Honduras saw a dramatic increase in mosquito-borne diseases, particularly dengue and chikungunya, in 2014 and 2015. The system of public hospitals is failing under this threat; in July 2015 the president of Honduras' medical school warned that public hospitals in Honduras were barely able to provide medicine for common illnesses, let alone an epidemic of chikungunya.*

* * * *

In extending TPS for [Nicaragua] on May 16, 2016, USCIS stated:

> *Since the last extension of Nicaragua's TPS designation, Nicaragua has experienced a series of environmental disasters that have exacerbated the persisting disruptions caused by Hurricane Mitch and significantly compromised Nicaragua's ability to adequately handle the return of its nationals. Nicaragua suffered from heavy rains and extensive flooding in October 2014, May 2015, and June 2015. Significant earthquakes struck in Nicaragua and off its coast in April and October of 2014. Between early May and late July 2015, the Telica volcano erupted 426 times, causing respiratory problems in neighboring communities. Much of the country is suffering from a prolonged regional drought, which, combined with the coffee rust epidemic in Central America, has negatively impacted livelihoods and food security.*

The Central Intelligence Agency (CIA) Factbook states that Honduras had an estimated Gross Domestic Product of $22.98 billion in 2017 in a country that had just less than 9.2 million people as of 2018.[25] The CIA specifically notes: "The country was devastated by Hurricane Mitch in 1998, which killed about 5,600 people and caused approximately $2 billion in damage. Since then, the economy has slowly rebounded."[26] Again, Honduras is the second poorest country in Central America, and suffers from what the CIA terms "extraordinarily unequal distribution of income,"[27] but these are not bases for granting, or continuing, TPS.

[25] *The World Factbook: Central America: Honduras*, CENTRAL INTELLIGENCE AGENCY, undated, *available at*: https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html.
[26] *Id*.
[27] *Id*.

The dengue and chikungunya situation, cited in the earlier extension of TPS for Honduras, has improved dramatically, moreover. With respect to dengue, the Pan American Health Organization stated in September 2017 that the number of reported cases was down 79 percent compared to the same period a year before.[28] Even better, "[a]s of [epidemiological week (EW)] 30 of 2017, the number of reported chikungunya cases represent a 97% decrease compared to the same period the previous year."[29]

Nicaragua is the poorest country in Central America, with "widespread underemployment and poverty" according to the CIA.[30] That said, "[d]espite being one of the poorest countries in Latin America, Nicaragua has improved its access to potable water and sanitation and has ameliorated its life expectancy, infant and child mortality, and immunization rates," although "income distribution is very uneven, and the poor, agriculturalists, and indigenous people continue to have less access to healthcare services." Again, poverty and income inequality are not bases for TPS.

Similarly, El Salvador was designated for TPS by the former Immigration and Naturalization Service (INS), as noted in March 2001.[31] As the Federal Register notice for that designation stated:

> *El Salvador suffered a devastating earthquake on January 13, 2001, and experienced two more earthquakes on February 13 and 17, 2001. Based on a thorough review by the Departments of State and Justice, the Attorney General has determined that, due to the environmental disaster and substantial disruption*

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[28] *Zika-Epidemiological Report, Honduras*, PAN AMERICAN HEALTH ORGANIZATION, Sept. 25, 2017, *available at*: https://www.paho.org/hq/dmdocuments/2017/2017-phe-zika-situation-report-hon.pdf.
[29] *Id*.
[30] *The World Factbook: Central America: Nicaragua*, CENTRAL INTELLIGENCE AGENCY, undated, *available at*: https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html.
[31] *Designation of El Salvador Under Temporary Protected Status Program*, 66 Fed. Reg. 14214-16 (Mar. 9, 2001), *available at*: https://www.federalregister.gov/documents/2001/03/09/01-5818/designation-of-el-salvador-under-temporary-protected-status-program.

of living conditions caused by the earthquakes, El Salvador is "unable, temporarily, to handle adequately the return" of its nationals. . . .

A recent Department of State report indicates that the January 13 and February 13 earthquakes have resulted in at least 1,100 deaths, 7,859 injuries, and over 2,500 missing. In addition, the earthquakes have displaced an estimated 1.3 million persons out of El Salvador's population of 6.2 million (e.g. 17%), over 80,000 of whom are living in temporary camps. The Department of State further reports that approximately 220,000 homes, 1,696 schools, and 856 public buildings have been damaged or destroyed. Earthquake-caused losses in housing, infrastructure, and the agricultural sector exceed $2.8 billion.[32]

As I have previously stated:

Among the reasons for the extension of that country's TPS designation are: "subsequent natural disasters and environmental challenges, including hurricanes and tropical storms, heavy rains and flooding, volcanic and seismic activity, an ongoing coffee rust epidemic, and a prolonged regional drought that is impacting food security." Despite these challenges, according to the CIA: "El Salvador has the fourth largest economy in the region."[33]

There are a significant number of countries in the world that are in much worse shape economically and politically than Honduras, Nicaragua, and El Salvador that are not designated for TPS, because they would not be eligible for such designation. The Trump Administration was correct to have discontinued the TPS designations for those countries.

Importantly, endless redesignations of TPS for countries that no longer meet the criteria can have deleterious effects, as I have explained in the past:

There are certainly exigent circumstances that militate in favor of the granting, for a brief period of time, protected status to the nationals of countries in the wake of significant natural disasters and or civil disorder. The creation of a quasi-permanent, decades-long benefit for the nationals of a country designated for TPS, however, actually makes it less likely that the United States will extend such protection in the future. Specifically, if the president and the secretary of Homeland Security believe that the designation of a country for TPS will have a "ratchet effect", by which large populations of foreign nationals will remain in the United States indefinitely, they will be wary of extending that protection

[32] *Id*. at 14214.

[33] Andrew Arthur, *'Temporary' Protected Status: The Biggest Misnomer in Immigration*, CENTER FOR IMMIGRATION STUDIES, Oct. 31, 2017, *available at*: https://cis.org/Arthur/Temporary-Protected-Status-Biggest-Misnomer-Immigration.

> *except in the direst of circumstances. This is particularly true if they were to conclude that there would be a political cost to be paid for the eventual termination of a TPS designation.*[34]

Congress should act to limit the authority of the secretary of Homeland Security to extend TPS in the future to ensure that it is used properly and effectively. The designation of a country for TPS by the secretary should be, as an initial matter, an emergency act. Therefore, section 244 of the INA should be amended to make such a designation effective for no more than one year.

At the end of that year, any one-year extension (and any extension thereafter) should be presented as proposed legislation to be voted on by Congress. This scheme would give Congress the opportunity to consider continued extensions annually, and ensure that the TPS system is not being abused. It would also return significant authority to Congress to set immigration policy.

Further, were there to be an amnesty of any of the almost 437,000 foreign nationals who currently have TPS in the United States, legislative fixes that would address the negative impacts of such amnesty, discussed below, must be a part of that legislation.

Deferred Action for Childhood Arrivals (DACA) and "the Dreamers"

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano announced that certain aliens who came to the United States under the age of 16 and who met specific guidelines could request consideration of Deferred Action for Childhood Arrivals (DACA) for a period of

[34] *Id*.

two years, subject to renewal.[35] The press release[36] accompanying that announcement set forth the parameters of that relief:

> *Under this directive, individuals who demonstrate that they meet the following criteria will be eligible for an exercise of discretion, specifically deferred action, on a case by case basis:*
>
> *Came to the United States under the age of sixteen;*
>
> *Have continuously resided in the United States for a least five years preceding the date of this memorandum and are present in the United States on the date of this memorandum;*
>
> *Are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;*
>
> *Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety;*
>
> *Are not above the age of thirty.*[37]

As of August 31, 2018, there were approximately 699,350 aliens present in the United States who were DACA beneficiaries, according to USCIS.[38]

On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke rescinded DACA, effective March 5, 2018.[39] DACA recipients whose benefits expired before that date

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[35] Janet Napolitano, *Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, DEP'T OF HOMELAND SECURITY, Jun. 15, 2012, *available at*: https://www.dhs.gov/sites/default/files/publications/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[36] *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, DEP'T OF HOMELAND SECURITY, Jun. 15, 2012, *available at*: https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low.

[37] *Id*.

[38] *Approximate Active DACA Recipients: Country of Birth. As of August 31, 2018*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Aug. 31, 2018, *available at*: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_August_31_2018.pdf.

[39] Elaine C. Duke, *Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)*, Sept. 5, 2017, *available at*: https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

could apply for renewal up until October 5, 2017.[40] As I explained in May 2018, however: "Due to federal District Court injunctions. . . that program remains in effect, and U.S. Citizenship and Immigration Services (USCIS) has resumed accepting requests to renew DACA grants."[41]

Again, as an aside, "deferred action" is a form of a "prosecutorial discretion."[42] The idea that a court could exercise the discretion of the prosecutor blurs the logical and necessary lines between one of the parties to a case and the purportedly neutral arbiter of that case, a cornerstone of our system of justice.

History of DACA

DACA finds its genesis in various iterations of what is known as the "DREAM Act," a brief history of which the American Immigration Council[43] described in a September 2017 fact sheet:

> *The first version of the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in 2001. As a result, young undocumented immigrants have since been called Dreamers. Over the last 16 years, numerous versions of the Dream Act have been introduced, all of which would have provided a pathway to legal status for undocumented youth who came to this country as children. Some versions have garnered as many as 48 co-sponsors in the Senate and 152 in the House.*
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> *Despite bipartisan support for each bill, none have become law. The bill came closest to passage in 2010 when the House of Representatives passed the bill and the Senate came five votes short of the 60 Senators needed to proceed to vote on the bill.*

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[40] *Id*.
[41] Andrew Arthur, *The 'Queen of the Hill' on a DACA Deal*, CENTER FOR IMMIGRATION STUDIES, May 22, 2018, *available at*: https://cis.org/Arthur/Queen-Hill-DACA-Deal.
[42] *See* Jessica Vaughn, *What is Deferred Action?*, CENTER FOR IMMIGRATION STUDIES, Jun. 15, 2012, *available at*: https://cis.org/Vaughan/What-Deferred-Action.
[43] *Fact Sheet: The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, American Immigration Council, Sept. 6, 2017, *available at*: https://americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers.

My colleague, Temple University Beasley School of Law Professor Jan Ting, described the path from the DREAM Act to DACA in a December 2, 2014 Backgrounder:

> *In September 2011, when pressured by illegal alien advocates to implement the DREAM Act "on his own," President Obama responded: "I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true." In June 2012, the president did what nine months before he had insisted he could not do, unilaterally instituting the Deferred Action for Childhood Arrivals program ("DACA"), under which illegal alien "Dreamers" can request a two-year deferral of any action to remove them, along with employment authorization documents.*[44]

These facts were referenced by then-AG Jeff Sessions in his September 5, 2017 remarks on DACA:

> *The DACA program was implemented in 2012 and essentially provided a legal status for recipients for a renewable two-year term, work authorization and other benefits, including participation in the social security program, to 800,000 mostly-adult illegal aliens.*
>
> *This policy was implemented unilaterally to great controversy and legal concern after Congress rejected legislative proposals to extend similar benefits on numerous occasions to this same group of illegal aliens.*
>
> *In other words, the executive branch, through DACA, deliberately sought to achieve what the legislative branch specifically refused to authorize on multiple occasions. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.*[45]
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> *Legality of DACA*

Professor Ting and AG Sessions were not the only legal experts to question the legality of DACA. In testimony before this committee in December 2013, George Washington University School of Law Professor Jonathan Turley explained:

> *The Administration's basis for negating statutory provisions lost even the pretense of reasoned authority in the immigration area. There has long been a general*

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[44] Jan Ting, *Backgrounder: President Obama's "Deferred Action" Program for Illegal Aliens Is Plainly Unconstitutional*, CENTER FOR IMMIGRATION STUDIES, Dec. 2, 2014, *available at*: https://cis.org/Report/President-Obamas-Deferred-Action-Program-Illegal-Aliens-Plainly-Unconstitutional.

