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Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Hearing on "Reining in Amnesty: *Texas v. United States* and its Implications"
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Mr. Chairman and Members of the Committee, although I serve as the Kansas Secretary of State, I come before you chiefly in my private capacity as an attorney who has litigated numerous immigration and preemption issues in the federal courts. I also served as Counsel to U.S. Attorney General John Ashcroft at the Department of Justice. I was Attorney General Ashcroft's chief advisor on immigration law during 2001-03. In addition, I served as a professor of Constitutional Law at the University of Missouri – Kansas City School of law from 1996 to 2011.

At the outset, it is important for this subcommittee to be aware that the decision of the Southern District of Texas in *Texas v. United States* is not the only federal court decision finding that the President's recent executive actions in immigration violate federal law. It is actually the second federal court to reach that conclusion. In August of 2012, ten ICE agents sued the Secretary of Homeland Security for the reason that the DACA Directive of June 2012 compels the agents to violate federal law. I am the lead attorney representing those ICE agents in that case. In April of 2013 the US District Court for the Northern District of Texas held that the DACA Directive compels ICE agents to violate the requirements of federal law found at 8 U.S.C. § 1225(b)(2)(A). *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788. The case is currently pending before the Fifth Circuit of the U.S. Court of Appeals. *Crane v. Johnson*, No. 14-10049. The reason that the Northern District of Texas did not issue a preliminary injunction in that case is that it subsequently concluded that the Civil Service Reform Act precluded the ICE agents from bringing their case in an Article III court and forced them to instead go through the administrative bodies normally reserved for garden variety employment disputes. We appealed the jurisdictional decisions of the district court, and the Department of Justice cross-appealed the merits decision.

Both cases present three independent reasons why the executive amnesty of June 2012 and its expansion in November 2014 are unlawful: (1) the executive actions do not comply with the requirements of the Administrative Procedure Act (APA); (2) even if they did comply with the APA, they would still be in direct violation of substantive provisions of federal law; and (3) even if they did not violate federal law, they would still be unconstitutional. My testimony is organized accordingly. The APA argument is most directly addressed by the *Texas v. United*

States decision; and the substantive violation of federal law is most directly addressed by the *Crane v. Napolitano* decision. Neither court needed to reach the constitutional question, but the plaintiffs' arguments on that question are also compelling.

I. Violation of the Administrative Procedure Act

The APA requires that agencies implementing federal statutes in whole or in part do so through rulemaking. Rulemaking is defined under the APA as the agency process for formulating, amending, or repealing a rule through notice and comment procedures under the APA. 5 U.S.C. § 553.

The Immigration and Naturalization Act (INA) delegates authority to the Secretary of Homeland Security and the Attorney General to implement its provisions through the formal promulgation of rules pursuant to the APA. Using specific eligibility criteria, the DACA and DAPA Directives enumerates the qualifications of a large class of individuals who are made eligible for non-removal and the specific benefit of employment authorization. Yet DHS has not promulgated any rule that establishes the criteria for eligibility for relief from removal from the United States or the granting of employment authorization as described in the Directive.

An administrative action that establishes criteria for exception from removal from the United States and defines a class with affirmative eligibility for benefits is quintessentially a "rule" under the APA. 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). The United States Supreme Court has made clear that "on-off" or "yes-no" eligibility for benefits under a Congressional enactment must be defined through formal rulemaking:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, … but also to employ procedures that conform to the law. … No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
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> The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.

Morton v. Ruiz, 415 U.S. 199, 231-32 (1974) (citations and footnotes omitted). In this instance, DHS has set out in the Directive a determination of future rights, privileges, and benefits. In so doing, the Administration has attempted to bury, outside of the APA, rulemaking decisions that have the "inherently arbitrary nature of unpublished ad hoc determinations." And as in *Morton*, "[t]he Secretary has presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met." *Morton*, 415 U.S. at 235.

DHS is not free to vacillate between regulations, policy, and discretion at will. *See Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012). Under prior Administrations, DHS, and the Department of Justice before it, consistently chose to formally promulgate regulations in order to establish or disestablish eligibility for immigration benefits.[1] At no time did DHS or its predecessors suggest that they had the authority to make a massive policy change to grant immigration benefits to more than fifteen percent of all unlawfully present aliens. Nor did they do so without promulgating a rule subject to advance notice and an opportunity for public comment and criticism.

The issuance of the DACA and DAPA Directives inherently requires rulemaking. The criteria imposed – for DACA, that the applicant must have entered the United States under the age of "sixteen", have resided continuously in the United States for at least "five" years, and be under the age of "thirty" – are fundamentally arbitrary thresholds of eligibility. They are policy selections that define a terminus for deciding whether one is "in" or "out." They are not clarifications of existing statutes or regulations; they are instead new policies establishing new standards of eligibility for a massive class of individuals.