[45] *Attorney General Sessions Delivers Remarks on DACA*, DEP'T OF JUSTICE, Sept. 5, 2017, *available at*: https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

consensus that a president cannot refuse to enforce a law that is considered constitutionally sound. Thus, in his general support for nonenforcement orders, former Attorney General Benjamin Civiletti acknowledged that "[t]he President has no `dispensing power,'" meaning that the President and his subordinates "may not lawfully defy an Act of Congress if the Act is constitutional . . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." Yet, in June 2012, President Obama appeared to exercise precisely this type of "dispensing power" in issuing an order to federal agencies that the Administration would no longer deport individuals who came to this country illegally as children despite the fact that federal law mandates such deportation. In disregarding the statutory language, the Administration rolled out a new alternative policy that individuals can qualify for "deferred action"' if they had come to the country before the age of 16, have no criminal history, resided in the U.S. for at least five consecutive years, and are either a student or have already graduated from high school, or earned an equivalent GED, or served in the military. Yet, this new, detailed system is the product not of Congress but the internal deliberations of a federal agency. While claimed to simply be an act of prosecutorial discretion, it constitutes a new and alternative immigration process for these individuals.

The Administration again circumvented Congress in August of this year with the announcement that deportation would no longer occur for any primary provider for any minor child or the parent or guardian of a child who is a U.S. citizen or legal permanent resident. Once again, it is not clear what Congress could do to counter such claims of discretion any more than it could set the date for the implementation of the ACA. The federal law mandates deportation for individuals in the country illegally. ***While prosecutorial discretion has been cited in individual case decisions, the Administration was using it to nullify the application of federal law to hundreds of thousands, if not millions of individuals. Once again, one's personal view of the merits of such an exception should not be the focus, or even a part, of the analysis. In ordering this blanket exception, President Obama was nullifying part of a law that he simply disagreed with. There is no claim of unconstitutionality. It is a raw example of the use of a "dispensing power" over federal law. It is difficult to discern any definition of the faithful execution of the laws that would include the blanket suspension or nullification of key provisions. What the immigration order reflects is a policy disagreement with Congress. However, the time and place for such disagreements is found in the legislative process before enactment. If a president can claim sweeping discretion to suspend key federal laws, the entire legislative process becomes little more than a pretense.*** *What is most striking is the willingness of some to accept this transparent effort to rewrite the immigration law after the failure to pass the DREAM Act containing some of the same reforms.*[46]

[46]*The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary, 113th Cong. (2013)* (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George

(Emphasis added).

Characteristics of DACA Recipients

The characteristics of the population of DACA recipients are only vaguely understood, as my colleague, Jessica Vaughan, explained in testimony[47] before the Senate Judiciary Committee:

> *Very little is known of the characteristics of the DACA population. Some studies have been done that create proxies for DACA beneficiaries within the Census Bureau data, but there is no way to know if they correctly describe the actual DACA population. Another widely cited study published by a pro-DACA advocacy group was based on a Facebook survey of DACA activists, but was not conducted using generally accepted scholarly survey methodology.*
>
> *I know of only one reputable academic study of actual DACA beneficiaries, conducted by Harvard scholar Roberto G. Gonzales, known as the National UnDACAmented Research Project. Gonzales and his team surveyed just over 2,000 self-described DACA-eligible respondents and performed about 200 follow-up detailed interviews. There are important (self-acknowledged) caveats to the findings, and Gonzales believes that for a variety of reasons, the respondents are more educated and well-off than the DACA population as a whole.*
>
> *To date Gonzales has published only a few of the findings, but together with other information that has been disclosed by USCIS, his results suggest that the DACA population spans the full spectrum of educational achievement and socio-economic status. Among the findings:*
>
> *73 percent of DACA recipients he surveyed live in a low-income household (defined as qualifying for free lunch in high school);*
>
> *22 percent have earned a degree from a four-year college or university;*
>
> *21 percent have dropped out of high school;*
>
> *20 percent have no education beyond high school and no plans to attend college;*
>
> *59 percent obtained a new job with a DACA work permit, but only 45 percent increased their overall earnings;*
>
> *36 percent have a parent who holds a bachelor's degree; and*
>
> *51 percent were already employed before DACA.*

Washington University), *available at*: https://www.govinfo.gov/content/pkg/CHRG-113hhrg85762/html/CHRG-113hhrg85762.htm.

[47] *Oversight of the Administration's Decision to End Deferred Action for Childhood Arrivals, Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017)* (statement of Jessica Vaughn, Director of Policy Studies, Center for Immigration Studies), *available at*: https://cis.org/Testimony/Oversight-Administrations-Decision-End-Deferred-Action-Childhood-Arrivals.

Ms. Vaughn made clear that a better understanding of the characteristics of the DACA population was necessary "in order to better understand the potential impact of an amnesty, and to help determine if the eligibility criteria for an amnesty should be different from the DACA rules."[48]

Legislative Proposals for DACA Recipients and "Dreamers"

In the last Congress, there were a number of proposals to provide legal status to the just less than 700,000 DACA recipients, as well as to provide status to others similarly situated.

For example, there was H.R. 4760 (2018)[49], the "Securing America's Future Act of 2018" (SAFA). SAFA was sponsored by Rep. Bob Goodlatte (R-Va.), then-chairman of this committee, and Rep. Mike McCaul (R-Texas), then-chairman of the House Homeland Security Committee. SAFA contained a number of enforcement provisions, and also ended the diversity visa program and chain migration. It would have provided aliens who had been granted DACA benefits the opportunity to apply for a three-year renewable legal status allowing them to work and travel overseas, but would not have provided DACA beneficiaries a direct path to lawful permanent residence.

There was also H.R.3440, the Dream Act of 2017, sponsored by Rep. Lucille Roybal-Allard (D-CA).[50] That bill would have granted permanent residence to any inadmissible or removable alien, or alien with TPS who: had been continually present United States for four years on the date of enactment; was younger than 18 at the time of initial entry into the United

[48] *Id.*
[49] Securing America's Future Act of 2018, H.R.4760, 115th Cong. (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text.
[50] Dream Act of 2017, H.R.3440, 115th Cong. (2017), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/3440.

States; was not inadmissible on criminal, security, terrorism, or other grounds; had not been engaged in persecution; had not been convicted of specified state or federal offenses; and who had fulfilled specific educational requirements. It also would have granted permanent residence to any DACA beneficiary who had not engaged in conduct that would make that alien ineligible for DACA. Finally, the bill provided for removal of the conditions on that LPR status, and contained a confidentiality provision barring release of information provided by applicants for conditional LPR status or DACA, subject to limited exceptions.

In addition, there was H.R. 4796[51], the "Uniting and Securing America" (USA) Act, sponsored by Rep. Will Hurd (R-TX) and Pete Aguilar (D-CA). That bill would have created a renewable eight-year conditional permanent resident status for aliens who entered the United States before the age of 18 and who had lived here since December 31, 2013, provided that they met certain educational requirements. DACA recipients would have been eligible for the status if they had satisfied educational, military, or employment requirements. It would have beefed up border security to a degree (but would not have included infrastructure along the entire Southwest border) and increased the number of immigration judges.

Issues With Respect to the DACA Population

Jon Feere, former Legal Policy Analyst at the Center for Immigration Studies, examined and rebutted many of the claims associated with DACA in June 2012, shortly after that program was announced.[52] The points he raised remain relevant to consideration of any amnesty that Congress proposes for the population of DACA recipients, and/or other aliens similarly situated.

[51] USA Act of 2018, H.R.4796, 115th Cong. (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4796. But the the the

[52] *See* Jon Feere, *Obama's Administrative Dream Act Myths*, CENTER FOR IMMIGRATION STUDIES, Jun. 17, 2012, *available at*: https://cis.org/Feere/Obamas-Administrative-Dream-Act-Myths.

One of the main issues he identified was the false claim that DACA only applied to aliens who have "no criminal record."[53]

As preliminary matter, I would note that most of the aliens who have benefited from DACA entered the United States illegally, and therefore are subject to the criminal grounds of inadmissibility under section 212 of the INA[54], although some likely entered legally and overstayed, and are therefore subject to the criminal grounds of removability under section 237 of the INA[55]. In either event, the criminal bars for DACA relief are both broader, but also in many ways significantly much narrower, than the criminal grounds of either inadmissibility or removability.

As set forth above, an applicant is barred from DACA relief if the applicant has been convicted of a felony offense, "significant misdemeanor," or "three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct."[56] While the terms "felony" and "misdemeanor" are defined in the federal criminal code[57], the criminal bars to DACA relief do not directly match up to the criminal grounds of inadmissibility or deportability, which generally focus on "crimes of moral turpitude," "aggravated felonies" drug offenses, and multiple criminal offenses generally.

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[53] *See What is DACA and who are the US 'Dreamers'?*, AL JAZEERA, Oct. 10, 2017, ("Recipients of the [DACA] programme's safeguarding must have no criminal record, proof they were brought to the US before the age of 16, were under 31 years of age when the programme was launched, and be at least 15 years old when applying to invoke its protection."), *available at*: https://www.aljazeera.com/news/2017/09/daca-rescinded-immigrant-programme-170905192454024.html.

[54] *See* section 212 of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

[55] *See* section 237 of the INA, *available at*: https://www.law.cornell.edu/uscode/text/8/1227.

[56] *DHS DACA Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 8, 2018, *available at*: https://www.uscis.gov/archive/frequently-asked-questions.

[57] *See* 18 U.S.C. § 3559 (2019), *available at*: https://www.law.cornell.edu/uscode/text/18/3559.

The DACA "Frequently Asked Questions" page on the USCIS website explains what a "significant misdemeanor" is:

> *For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:*
>
> *Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or,*
>
> *If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.*[58]

I must first note that driving under the influence is not a ground of inadmissibility or removability, however it should be.[59] Firearms offenses, again, are not a ground of inadmissibility, however again Congress should designate them as such.

All of that said, this is otherwise an extremely limited list of criminal offenses, particularly as compared to the grounds of inadmissibility. For example, under section 212(a)(2)(A)(ii) of the INA, an alien convicted of violating (or conspiring or attempting to violate) any law or regulation of the state, the United States, or a foreign country relating to a controlled substance is inadmissible.[60] That includes simple possession of drugs, not just drug trafficking.

Similarly, an alien convicted of two crimes of moral turpitude (including theft, fraud, and many violent offenses) is inadmissible under section 212(a)(2)(A)(i) of the INA, regardless of

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[58] *DHS DACA Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 8, 2018, *available at*: https://www.uscis.gov/archive/frequently-asked-questions.
[59] *See* Andrew Arthur, *Sanctuary for Illegal Alien Drunk Drivers?*, CENTER FOR IMMIGRATION STUDIES, Jun. 20, 2017, *available at*: https://cis.org/Arthur/Sanctuary-Illegal-Alien-Drunk-Drivers.
[60] *See* section 212(a)(2)(A)(ii) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

the sentence imposed, or even if no sentence was imposed, and regardless of whether those crimes arose from the same scheme of criminal misconduct.[61] Under section 212(a)(2)(B) of the INA, an alien convicted of any two offenses for which the aggregate sentences to confinement was five years or more is inadmissible, even if the alien did not serve one day in jail.[62]

There is no explanation whatsoever as to why an alien who is inadmissible or removable on criminal grounds should be eligible for DACA relief. The only purpose served by that discrepancy is to allow serious criminals who would otherwise be removable to remain in the United States, but there is no reason why that would be a desirable outcome.

Were there to be any consideration of legalizing the population of DACA recipients, they should be subject to the same criminal grounds of inadmissibility and deportability as any other alien, and Congress should add driving under the influence and firearms offenses to the grounds of inadmissibility.

Finally, as Ms. Vaughn told the Senate:

> *The low eligibility standards, which explicitly allowed some people with criminal records to obtain DACA, together with the inadequate screening of applications and failure to ensure thorough review of databases virtually guaranteed that mistakes were made in granting DACA benefits to individuals who turned out to be criminals. USCIS has disclosed that 2,139 people have had their DACA benefits revoked due to criminal behavior or gang ties. According to USCIS, most of these crimes were for "alien smuggling, assaultive offenses, domestic violence, drug offenses, DUI, larceny and thefts, criminal trespass and burglary, sexual offenses with minors, other sex offenses, and weapons offenses."*
>
> *Following the mistaken approval of benefits in 2013 for Emmanual Jesus Rangel-Hernandez, a DACA beneficiary who killed four people in Charlotte, N.C., who was approved for DACA despite evidence of gang membership that was in the system (that the USCIS officer failed to check), in the spring of 2015 USCIS had*

[61] *See* section 212(a)(2)(A)(i) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[62] *See* 212(a)(2)(B) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

to provide "refresher training" on how to perform thorough background checks for all officers who handled DACA applications. Following a review of cases prompted by Sen. Grassley's inquiries into this case, USCIS found and terminated hundreds more cases. The vast majority were cases of criminal offenses that were committed after DACA approval, but about 5 percent were cases where the information was available to the USCIS officer at the time of adjudication.

Even more disturbing, only about one-third of these individuals whose DACA status was terminated due to crimes or gang ties were promptly removed; most of the rest were released and allowed to remain in the United States for some time, even without DACA benefits. It appears that more than 100 of these gang members were not put on the path to deportation at all and likely have been allowed to remain in the United States.

An MS-13 gang leader in Frederick, Md., was able to receive DACA benefits and worked as a custodian at a local middle school. He is now incarcerated for various gang-related crimes, but reportedly was told by gang leaders in El Salvador to take advantage of the lenient policies at the U.S. border to bring in new recruits, knowing that they would be allowed to resettle in the area with few questions asked.

In another troubling case, Edgar Covarrubias-Padilla, an alleged DACA recipient who was working as the night manager at a popular overnight science camp in northern California, was arrested by local authorities and charged with four felonies, including possession and distribution of more than 600 child porn images and a charge for lewd and lascivious act with a child under 14. According to whistle-blowers, ICE agents had become aware of an investigation into Covarrubias-Padilla's behavior and updated his USCIS file, but USCIS took no action for months, and Covarrubias-Padilla remained in his job in a position to abuse other children.

The implementation of DACA prevented the removal of thousands of aliens who were in deportation proceedings at the time. According to ICE records, in the first six months that DACA was operating, there were 4,594 people who had been in removal proceedings, but who instead received DACA benefits. There is a strong likelihood that many of these individuals had criminal convictions in order for them to be in deportation proceedings under Obama administration policies. In some instances, Obama appointees at DHS headquarters exerted pressure on field office enforcement personnel to drop deportation proceedings for aliens seeking DACA benefits, even in cases where the deportation case was based on state criminal convictions.[63]

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[63] *Oversight of the Administration's Decision to End Deferred Action for Childhood Arrivals, Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017)* (statement of Jessica Vaughn, Director of Policy Studies, Center for Immigration Studies), *available at*: https://cis.org/Testimony/Oversight-Administrations-Decision-End-Deferred-Action-Childhood-Arrivals.

Any amnesty of some or part of the DACA population, and especially any amnesty of similarly situated aliens, must insure that such errors are not replicated. Further, if the population of aliens granted amnesty were to be expanded past the number of DACA applicants, the possibility of similar errors occurring in the future increases, reason enough to limit any future amnesty.

Mr. Feere also addressed the contention that DACA recipients "must have lived in the United States for five continuous years":

> *It is well established in immigration law that the "continuous residence" requirement does not actually require an alien to be continuously resident in the United States. Immigration attorneys have been successful in getting immigration courts to whittle this down to a point where it is almost meaningless. For example, an alien seeking naturalization must also prove five years of continuous residency, but that can still be met even if the alien has been absent from the United States for up to six months. And the alien can have multiple six-month vacations over the course of five years. If Obama's administrative DREAM Act follows established precedent, the five-year residency requirement will not mean much.*[64]

In fact, the "Frequently Asked Questions" for DACA on the USCIS website contains the following:

> *Do brief departures from the United States interrupt the continuous residence requirement?*
>
> *A58: A brief, casual and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:*
>
> *The absence was short and reasonably calculated to accomplish the purpose for the absence;*
>
> *The absence was not because of an order of exclusion, deportation or removal;*

[64] Jon Feere, *Obama's Administrative Dream Act Myths*, CENTER FOR IMMIGRATION STUDIES, Jun. 17, 2012, *available at*: https://cis.org/Feere/Obamas-Administrative-Dream-Act-Myths.

The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation or removal proceedings; and

The purpose of the absence and/or your actions while outside the United States were not contrary to law.

Once USCIS has approved your request for DACA, you may file Form I-131, Application for Travel Document, to request advance parole to travel outside of the United States. [65]

Whether an "absence was short and reasonably calculated to accomplish the purpose for the absence" itself, under circular logic, raises the question of whether the departure was brief, casual, and innocent, and thus would open any potential amnesty of DACA recipients (or potential DACA recipients) up to significant litigation, at considerable cost the American people who would bear much of the cost of that litigation.

And again, a DACA recipient can travel on advance parole, meaning that the beneficiary could have spent a significant amount of time in the past six years in his or her home country, and could even have started a family there. Should Congress propose an amnesty for those individuals, it should set a specific time limit for the amount of time that each actually spent outside of the United States in that status.

Defining the Class of Aliens Eligible for an Amnesty

Should Congress create a new amnesty for some class of aliens unlawfully present in the United States, there are significant issues that must be addressed in determining how broad that amnesty should be.

DACA recipients logically have the strongest moral claim to an amnesty relief. As my colleague Mark Krikorian has previously asserted, "fixing the specific problem of 690,000

[65] *DHS DACA Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 8, 2018, *available at*: https://www.uscis.gov/archive/frequently-asked-questions.

people who applied in good faith for Obama's illegal program, and whose work permits will start expiring after March 5, is very different from passing a DREAM Act amnesty from scratch."[66] He continued:

> *A DACA fix would be a targeted measure for a finite, fixed universe of people. It would, in effect, merely be an upgrade from the tainted "amnesty lite" that Obama gave them to a lawful "amnesty premium". While a DACA fix should include a review of the existing files for fraud (which may be widespread), administratively it would be relatively straightforward, since everyone involved is already in the database.*[67]
>
> *A from-scratch DREAM Act, on the other hand, would be, as Fred Bauer wrote . . . "a substantial piece of legislation".*

In fact, some DACA recipients would appear to have different justifications for amnesty relief that are stronger than others. For example, I note that Jon Feere previously rebutted claims that DACA was "for children": "The plan would benefit illegal aliens up to age 30, and anyone 18 or older is an adult. This is not just for youths."[68]

Mr. Feere is correct in his contentions. In fact, an alien could have entered the United States the day before his or her 16th birthday, and be a DACA recipient at the age of 36, closer to middle age than youth.

Granting benefits to an alien who has been raised in this country and socialized as an American may make moral sense. A 15-year-old, however, who grew up in another country before coming to the United States almost definitely knows the language and the customs in his or her home country, and has had the added advantage of having likely benefited from an

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[66] Mark Krikorian, *DACA Fix vs. DREAM Act: Moving the Goalposts*, CENTER FOR IMMIGRATION STUDIES, Sept. 13. 2017, available at: https://cis.org/Krikorian/DACA-Fix-vs-DREAM-Act-Moving-Goalposts.
[67] *Id*.
[68] Jon Feere, *Obama's Administrative Dream Act Myths*, CENTER FOR IMMIGRATION STUDIES, Jun. 17, 2012, *available at*: https://cis.org/Feere/Obamas-Administrative-Dream-Act-Myths.

education in this country and from American healthcare. As a father and a former coach for various recreational-league teams, I can state unequivocally that a 15-year-old is familiar with the customs and norms in the society in which he or she was raised. I would also note that many of the asylum cases that I heard as an immigration judge involved threats of violence from gang members of tender years, some as young as 12. "Youth" can be a relative term as it relates to different cultures.

Should Congress consider some amnesty for any alien who entered the United States, either voluntarily or with his or her family, Congress should set a lower age-bar than 16 to reflect these realities.

With respect to the former issue, of whether DACA recipients entered the United States voluntarily, Mr. Feere stated:

> *Obama's proposal would benefit illegal aliens who snuck into the United States on their own. Like the failed DREAM Act, this plan does not include any language requiring that illegal alien beneficiaries actually be "brought" into the United States by their parents. This is a fictitious description that amnesty advocates have created in the hope that it creates sympathy, and ultimately support, for amnesty. It is well known that teenage aliens frequently enter the United States illegally on their own volition. Put another way, people who knowingly and willingly violated U.S. sovereignty will benefit from Obama's plan. The only reason that "children brought into the United States" are sympathetic is because they did not make the decision to violate U.S. sovereignty. The same cannot be said for many of the potential beneficiaries under this plan.*
>
> *Even Janet Napolitano's memo contains an inconsistency. She writes that it is for "certain young people who were brought to this country" yet in the nuts-and-bolts section of the memo, she explains that the plan would apply to all illegal aliens who "came to the United States under the age of 16". Legally and morally culpable illegal aliens will benefit under the plan.*[69]

Again, his points are well taken. It should be noted that 20,123 so-called "unaccompanied alien children" (UACs) were apprehended along the Southwest Border in the

[69] *Id*.

first four months of FY 2019. [70] By definition[71], those UACs were not brought to the United States with their parents, and no UAC who entered without being brought to this country by a parent or guardian should benefit from any future amnesty, if one were to be considered.

It could reasonably be argued, though, that it makes no moral sense to benefit any DACA recipient over a foreign national of the same age from the same country who did not leave that country. For example, in October 2017, I made the point that DACA recipients could provide many of the same benefits to their home countries that, the State Department argues, J-1 visa holders under the "Summer Work Travel" program provide to theirs:[72]

> *[T]he population of aliens who have received DACA benefits are working age individuals who have either received an education United States, or who [have] satisfied the educational standards in this country, or who have served in the armed forces. Such individuals would plainly possess skills that are needed in any economy, developed or underdeveloped.*
>
> *This is especially true, however, when the countries from which those aliens hail are taken into consideration. According to U.S. Citizenship and Immigration Services (USCIS), the vast majority of those aliens were from Mexico, followed by significantly lower numbers from El Salvador, Guatemala, Honduras, and Peru.*
>
> *With respect to Mexico, the CIA World Factbook states:*
>
> > *Mexico's current government, led by President Enrique PENA NIETO, has emphasized economic reforms, passing and implementing sweeping energy, financial, fiscal, and telecommunications reform legislation, among others, with the long-term aim to improve competitiveness and economic growth across the Mexican economy. Mexico began holding public auctions of exploration and development rights to select oil and gas resources in 2015 as a part of reforms that allow for private investment in the oil, gas, and electricity sectors. Mexico held its fourth auction in December 2016 and allocated 8 of 10 deepwater fields, demonstrating Mexico's capacity to*

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[70] *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION, Feb. 8, 2019, available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions.

[71] *See* 6 U.S.C. § 279(g)(2) (2019) (defining "unaccompanied alien child"), *available at*: https://www.law.cornell.edu/uscode/text/6/279.

[72] Andrew Arthur, *Should DACA Recipients Become 'Cultural Ambassadors' to Their Home Countries?*, CENTER FOR IMMIGRATION STUDIES, *available at*: https://cis.org/Arthur/Should-DACA-Recipients-Become-Cultural-Ambassadors-Their-Home-Countries.

> *attract investment amid low oil prices. The government will allocate additional fields in 2017.*
>
> *This is clearly the sort of dynamic economy that would benefit from an influx of young educated workers. It is no wonder that Mexican Foreign Secretary Luis Videgaray stated in September 2017 that: "For Mexico it will be a pleasure to receive the young DACA. They are talent and human capital for our country" before adding: "but if they want to stay in the country where they have grown up, we have a legal and moral obligation to support them to achieve their dreams."*

In any event, it is not entirely clear what moral justification supports the extension of lawful permanent residence to Dreamers who are not otherwise covered by DACA. Those individuals either entered illegally or overstayed after the DACA program was instituted, or failed to take advantage of that program to begin with. Any argument that those foreign nationals were not drawn to this country by the Obama Administration's unlawful DACA program (but, see below) would be belied by the granting of green cards to them. In fact, if anything, it would simply underscore the fact that they understand U.S. immigration policy better than many so-called "experts" and government officials who asserted to the contrary.

The argument for granting lawful permanent residence to TPS recipients is even weaker. They have already been the beneficiaries of a generous program that has protected them against hardship in their countries. To the extent that TPS recipients have had children born in the United States, it is important note that under current immigration law, those children (after they have turned 21) would be eligible to petition for their parents to obtain green cards. To the extent that they own property in the United States, they would be able to either sell that property to begin new lives back home (likely in a better financial position than their neighbors), or leave the care thereof to friends and relatives in the United States who would be able to convey the proceeds from that property to them in their home countries. Furthermore, again, they have had the benefits of not only the protection of the United States, but also access to the American

educational system and healthcare, placing them in a better position than their compatriots who did not enter the United States illegally or overstay.

It is also important, in framing any amnesty, to consider the impact that amnesty will have on the ability of USCIS to process applications and provide benefits to those who did not break the law. In October 2018, for example, Jessica Vaughan explained:

> *The cost of adjudicating DACA applications has been subsidized by other immigration benefits applicants to the tune of $316.5 million over the last three years, according to information released by USCIS on Friday. This subsidy was needed because the Obama administration did not impose an application fee for DACA status. Most immigration benefits applicants pay for the application for the status they are seeking, with additional fees for a work permit and fingerprint collection; DACA applicants only had to pay for the work permits and fingerprints, leaving legal immigrants and visa applicants to pick up the tab for the cost of adjudicating their eligibility for DACA.*[73]

USCIS, like any other institution, only has limited resources, and in this case limited capacity to adjudicate the applications and benefit requests that it is already handling. Adding almost 500,000 to one million (at a minimum, see below) to that agency's workload would, without a doubt, slow its ability to provide benefits to aliens who have applied legally for them.

Even if the fee for any new amnesty were set high enough to pay for all of the costs of adjudicating each application (and no waivers were allowed), two other factors merit consideration.

First, to the extent that such amnesty would cover individuals who have not previously applied for some sort of benefit or relief in the United States, the applications themselves would be complicated from an evidentiary standpoint, and require significant agency resources to

[73] Jessica Vaughn, *DACA Applications Cost Legal Immigrants $316.5 Million Since 2015*, CENTER FOR IMMIGRATION STUDIES, Oct. 8, 2018, *available at*: https://cis.org/Vaughan/DACA-Applications-Cost-Legal-Immigrants-3165-Million-2015.

adjudicate. Proving one's presence in the United States while one is an unlawful status is an evidentiary challenge. Overstays can at least point to a stamp in their passports to show their date of entry, but even they would have to submit voluminous evidentiary proof of their continued presence. Those who entered unlawfully would have to offer significant extrinsic evidence to establish not only their continued presence in this country, but also their dates of entry.

Second, such an amnesty would almost definitely require USCIS to hire additional adjudicators, and there would logically be a learning curve for those new adjudicators, even assuming sufficient applicants could be found. Thus, there would be considerable lag time between the period that an alien who is ineligible for such an amnesty (on criminal grounds, for example) filed an application and the time that that application was denied. This would simply encourage additional migrants to enter this country illegally, as well as pose a criminal danger to the American people.

Limiting the Effects of an Amnesty

There are two direct downstream of effects of any amnesty: they encourage other aliens to enter the United States illegally to take advantage of a future amnesty, and they result in greater immigration to the United States as a result of chain migration. In addition, a Dream Act amnesty alone would be expensive from a fiscal point of view, and that cost would only be compounded by adding in an amnesty for TPS recipients. Finally, prior amnesties have been rife with fraud, and there is no reason to expect that a broad amnesty that would include individuals who have not already received DACA or TPS benefits would be any different.

Increased Illegal Migration

For proof of the increased incentives for illegal migration, one need look no further than DACA, an administrative amnesty, itself. In FY 2011, before DACA took effect, 16,067 UACs were apprehended after illegally entering the United States.[74] By FY 2013, after DACA, that number had grown to 38,833 (a 241 percent increase), and continued to climb to 68,631 (a 427 percent increase) by the next year.[75] Although critics allege that the two could not be linked because aliens who entered after the effective date of DACA could not take advantage of that program, there is no other logical reason for a surge of such size.[76] Rather, it is indicative of the facts that those illegal entrants understood what many in policy positions did not: any amnesty indicates a lack of willingness on the part of the United States to enforce its immigration laws.

Increased Legal Chain Migration

An increase in the total amount of legal migration as result of an amnesty is a matter of simple application of the INA itself, at least as currently written. For example, my colleague Ms. Vaughn explained in February 2018:

> *No other advanced country has an immigration system as generous as ours, which allows immigrants to sponsor grown sons and daughters (and their children), siblings (and their children), parents (and their relatives), and new*

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[74] *Total Unaccompanied Alien Children (0-17 Years Old) Apprehensions By Month - FY 2010*, UNITED STATES BORDER PATROL, undated, *available at*: https://www.cbp.gov/sites/default/files/assets/documents/2018-Jul/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10-FY17.pdf.

[75] *Id*.

[76] *See, e.g.,* Matthew Sussis, *No Relationship Between Homicide Rates in Central America and Illegal Border Crossings*, CENTER FOR IMMIGRATION STUDIES, Mar. 4, 2019, ("One of the most common arguments from advocacy groups with regard to the influx of Central American migrants is that these migrants are fleeing violence. Groups such as the ACLU and SPLC cite "gang brutality", "gang violence", and fear of murder as reasons why the number of illegal, border-crossing migrants from the Northern Triangle (Honduras, Guatemala, and El Salvador) has soared in recent years.
As such, one might expect that, as the murder rate rises in those countries, the number of border-crossers would correspondingly go up, and vice versa. But the data show no obvious relationship between Central American homicide rates and the number of Central Americans apprehended illegally crossing our border in a year."), available at: https://cis.org/Sussis/No-Relationship-Between-Homicide-Rates-Central-America-and-Illegal-Border-Crossings.

spouses (and their relatives). According to Princeton University researchers, in recent years each new immigrant has sponsored an average of 3.45 additional relatives.

The parents and spouses of U.S. citizens may enter in unlimited numbers, and they represent the bulk of chain migration. The "parents" category, in particular, has been the fastest growing, bringing in about 174,000 in 2016, which is more than quadruple the number who came in 1986, the year of the last big amnesty.

The chain-migration multiplier would be even higher but for the numerical limit of 226,000 on the extended-family categories that Congress wisely imposed. Over time, a lengthy waiting list of extended family members has built up, now numbering nearly four million people. These applicants wait between two and 23 years to apply, with the longest waits in the "sibling" category.

* * * *

Over the past 35 years, chain migration has made up 60 percent of total legal immigration. Essentially, our system lets yesterday's immigrants choose most of tomorrow's immigrants.

A big share of recent immigration has been chain migration launched by the 1986 IRCA amnesty of about three million illegal aliens. Amnesties always go on longer and benefit more people than anyone can imagine at the time they are enacted. The government did not issue the last IRCA green cards until 2015, when 13 direct beneficiaries and 19 family members got their green cards, 29 years after Congress passed the bill. Since chain immigrants tend to resemble their sponsors in terms of education and skills, many of today's legal immigrants resemble the illegal aliens who received amnesty in 1986. This helps explain why today's immigrants tend to be less educated and tend to work in lower-paying jobs, and why about half of all immigrant-headed households are dependent on welfare programs.[77]

Any amnesty of some or all of the DACA population, and especially any amnesty that would include similarly situated aliens and/or TPS recipients, must include provisions that will address the negative effects of increased legal immigration that would inevitably follow such an amnesty.

[77] Jessica Vaughn, *Why Cutting Chain Migration Must Be Part of an Immigration Deal*, CENTER FOR IMMIGRATION STUDIES, Feb. 1, 2018, *available at*: https://cis.org/Vaughan/Why-Cutting-Chain-Migration-Must-Be-Part-Immigration-Deal.

In this regard, with respect to increased chain migration resulting from a DACA amnesty, Ms. Vaughan has written:

> *Like other amnesties before it, a DACA amnesty inevitably would create a new surge of chain migration. This is because the vast majority of the DACA beneficiaries originally arrived with their parents, and these parents plus any siblings typically are still living in the United States illegally. It is reasonable to assume that the DACA amnesty grantees would seek to sponsor their parents and non-citizen siblings at the earliest opportunity — which would be as soon as they obtain citizenship, under current rules.*
>
> *If there are no other changes to the immigration system. . . an amnesty for DACA recipients potentially could add at least 700,000 and quite likely well over a million new family-based immigrants. The admissions would begin as soon as two years after the DACA beneficiaries receive green cards (in the case of spouses) and continue for another 20 years or more (in the case of siblings). The total number of chain immigrants depends on the number of family members that DACA members have, both in the United States and abroad; how quickly the DACA beneficiaries become citizens; and how quickly their sponsored spouses and parents become citizens. The greatest multiplier effect will come as the DACA amnesty beneficiaries sponsor their parents.*
>
> *Under current rules, DACA amnesty beneficiaries will be able to petition for non-citizen spouses and their children right away. An analysis of Census data by the Center for Migration Studies found that, in 2014, 5 percent of the original DACA-eligible population were married to non-U.S. citizen, non-legal immigrants (most likely illegal aliens). By today's DACA numbers, that would be about 34,500 non-legal spouses.*
>
> *However, there are a number of hurdles to obtaining green cards for the illegal alien spouses (and their children) of DACA amnesty beneficiaries. First, the category for these applicants is numerically limited, and the current waiting time is about two years after the petition is filed; those being admitted now in this category applied in the fall of 2015. These waiting times could increase somewhat if there were a large volume of applicants in this category, which has an annual limit of about 88,000.*
>
> *The second hurdle is that by law an alien who has been present in the United States unlawfully as an adult for more than six months and then departs is subject to bar on re-entry of either three or 10 years, depending on the length of illegal presence (INA Section 212(a)(9)(B)). If a DACA beneficiary is sponsoring an illegal alien spouse for a green card, then in some cases that illegal alien must depart from the country to apply for the green card in their home country, which makes them subject to the re-entry bar. This requirement applies to those illegal aliens who were illegal border-crossers, but not to visa overstayers. There is a waiver available in certain circumstances, but these are not routinely approved (and should not be) because they require that a sponsor demonstrate that there*

would be extreme hardship to a U.S. citizen, perhaps a child, if the spouse is not permitted to stay in the country. In the majority of these cases, the illegal alien spouses usually choose to take their chances by staying in the country illegally while waiting for the sponsor to become a citizen (and beg or demand for prosecutorial discretion if caught) rather than move with their spouse to their home country to wait out the bar. Given these hurdles, it is unlikely that there will be a very large number of illegal aliens who obtain green cards through marriage to a DACA beneficiary.

If we assume that the percentage of illegally present DACA spouses who overstayed visas (as opposed to illegal border crossers) is proportionate to the total population of overstayers, then it is likely that about 13,800 illegal alien spouses of DACA beneficiaries would be able to obtain green cards, along with an unknown number of the spouses' illegally resident children (34,500, [or] 40 percent). This would occur two to three years after the amnesty, at the earliest. Upon receiving green cards, these spouses can then begin to sponsor their family members.

Parents and siblings are another story. It is widely assumed that most individuals with DACA came to the United States with one or both parents and possibly siblings, and that these parents and siblings are also in the country illegally (some of the siblings might also have qualified for DACA). If DACA beneficiaries are awarded green cards under an amnesty program, then under the current system, if they become citizens they will be able to sponsor their parents and siblings for green cards. Under current law, after five years of lawful residency they will be able to apply for naturalization. To qualify for citizenship, an applicant must demonstrate good moral character, English proficiency, and pass a basic civics test.

Unlike spouses of green card holders, the parents of DACA beneficiaries would face no waiting lists, because under current law the parents of citizens are admitted in unlimited numbers. Even without a waiting list, it is possible that the processing time would lengthen somewhat, as USCIS would experience a higher volume of naturalization and subsequent petitions for parents beginning five years after the amnesty, but this would not necessarily be the case if the agency plans ahead.

The illegal alien parents who arrived on visas (or with visa waivers) and overstayed would be able to adjust status as soon as their applications are processed. Similarly, any parents who remained abroad would be able to enter as soon as their applications are processed.

Theoretically, the illegally present parents who crossed the border illegally would not be eligible to complete their green card application within the country and would have to depart, subjecting them to the three/10-year bar on admission. Some would qualify for waivers to the bar based on a demonstration of extreme hardship to a citizen, but presumably these would be relatively small in number. An equally plausible scenario is that many of the parents would return to their home country, most likely Mexico, to apply for an immigrant visa and simply

claim that they had never been or had not remained in the United States illegally long enough to trigger the re-entry bar. If an alien has never been encountered by a federal agency, there would be no record of the alien's presence that the consular officer could easily access.

Under current procedures, as a practical matter it would be difficult for a consular officer to disprove the alien's claim and to articulate sufficient grounds to refuse the immigrant visa. Unless consular officers are provided with better vetting tools, perhaps including access to state driver's license databases, tax records, and other sources commonly used in the private sector, and encouraged to apply the law strictly, with such high stakes for the alien and such huge workloads for the consular officers, it is likely that many applicants will attempt this type of misrepresentation, and many will succeed.

For all of the reasons stated above, it is realistic to conclude that most of the parents of the DACA beneficiaries would be able to obtain green cards soon after their sons or daughters become citizens. If 700,000 DACA beneficiaries obtain citizenship and sponsor one parent each, that would be an additional 700,000 chain immigrants beginning five years after the amnesty. Some of the DACA beneficiaries might become citizens three years after the amnesty if they marry U.S. citizens. Others might choose not to naturalize at all. What is clear is that having parents in the country illegally would be a powerful motivation to become citizens. In addition, the sponsored parents would be able to sponsor other members of their families when they receive green cards and citizenship, continuing the chain.

The illegally present siblings of naturalized DACA beneficiaries also could be sponsored for green cards. Under the current system, they would face an extended waiting list, likely 20 years or more, depending on their country of citizenship. In addition, they would be subject to the bar on admission after illegal presence, but potentially could find the same ways to get around it as the parents.[78]

The same logic would apply to a broader amnesty, only in the increased numbers.

Congress could make changes to the legal immigration system to mitigate the inevitable chain migration effects of a future amnesty, however.

[78] Jessica Vaughn, *Backgrounder: Immigration Multipliers, Trends in Chain Migration*, CENTER FOR IMMIGRATION STUDIES, *available at*: https://cis.org/Report/Immigration-Multipliers.

One proposal that would do just that was the Reforming American Immigration for Strong Employment (RAISE) Act, which was introduced by Sens. Tom Cotton (R-Ark.) and David Perdue (R-Ga.) in February 2017.[79] This bill was endorsed by President Trump.

Among other provisions, the RAISE Act would have eliminated the permanent resident categories for siblings and adult sons and daughters of citizens.[80] It would also have replaced the green card benefit for parents of citizens with a five-year renewable residency visa without work authorization.[81]

The provisions in the RAISE Act would reduce the chain migration impact of any future amnesty. The siblings of amnesty beneficiaries would no longer qualify for permanent residence based on their family relationships. The admission of the parents of amnesty beneficiaries would not likely be affected in a significant way, because these parents would be able to qualify presumably for the long-term residency that would be provided therein in the same numbers that they qualify for permanent residence under current law. While they would not be able to work in the United States legally, that fact would be unlikely to deter them from making a non-immigrant application. As Jessica Vaughan has noted: "Many are working here illegally already and probably would continue doing so. Others are at or approaching retirement age and might drop out of the workforce."[82] Notably, however, the provisions of the RAISE Act would prevent parents who are sponsored for nonimmigrant visas to sponsor additional family members,

[79] RAISE Act, S. 354, 115th Cong. (2017), *available at*: https://www.congress.gov/bill/115th-congress/senate-bill/354.
[80] *Id*. at § 4.
[81] *Id*. at § 4(d).
[82] [82] Jessica Vaughn, *Backgrounder: Immigration Multipliers, Trends in Chain Migration*, CENTER FOR IMMIGRATION STUDIES, *available at*: https://cis.org/Report/Immigration-Multipliers.

because they would not have green cards or a path to citizenship, unless they are eligible under a different visa category.

The inevitable increase in the number of aliens were given access to green cards after any amnesty could also be mitigated by ending the diversity-visa lottery. The State Department website describes that program:

> *Section 203(c) of the Immigration and Nationality Act (INA) provides for a class of immigrants known as "diversity immigrants," from countries with historically low rates of immigration to the United States. A limited number of visas are available each fiscal year. The DVs are distributed among six geographic regions and no single country may receive more than seven percent of the available DVs in any one year.*[83]

Every year, 50,000 visas are available under that program, and are mostly allocated to foreign nationals who live outside of the United States.[84]

Respectfully, the diversity-visa program makes no sense. In essence, it provides access to one of the most prized statuses in the world, United States citizenship, to foreign nationals based largely on chance.

The diversity visa program is also otherwise extremely flawed. My colleague, Steven Camarota, summarized many of the most significant issues with that visa program in an opinion piece that he authored for the *Los Angeles Times*:

> *Enacted in its current form in 1990, the lottery was meant to increase diversity by allowing more immigration from countries that send relatively few people to the United States. Often, citizens from these countries lack the skills to qualify in one of the employment-based visa categories. Besides living in such a country, the only prerequisites are a high school education or two years of work experience in a job that requires two years of training. The roughly 50,000 winners receive a green card (permanent residence) for themselves, their spouses, and children.*

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[83] *Diversity Visa Program – Entry*, DEP'T OF STATE, undated, *available at*: https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry.html.
[84] *See Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 11, 2018, *available at*: https://www.uscis.gov/greencard/diversity-visa.

After five years in the United States, they can become citizens and begin to sponsor other relatives.

The whole idea was based on the very odd notion that every individual in the world should have some chance of coming to the United States. The interests of the American people were certainly not a paramount consideration when Congress created this program.

National security problems with the lottery have long been known. At a 2003 congressional hearing, the inspector general of the State Department, which oversees the lottery, testified that the program "contains significant risks to national security from hostile intelligence officers, criminals and terrorists attempting to use the program for entry into the United States as permanent residents."

The concerns identified at that hearing 14 years ago remain. In 2016, Immigration and Customs Enforcement created a list of countries that "promote, produce, or protect terrorist organizations or their members." Of the top 10 source countries for lottery winners in 2016, four were on ICE's list: Egypt (No. 2), Iran (No. 3), Uzbekistan (No. 5) and Sudan (No. 7). Many other countries on the ICE list also send significant numbers of lottery winners.

Putting aside the terrorism risk, there is an even more basic problem with the program: It is administratively burdensome to run. In 2015, 14.4 million individuals plus family members successfully registered for the annual drawing. The State Department has to weed out those who do not qualify. After a computer randomly selects 100,000 names, State Department employees interview and vet the finalists, whittling down the list to the 50,000 cap. This is no simple task, since most applicants come from countries where recordkeeping is spotty and documents are hard to verify. Screening for visa lottery fraud takes up valuable State Department resources that could be allocated elsewhere if the program did not exist.

Given our modern economy, it makes no sense to run a program that brings in tens of thousands of immigrants each year, many of whom have very modest levels of education. In 2012, 63 percent of households headed by an immigrant with only a high school education accessed one or more of the nation's major welfare programs. Moreover, real wages for Americans with this level of education have either stagnated or declined over the long term, and the share of less-educated Americans in the labor market is at or near historic lows.[85]

[85] Steven Camarota, *Trump's right. End the diversity visa lottery*, LOS ANGELES TIMES, Nov. 3, 2017, *available at*: https://cis.org/Oped/Trumps-right-End-diversity-visa-lottery.

Significantly, that program actually also has a negative foreign-policy effect by contributing to a "brain-drain" in many of the sending countries in Africa, a point that my colleague Preston Huennekens expounded upon in November 2017.[86]

Finally, while the diversity visa lottery on its face benefits only a very limited number of aliens, the chain-migration effects of that program are substantial, in part as a direct result of the increase in the number of foreign nationals who enter the United States each year, but also as relates to other foreign nationals who are applying for other visas who may more directly benefit the United States and its economy. Again, as Mr. Huennekens has explained:

> *When accounting for chain migration, the Visa Lottery may have brought in more than 3.8 million people in total since 1994. Despite its supporters' assurances that the Visa Lottery is responsible for only 50,000 immigrants in any given year, chain migration means that the program actually accounts for perhaps 165,000 new immigrants per year because of earlier lottery winners sponsoring their relatives. In addition, the multiplier for Visa Lottery immigrants could be even larger than other green card categories because the per-country caps and long waiting lists that slow down immigration from the main sending countries like Mexico and the Philippines would not apply to applicants from lottery source countries, since they are by definition getting fewer green cards overall.*[87]

Were Congress to consider any amnesty that would provide lawful permanent residence to 700,000 foreign nationals (or more), it could mitigate the negative chain-migration effects of that amnesty by ending the diversity-visa program, an illogical visa category that has outlived its usefulness and that has harmful effects both on the working poor in the United States and on the countries from which the "winners" of the diversity-visa lottery hail.

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[86] Preston Huennekens, *Visa Lottery's Effect on Developing Countries*, CENTER FOR IMMIGRATION STUDIES, Nov. 16, 2017, *available at*: https://cis.org/Huennekens/Visa-Lotterys-Effect-Developing-Countries.

[87] Preston Huennekens, *Chain Migration Means Visa Lottery Brings in More People Than You Think*, CENTER FOR IMMIGRATION STUDIES, Nov. 3, 2017, *available at*: https://cis.org/Huennekens/Chain-Migration-Means-Visa-Lottery-Brings-More-People-You-Think.

Finally, in the place of the chain-migration system that currently drives much immigration to the United States, and after taking into account the additional number of aliens would be able to immigrate under any proposed amnesty, Congress should move to a merits-based visa system, as the White House has previously proposed. [88]

Most of those who enter the United States illegally have low levels of education. As my colleague Steven Camarota explained in October 2018 :

> *As we pointed out in our prior study, research by the Center for Immigration Studies, the Pew Research Center, the Heritage Foundation, and others have all found that a very large share of illegal immigrants have relatively few years of schooling — most have not completed high school or have only a high school education. ... [T]hey tend to earn wages commensurate with their education levels and, as result, they typically have low incomes on average, though there are individual exceptions.*[89]

It is safe to assume that many if not most DACA beneficiaries are on the low end of the educational and work-experience spectrum. Given this fact, they are and will be competing for jobs with American workers (both citizens and lawful permanent immigrants) with low levels of education, and therefore those who are most harmed within the United States by any amnesty are the most disadvantaged to begin with.

I would note that in her August 3, 1994 testimony before the Senate Committee on the Judiciary, the late civil-rights icon Barbara Jordan, then-chairwoman of the U.S. Commission on Immigration Reform made a similar point about unlawful immigration generally:

> *Unlawful immigration is unacceptable. Enforcement measures have not sufficiently stemmed these movements. Failure to develop more effective strategies to curb unlawful immigration has blurred distinctions between legal*

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[88] *Immigration Principles & Policies*, THE WHITE HOUSE, Oct. 8, 2017, *available at*: http://i2.cdn.turner.com/cnn/2017/images/10/08/final.immigration.priorities.10.08.17.pdf.

[89] Steven Camarota, *Enforcing Immigration Law Is Cost Effective, Each illegal alien costs nearly $70,000 during their lifetime*, CENTER FOR IMMIGRATION STUDIES, Oct. 28, 2018, *available at*: https://cis.org/Camarota/Enforcing-Immigration-Law-Cost-Effective.

> *and illegal immigrants. ... The Commission is particularly concerned about the impact of immigration on the most disadvantaged within our already resident society — inner city youth, racial and ethnic minorities, and recent immigrants who have not yet adjusted to life in the U.S.*[90]

Moving to a merits-based visa system would ensure that future immigrants to the United States have the skills and ability that they need to succeed in this country, and also that they bring with them the capacity to support not only themselves, but also to grow our economy, helping to raise the wages and working conditions of all Americans.

Notably, this is not a quid pro quo for an amnesty. Rather, it is a necessary step that Congress must take in order to mitigate the deleterious effects of any amnesty on what Rep. Jordan correctly described as "the most disadvantaged within our already resident society."[91]

Improvements to Border Security to Stem Future Illegal Migration

Many proposals to improve border security in response to increased illegal entry following an amnesty were contained in the president's "Framework on Immigration Reform & Border Security,"[92] which was released by the White House on January 23, 2018. That framework would have called for the legalization of 1.8 million DACA recipients and DACA-eligible aliens who are in the United States unlawfully.[93] To lessen the harmful effects of such an amnesty, that framework proposed increased resources for immigration enforcement, and a series of legislative fixes to pressing issues.

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[90] *Hearing Before the S. Comm. on the Judiciary, Subcomm. on Immigration and Refugee Affairs*, 103d Cong. (1994) (statement of Barbara Jordan, Chairman, Commission on Immigration Reform), *available at*: https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1994_Aug.%2030.pdf.

[91] *Id*.

[92] *Fact Sheet: White House Framework on Immigration Reform & Border Security*, THE WHITE HOUSE, Jan. 25, 2018, *available at*: https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/.

[93] *Id*.

For example, that framework directed that legislation: "Deter illegal entry by ending dangerous statutorily-imposed catch-and-release and by closing legal loopholes that have eroded our ability to secure the immigration system and protect public safety."[94] While there are many such loopholes, three in particular stand out:

- *Deficiencies in the credible fear system.*[95] *Aliens caught entering the United States illegally are supposed to be "expeditiously removed" from the United States, without seeing an immigration judge.*[96] *If the alien claims a "credible fear" of return, however, the alien will be interviewed by an asylum officer.*[97] *If the asylum officer finds the alien has established a credible fear, the alien is eligible for removal proceedings to apply for asylum.*[98] *In FY 2018, 41 percent of all aliens in expedited removal (97,192) were referred for a credible fear interview with an asylum officer.*[99] *That year, asylum officers made decisions with respect to 84,336 of those cases.*[100] *Credible fear was found in 88.5 percent (74,677) of those cases.*[101]. *In 2009, according to then-AG Sessions in October 2017, the Obama administration began releasing aliens found to have credible fear.*[102] *As a likely result, the number of credible fear reviews increased significantly, from 5,000 in 2009, to 94,000 in 2016.*[103] *In fact, prior to 2013, only one percent of arriving aliens claimed credible fear, whereas currently 10 percent make such claims.*[104] *From FY 2008 through FY 2018, only 53 percent of*

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[94] *Id*.
[95] *See* Andrew Arthur, *Fraud in the "Credible Fear" Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES, Apr. 2017, *available at*: https://cis.org/sites/cis.org/files/arthur-credible-fear-4-17_0.pdf.
[96] Section 235(b)(1)(A)(i) of the Immigration and Nationality Act (INA), *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5389.html.
[97] Section 235(b)(1)(A)(ii) of the INA, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5389.html.
[98] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5389.html.
[99] Andrew Arthur, *Synopsis of the Mass Migration Presidential Proclamation and Asylum Interim Final Rule*, CENTER FOR IMMIGRATION STUDIES, Nov. 9, 2018, *available at*: https://cis.org/Arthur/Synopsis-Mass-Migration-Presidential-Proclamation-and-Asylum-Interim-Final-Rule.
[100] *See Credible Fear Workload Report Summary, FY 2018 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, undated, *available at*: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearandReasonableFearStatisticsandNationalityReport.pdf.
[101] *Id*.
[102] *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE, OFC. OF PUBLIC AFFAIRS, Oct. 12. 2017, *available at*: https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.
[103] *Id*.
[104] *To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard*, U.S. DEP'T OF HOMELAND SECURITY, Apr. 4, 2018, *available at*: https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard.

all aliens referred after credible-fear review to immigration court filed an asylum application, despite the fact that such applications were the purpose of those referrals.[105] *U.S. Immigration and Customs Enforcement (ICE) lacked detention space to hold all aliens who claimed credible fear in the past, and many were released for hearings that may occur years in the future. It is unclear whether DHS will be able to find sufficient space to detain aliens who are apprehended and are found to have credible fear pending a final decision on their applications for asylum, despite the department's best efforts.*

- *The current iteration of the William Wilberforce Trafficking Victims Reauthorization Protection Act of 2008 (TVPRA).* [106] *Section 462 of the Homeland Security Act of 2002 had vested jurisdiction over the care and placement of UACs in removal proceedings with the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS).* [107] *The TVPRA distinguishes between UACs from "contiguous" countries (Canada and Mexico) from aliens who are nationals of "non-contiguous" countries.*[108] *A UAC from a contiguous country can be returned if the alien has not been trafficked and does not have a credible fear.*[109] *Under the TVPRA, however, aliens who are not from Canada or Mexico are to be transferred to the care and custody of HHS within 72 hours and placed in formal removal proceedings, even if they have not been "trafficked."*[110] *ORR statistics reveal that the average length of time that a UAC remained in that office's care in FY 2018 was 60 days*[111]*, in one of 100 shelters that HHS operates in 17 states.*[112] *Between February 2014 and September 2015, 56,000 (80 percent) of the children were placed with sponsors illegally in the United States and an additional 700 were*

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[105] Andrew Arthur, *Synopsis of the Mass Migration Presidential Proclamation and Asylum Interim Final Rule*, CENTER FOR IMMIGRATION STUDIES, Nov. 9, 2018, *available at*: https://cis.org/Arthur/Synopsis-Mass-Migration-Presidential-Proclamation-and-Asylum-Interim-Final-Rule.

[106] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), *available at*: https://www.congress.gov/bill/110th-congress/house-bill/7311?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1.

[107] Homeland Security Act of 2002, Pub. L. 107-296 (2002), § 462, *available at*: https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf.

[108] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, §235, Pub. L. 110-457 (2008), *available at*: https://www.congress.gov/bill/110th-congress/house-bill/7311?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1.

[109] *Id*. § 235(a)(2).

[110] *Id*. at §§ 235(a)(3) and (b).

[111] *Facts and Data, General Statistics*, OFFICE OF REFUGEE RESETTLEMENT, Feb. 13, 2019, *available at*: https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.

[112] *Fact Sheet, Unaccompanied Alien Children Program*, DEP'T OF HEALTH AND HUMAN SERVICES, ADMIN. FOR CHILDREN AND FAMILIES, Dec. 2018, *available at*: https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_alien_children_program_fact_sheet_december_2018.pdf.

placed with sponsors in deportation proceedings.[113] *In FY 2014, according to CRS, most of the UACs who were released were placed with parents or legal guardians.*[114]

- *The* Flores *settlement agreement.*[115] *The agreement, which was originally signed in 1997, has now been read to create a presumption in favor of the release of all alien minors, even those alien minors who arrive with their parents.* [116] *As DHS has stated: "Under the* Flores *Agreement, DHS can only detain UACs for 20 days before releasing them to [HHS] which places the minors in foster or shelter situations until they locate a sponsor."*[117] *The agreement encourages UACs to enter the United States illegally, and encourages the parents of UACs to hire smugglers to bring them to the United States. Further, it encourages people to bring their own children (or children whom they claim to be their own) when they make the perilous journey to the United States, thinking that it will make it more likely that they (the parents or purported parents) will be released if they travel with children.*

Any legislation that would provide amnesty must plug these loopholes in order to address the inevitable wave of additional migrants entering illegally that such legislation would encourage.

With respect to credible fear, the aforementioned SAFA[118], which as noted was introduced in the 115th Congress, contained two provisions that would have amended the expedited-removal process in section 235 of the INA to put asylum officers in a better position to make credible-fear determinations.

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[113] Joseph J. Kolb, *Implementation of a Law to Protect Trafficking Victims Has Become a Public Safety Issue*, CENTER FOR IMMIGRATION STUDIES, Nov. 3, 2016, *available at*: https://cis.org/Report/Implementation-Law-Protect-Trafficking-Victims-Has-Become-Public-Safety-Issue.
[114] William A. Kandel, *Unaccompanied Alien Children: An Overview*, CONGRESSIONAL RESEARCH SERVICE, at 10 n.51, Jan. 18, 2017, *available at*: https://fas.org/sgp/crs/homesec/R43599.pdf.
[115] *Flores v. Reno*, Stipulated Settlement Agreement, *available at*: https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf. The
[116] *See Flores v. Lynch*, 828 F. 3d 898 (9th Cir. 2016), *available at*: https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.
[117] *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes*, U.S. DEP'T OF HOMELAND SECURITY, Feb. 15, 2018, *available at*: https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and.
[118] Securing America's Future Act of 2018, H.R.4760, 115th Congress (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text.

Section 4402 of division B, title IV of that bill[119] would have amended the definition of "credible fear of persecution" in section 235(b)(1)(B)(v) of the INA to apply the same credibility standards that are used in asylum adjudications, and to make it clear that credible fear should only be found where "it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien's claim are true." All too often, it appears that asylum officers believe they are required to accept a credible-fear applicant's statements at face value absent significant inconsistencies. This provision would have addressed that issue.

Second, section 4403 of division B, title IV[120] of that bill would have directed uniformity in questioning by asylum officers in credible fear cases, and required recording of credible fear interviews, which would be made available to the immigration court considering the alien's asylum claim. The second provision is particularly important, as aliens who have passed credible fear and are applying for asylum will often claim that they were misquoted during their credible fear interviews when confronted with inconsistencies between the record of those interviews and their testimony in court.

In addition, SAFA would have attempted to plug the loopholes in section 235 of the TVPRA. Division B, title V, section 5501[121] of that bill would have eliminated the conflicting rules between nationals from contiguous and non-contiguous countries, and subjected all minors to expeditious return if they have not been trafficked and do not have a credible fear of persecution. In addition, it would have ensured that minors who were victims of severe forms of

[119] *Id*. at div. B, tit. IV, § 4402.
[120] *Id*. at div. B, tit. IV, § 4403.
[121] Securing America's Future Act of 2018, H.R.4760, 115th Congress, div. B, tit. V, § 5501 (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text.

trafficking are afforded a hearing before an immigration judge within 14 days, while extending the ability of DHS to hold a UAC for up to 30 days to ensure a speedy judicial process.

Further, section 5501 of SAFA would have provided authority for the Secretary of State to negotiate agreements with foreign countries regarding UACs, including protections for minors who are returned to their country of nationality.[122]

Moreover, section 5503 of division B, title V of SAFA[123] would have eliminated section 208(b)(3)(C) of the INA[124], which gives UACs the opportunity to have their asylum applications heard by both asylum officers at USCIS and immigration judges, even if they would otherwise be subject to expedited removal under section 235(b) of the INA. Again, this provision of current law provides UACs greater incentives to enter the United States illegally and make an asylum claim, regardless of its validity.

Finally, SAFA would have provided for a fix to *Flores* as it pertains to accompanied children. Specifically, division B, title V, section 5506 of that bill[125] would have clarified that there was no presumption that an accompanied child should not be detained, and vested jurisdiction over detention determinations for accompanied children with the secretary of Homeland Security. It also would have mandated that accompanied children be released only to the alien's parent or legal guardian.

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[122] *Id*. at § 5501.
[123] *Id*. at § 5503.
[124] Section 208(b)(3)(C) of the INA, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html.
[125] Securing America's Future Act of 2018, H.R.4760, 115th Congress, div. B, tit. V, § 5506 (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text

The White House framework also called for "the detention and removal of criminal aliens, gang members, violent offenders, and aggravated felons."[126] While this may not appear at first blush to be a "border security" issue, it is because so-called "sanctuary" policies protect such aliens from removal, encouraging both illegal entry as well as reentry by previously removed criminal aliens. Once in a sanctuary jurisdiction, the logic reasonably goes, an alien who entered illegally can live all but free from ICE apprehension.

As my colleagues Bryan Griffith and Jessica Vaughn have explained, sanctuary:

> *[C]ities, counties, and states have laws, ordinances, regulations, resolutions, policies, or other practices that obstruct immigration enforcement and shield criminals from ICE — either by refusing to or prohibiting agencies from complying with ICE detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding communication or information exchanges between their personnel and federal immigration officers.*[127]

Denying federal funding to sanctuary jurisdictions and providing ICE with strong detainer authority are essential to reversing those policies, and in turn dealing with the additional population of aliens who would enter illegally following an amnesty.

Language dealing with sanctuary cities and cooperation with local law enforcement can also be found in Title II of Division B in SAFA, and should be included in any amnesty legislation to minimize the negative impact of such legislation on border security.[128]

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[126] *Fact Sheet: White House Framework on Immigration Reform & Border Security*, THE WHITE HOUSE, Jan. 25, 2018, *available at*: https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/.

[127] Bryan Griffith and Jessica Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CENTER FOR IMMIGRATION STUDIES, Mar. 1, 2019, *available at*: https://cis.org/Map-Sanctuary-Cities-Counties-and-States. But

[128] Securing America's Future Act of 2018, H.R.4760, 115th Congress, div. B, tit. II (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text.

There is another major legal loophole that must be plugged as relates to detention. Specifically, in *Zadvydas v. Davis*[129], the Supreme Court held that the government could not indefinitely detain an alien who had been ordered removed for more than six months unless the alien's removal was reasonably foreseeable. This has required in certain instances the release of potentially dangerous aliens.

Clear authority that allows ICE to detain dangerous aliens indefinitely after a final order of removal until removal is possible is critical to protecting our society from aliens who pose criminal and national-security risks, but as importantly to reducing incentives to enter illegally by ensuring that if an alien is ordered removed, that the alien will be removed.

Title III, Division B, section 3309 of SAFA[130] would have closed the *Zadvydas* loophole by providing the secretary of Homeland Security the authority to detain dangerous aliens beyond the 90-day removal period in section 241(a)(1)(A) of the INA[131], and that language should be included in any proposed amnesty legislation.

A related issue is the problem of so-called "recalcitrant" countries, another element of the president's immigration framework.[132] These are countries that refuse to accept back their nationals after they had been ordered removed.

The framework states that legislation must "[e]nsure the prompt removal of illegal border-crossers regardless of country of origin." As the House Oversight and Government

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[129] *Zadvydas v. Davis*, 533 U.S. 678 (2001), available at: https://www.law.cornell.edu/supct/pdf/99-7791P.ZO
[130] Securing America's Future Act of 2018, H.R.4760, 115th Congress, div. B, tit. III, § 3309 (2018), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/4760/text

[131] Section 241(a)(1)(A) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1231&num=0&edition=prelim
[132] *See Fact Sheet: White House Framework on Immigration Reform & Border Security*, THE WHITE HOUSE, Jan. 25, 2018, *available at*: https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/ ("Ensure the prompt removal of illegal border-crossers regardless of country of origin.").

Reform Committee found in July 2016: "Thousands of deportable criminal aliens are released back onto U.S. streets because their home countries refuse to repatriate them."[133]

Those aliens can pose a significant threat to the community. The *Washington Times*[134] reported in May 2017:

> *Recalcitrant countries have long been among the serious issues that didn't get much attention, though the consequences can be extreme.*
>
> *In one notorious case, Haiti refused to take back an illegal immigrant who had served time for attempted murder, and U.S. officials were forced to release him. He killed a young woman in Connecticut just months after his release.*
>
> *Another illegal immigrant, Thong Vang, was released from prison in 2014 after serving time for rape convictions, and his home country of Laos refused to take him back. He was sent to a California prison last year and shot two guards, police said.*

In August 2017, *U.S. News and World Report*[135] identified 12 recalcitrant countries: Burma, Cambodia, China, Cuba, Eritrea, Guinea, Hong Kong, Iran, Laos, Morocco, South Sudan and Vietnam. In September 2017, DHS, in coordination with the Department of State, announced the implementation of visa sanctions on four countries (Cambodia, Eritrea, Guinea, and Sierra Leone) "due to lack of cooperation in accepting their nationals ordered removed from the United States."[136]

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[133] Andrew Arthur, *What must be in any DACA amnesty bill*, WASHINGTON TIMES, Jan. 29, 2018, *available at*: https://m.washingtontimes.com/news/2018/jan/29/what-must-be-daca-amnesty-bill/.

[134] Stephen Dinan, *Trump presses more countries take back U.S. deportees in immigration success*, WASHINGTON TIMES, May 16, 2017, *available at*: https://www.washingtontimes.com/news/2017/may/16/countries-refusing-us-deportees-cut-from-20-to-12/.

[135] Alan Neuhauser, *DHS Seeks Sanctions on Countries that Refuse Deportees*, U.S. NEWS AND WORLD REPORT, Aug. 23, 2017, *available at*: https://www.usnews.com/news/national-news/articles/2017-08-23/dhs-seeks-sanctions-on-countries-that-refuse-to-accept-deportees.

[136] *DHS Announces Implementation of Visa Sanctions on Four Countries*, DEP'T OF HOMELAND SECURITY, Sept. 13, 2017, *available at*: https://www.dhs.gov/news/2017/09/13/dhs-announces-implementation-visa-sanctions-four-countries.

Additional authorities to respond to the issue of recalcitrant countries, including the suspension of aid, would assist DHS in removing aliens whose countries do not want them back. Title VI, section 601 of the "Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act," (Davis-Oliver)[137], which was introduced in the 115th Congress, contained a process to ensure timely repatriation of aliens ordered removed by providing sanctions for officials and employees of recalcitrant countries and by reducing the visas available to those individuals. As noted, ensuring the quick removal of removable aliens is crucial to border security. Accordingly, any amnesty legislation should include this provision, or a similar one to ensure that recalcitrant countries quickly accept the return of their nationals.

The White House framework also calls for the appropriation of "additional funds to hire new DHS personnel, ICE attorneys, immigration judges, prosecutors and other law enforcement professionals." [138] In its October 2017 Immigration Principles and Priorities memorandum, the White House explained, under the heading "Ensure Swift Border Returns":

> *Immigration judges and supporting personnel face an enormous case backlog, which cripples our ability to remove illegal immigrants in a timely manner. The Administration therefore proposes providing additional resources to reduce the immigration court backlog and ensure swift return of illegal border crossers.*[139]

At the present time, there are approximately 400 immigration judges at the nation's 63 immigration courts.[140] There were almost 830,000 pending cases in immigration courts as of

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[137] Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act, H.R. 2431, 115th Cong. tit. VI, § 601 (2017), *available at*: https://www.congress.gov/bill/115th-congress/house-bill/2431/text#toc-H223BF95043FF44FAAC50E5B9D09A3513.

[138] *Fact Sheet: White House Framework on Immigration Reform & Border Security*, THE WHITE HOUSE, Jan. 25, 2018, *available at*: https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/.

[139] *Immigration Principles & Policies*, THE WHITE HOUSE, Oct. 8, 2017, *available at*: http://i2.cdn.turner.com/cnn/2017/images/10/08/final.immigration.priorities.10.08.17.pdf.

[140] *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Feb. 21, 2019, *available at*: https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.

January 2019[141], however, meaning that there are 2,075 pending cases per immigration judge. Additional resources must be provided if the immigration judge corps is to ever gain control of its dockets, and thus ensure the swift removal of aliens who have entered illegally and who do not have relief.

Ensuring the quick completion of immigration cases is key to deterring illegal entrants: if the purpose of illegal entry is to live and work in the United States, the shorter the period of time that a migrant is able to do so, the fewer the economic incentives there are to enter illegally to begin with.

Such courts must also be staffed by ICE lawyers, who represent DHS in removal proceedings. Accordingly, the number of ICE attorneys must increase proportionally with any increase in the number of immigration judges.

Thus, any immigration amnesty bill must provide additional resources for immigration court adjudications.

Finally, the best way to secure the border and to inhibit future flows encouraged by an amnesty is to "turn off the jobs magnet" and prevent unauthorized aliens from working in the United States. When I was an immigration judge, the vast majority of aliens who appeared before me who had entered illegally had come to this country to work. If the U.S. government can prevent those aliens from working, therefore, they would not come. And the best way to prevent those aliens from working is to mandate E-Verify.

As DHS has explained:

[141] *Immigration Court Backlog Tool*, TRANSACTIONAL RECORDS ACTION CLEARINGHOUSE, undated, *available at*: https://trac.syr.edu/phptools/immigration/court_backlog/.

> *E-Verify is a web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States. E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees on the Form I-9, Employment Eligibility Verification, against records available to the Social Security Administration (SSA) and the Department of Homeland Security (DHS).*
>
> * * * *
>
> *E-Verify, which is available in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and Commonwealth of Northern Mariana Islands, is currently the best means available to electronically confirm employment eligibility.*[142]

The confirmation process works quickly, as DHS makes clear:

> *In the E-Verify process, employers create cases based on information taken from an employee's Form I-9, Employment Eligibility Verification. E-Verify then electronically compares that information to records available to [DHS] and the Social Security Administration (SSA). The employer usually receives a response within a few seconds either confirming the employee's employment eligibility or indicating that the employee needs to take further action to complete the case.*[143]

Currently, E-Verify is voluntary for most employers.[144]

Simply put, E-Verify is the most dependable, and surest, change that Congress could mandate that would inhibit any future flows of illegal migrants encouraged by an amnesty. Any proposed amnesty legislation should make that system mandatory.

Reducing the Likelihood of Fraud

Fraud has inevitably been a significant side effect of past amnesties. For example, in 1989, Roberto Suro, writing in the *New York Times*, described the 1986 amnesty as "one of the most extensive immigration frauds ever perpetrated against the United States Government."[145] As he explained:

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[142] *About E-Verify*, DEPARTMENT OF HOMELAND SECURITY, undated, *available at*: https://www.e-verify.gov/.
[143] *Id*.
[144] *Id*.
[145] Roberto Suro, *Migrants' False Claims: Fraud on a Huge Scale*, NEW YORK TIMES, Nov. 12, 1989, *available at*: https://www.nytimes.com/1989/11/12/us/migrants-false-claims-fraud-on-a-huge-scale.html.

> *More than 1.3 million illegal aliens applied to become legal immigrants under a one-time amnesty for farm workers. The program was expected to accommodate only 250,000 aliens when Congress enacted it as a politically critical part of a sweeping package of changes in immigration law.*
>
> *Now a variety of estimates by Federal officials and immigration experts place the number of fraudulent applications at somewhere between 250,000 and 650,000.*[146]

Undoubtedly, one of the main drivers of that fraud was the confidentiality provisions there were included in each of the 1986 amnesties.[147] Those confidentiality provisions prevented the Department of Justice (including the former INS) from using the information provided in an amnesty application for any purpose other than to make a determination on that application, or to investigate false statements in those applications.[148] The problem was that the false statements in those applications were not generally self-evident, and fraud was often not detected until well after benefits had been granted. Further, that information was not available for the deportation or removal proceedings of an alien who subsequently became deportable or removable from the United States, a fact which usually to one degree or another inhibited the prosecution of those proceedings.

There was never any reason to prevent the use of amnesty application information for law-enforcement purposes in any way. Plainly, the applicants for amnesty benefits are not required to make those applications, and should have been deemed to have assumed the risk that the information that they voluntarily provided to the INS could be used for immigration-enforcement purposes if they were not granted amnesty benefits.

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[146] *Id*.
[147] *See* section 245A(c)(5) of the INA, *available at: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1255a&num=0&edition=prelim;* section 210(b)(6) of the INA, *available at*: http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1160&num=0&edition=prelim.
[148] *Id*.

No amnesty proposal should include a confidentiality provision. Again, an applicant for amnesty is requesting a benefit from the federal government, and is voluntarily providing information to the government. If the applicant is removable, and not eligible for the benefit, the applicant should be removed. That applicant should not be able to have it both ways, that is to provide information for an immigration benefit, but not have that information available to the government if the benefit is denied and the government seeks the applicant's removal.

Cost

In December 2017, the non-partisan Congressional Budget Office (CBO) released its cost estimate[149] of S. 1615[150], the DREAM Act of 2017, the Senate companion to the aforementioned H.R. 3440. CBO estimated that the cost of that legislation to American taxpayers would be in the tens of billions of dollars.

That estimate[151] states:

> *CBO and the staff of the Joint Committee on Taxation (JCT) estimate that enacting S. 1615 would increase direct spending by $26.8 billion over the 2018-2027 period. Over that same period, CBO and JCT estimate that the bill would increase revenues, on net, by $0.9 billion—a decline in on-budget revenues of $4.3 billion and an increase in off-budget revenues [Social Security taxes] of $5.3 billion.*
>
> *In total, CBO and JCT estimate that changes in direct spending and revenues from enacting S. 1615 would increase budget deficits by $25.9 billion over the 2018-2027 period, boosting on-budget deficits by $30.6 billion and decreasing off-budget deficits by $4.7 billion over that period.*

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[149] *Congressional Budget Office Cost Estimate*, S. 1615, Dream Act of 2017, CONGRESSIONAL BUDGET OFFICE, Dec. 15, 2017, *available at*: https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/s1615.pdf.
[150] Dream Act of 2017, S. 1615, 115th Cong. (2017), *available at*: https://www.congress.gov/bill/115th-congress/senate-bill/1615/related-bills.
[151] *Congressional Budget Office Cost Estimate*, S. 1615, Dream Act of 2017, CONGRESSIONAL BUDGET OFFICE, Dec. 15, 2017, at 1, *available at*: https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/s1615.pdf.

It also "estimates that providing higher education assistance for newly eligible people under S. 1615 would cost $1.0 billion over the 2018-2022 period."[152]

As CBO explains:

> *The bill would affect direct spending by conferring eligibility for federal benefits—health insurance subsidies and benefits under Medicaid and the Supplemental Nutrition Assistance Program (SNAP), among others—provided that those applicants met the other eligibility requirements for those programs.*[153]

With respect to direct spending, CBO finds that S. 1615 would increase earned income and child tax credits by $5.5 billion between 2018 and 2027.[154] It finds that the bill would increase spending for Medicaid by $5.0 billion during that period, and would increase direct spending for SNAP benefits by $2.3 billion in that timeframe.[155] Direct spending for Supplemental Security Income (SSI) benefits would increase by $900 million during that 10-year period under the bill.[156] Finally, the bill would increase Social Security spending (which is off-budget) by $600 million, and Medicare spending by $300 million between 2018 and 2027.[157] Federal direct spending for assistance for higher education would also increase, by $500 million in that timeframe under the bill, CBO estimates.[158] Most significantly, however, "CBO and JCT estimate that enacting S. 1615 would increase outlays for subsidies for health insurance purchased through the marketplaces by $11.8 billion over the 2018-2027 period."[159]

In reaching the $900 million revenue-increase figure, CBO assumes that more employees would work "on the books," and therefore report their income, increasing revenue, "mostly in the

[152] *Id*. at 2.
[153] *Id*. at 1.
[154] *Id*. at 12.
[155] *Id*.
[156] *Id*. at 13.
[157] *Id*.
[158] *Id*. at 14.
[159] *Id*. at 11.

form of Social Security taxes, which are categorized as off-budget."[160] It finds, however, that "increased reporting of employment income would result in increases in tax deductions by businesses . . . . As a result, corporations would report lower taxable profits and pay less in income taxes."[161] In addition: "Noncorporate businesses, such as partnerships and sole proprietorships, also would report lower taxable income, which would decrease individual income taxes paid by the partners and owners." [162] Finally:

> *CBO and JCT estimate that there would be a $1.2 billion decrease in revenues over the 2018-2027 period associated with increases in the nonrefundable portion of the premium assistance tax credit provided through the health insurance marketplaces established under the Affordable Care Act.*[163]

Therefore, CBO concludes, the increases in revenues "would be mostly offset" by the decreases.[164]

In the longer run:

> *CBO estimates that enacting S. 1615 would increase net direct spending by more than $2.5 billion and on-budget deficits by more than $5 billion in at least one of the four consecutive 10-year periods beginning in 2028. Several factors would drive an increase in spending on federal benefits:*
>
> • *The direct beneficiaries of S. 1615 would continue to naturalize, making them eligible to sponsor immediate relatives for LPR status without an annual limit.*
>
> • *The later recipients of conditional LPR status and all family-sponsored legal permanent residents would exceed five years in LPR status, conferring eligibility for full Medicaid benefits and SNAP. (Legal permanent residents who naturalize after five years also would become eligible for SSI.)*
>
> • *Both the direct beneficiaries of S. 1615 and their family members who later receive LPR status would pay enough years of payroll taxes to become eligible for Social Security and Medicare.*[165]

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[160] *Id*. at 14.
[161] *Id*.
[162] *Id*. at 14-15.
[163] *Id*. at 15.
[164] *See id*. at 14-15.
[165] *Id*. at 16.

In reaching these conclusions, CBO estimates that 3.25 million aliens would potentially be eligible for conditional lawful permanent resident status, but that not all of them will apply for that status or be approved. [166] Consequently, CBO estimates that approximately two million aliens would be granted conditional lawful permanent resident status under that bill.[167]

Conditions would be removed for 1.6 million of those aliens, and "roughly 1 million of the 1.6 million people receiving unconditional LPR status would become naturalized U.S. citizens during the 2018-2027 period, and . . . a substantial number of people would naturalize in the following decades."[168]

Needless to say, these costs would increase if any potential amnesty included almost 437,000 additional applicants who currently have TPS.

Conclusion

Congress should carefully consider the inevitable costs and ramifications of any future amnesty before it undertakes consideration of such amnesty.

Any amnesty should be avoided, because of the message that it sends to foreign nationals about the seriousness of the United States government as it relates to its immigration laws. If, however, Congress believes that an amnesty is appropriate for some population of individuals unlawfully present in the United States, such amnesty should be narrowly tailored to benefit only those with the most compelling claims to that exceptional relief.

[166] *Id*. at 5.
[167] *Id*.
[168] *Id.* at 6.

In addition, if it undertakes any amnesty, Congress should take additional steps to ameliorate the negative consequences that will necessarily follow from that amnesty.

Again, thank you for inviting me to testify today. I look forward your questions.