A central facet of the APA is the exposure of a proposed rule to public comment and criticism, which in turn provides the promulgating agency an opportunity to answer such criticism, make changes to the proposed rule, or even decline to publish a final rule in light of the criticism. By attempting to make this policy change through executive fiat, DHS avoided this public scrutiny and plainly violated the terms of the APA.

The district court in *Texas v. United States* reached this conclusion easily. The court found "both factually based upon the record and the applicable law, that DAPA is a 'legislative' or 'substantial' rule that should have undergone the notice-and-comment rule making procedure mandated by 5 U.S.C. § 553. The DHS was not given any 'discretion by law' to give 4.3 million removable aliens what the DHS itself labels as 'legal presence.'" *Texas*, slip op. at 112. It is difficult to see how any appellate court could reach a different conclusion. However, even if the DACA and DAPA Directives could somehow be seen as mere "guidance" that is not subject to the APA, it is equally clear that the Directives violate the express terms of federal law.

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[1] *See, e.g.*, Department of Homeland Security, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 77 Fed. Reg. 19,902 (April 2, 2012) (proposed rule).

II. Violation of Substantive Provisions of Federal Law at 8 U.S.C. § 1225

In 1996, Congress acted to drastically limit the any discretion that ICE officers might otherwise have with respect to the initiation of removal proceedings. Frustrated with executive non-enforcement of federal immigration laws, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). "[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 483-84 (1999). Congress therefore acted to statutorily restrict the discretion available to the executive branch. As a conference committee report in 1996 succinctly stated: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.). To achieve its objective of maximizing the removal efforts of the executive branch, Congress inserted several interlocking provisions into the INA to *require* removal when immigration officers encounter illegal aliens. It was Congress's objective to end the so-called "catch and release" practice that the INS had legitimized through a series of policy directives in the preceding years.

Those provisions requiring removal are as follows. 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." The proceedings under 8 U.S.C. § 1229a are removal proceedings in United States Immigration Courts.

The DACA and DAPA Directives order the ICE-officers to violate these provisions of federal law by declining to place certain aliens into removal proceedings, when federal law clearly requires them to place such aliens into removal proceedings. The First Circuit has already characterized 8 U.S.C. § 1225(b)(2)(A) as mandatory in nature: "Congress did not place the decision as to which applicants for admission are placed in removal proceedings into the discretion of the Attorney General, but created mandatory criteria. *See* 8 U.S.C. §§ 1225(b)(1), (2)." *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). Because Congress has expressly limited DHS discretion not to initiate removal proceedings, any "prosecutorial discretion" that they exercise must be consistent with 8 U.S.C. § 1225.

Since that statute mandates the commencement of removal proceedings, such discretion can only be exercised *after* such proceedings have been initiated, and according to the procedures established by Congress, as is the case with cancellation or withholding of removal. *See* 8 U.S.C. §§ 1229b, 1231(b)(3). An executive agency's policy preference about how to enforce (or, in this case, not enforce) an act of Congress cannot trump the power of Congress: a Court may not, "simply … accept an argument that the [agency] may … take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

It is Congress that determines which aliens are to be removed from the United States, even though it exercises that power through executive officers: "The power of Congress … to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised through executive officers …." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). Consequently, the Secretary of Homeland Security's authority to enforce the immigration laws under 8 U.S.C. § 1103(a)(5) cannot be construed to authorize him to order his subordinate employees to violate the requirements of federal law expressed in 8 U.S.C. § 1225.

The Supreme Court has recognized that Congress has the authority to statutorily restrict executive discretion in this manner: "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Through IIRIRA, Congress circumscribed the executive branch's discretion *not* to pursue the removal of illegal aliens. The interlocking provisions of 8 U.S.C. §§ 1225(a)(1), 1225(a)(3), and 1225(b)(2)(A) provide clear statutory direction to DHS. If an illegal alien is encountered by DHS, an inspection *must* occur, and if that illegal alien is not entitled to be admitted to the United States, he or she *must* be placed in removal proceedings. Any subsequent relief, whether it be through asylum, cancellation of removal, or withdrawal of removal, must be authorized by federal statute. Wholesale grants of "deferred action" are no longer possible after IIRIRA.

The district court in *Crane* read the plain terms of federal law to mean exactly what they say. "Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Crane*, slip op. at 15. Addressing the DHS contention that federal immigration laws allow for some discretion to be exercised, the court pointed out that such discretion has been taken away by Congress. "The Court finds that Congress, by using the mandatory term 'shall' in Section 1225(b)(2)(A), has circumscribed ICE's power to exercise discretion when determining against which 'applicants for admission' it will initiate removal proceedings." *Crane*, slip op. at 17.

The district court in *Crane* also explained why the mandatory language of 8 U.S.C. § 1225(b)(2)(A) is different from the more permissive federal statute at issue in *Heckler*:

> The Supreme Court found that the Act's enforcement provisions, on the whole, committed "complete discretion to the Secretary to decide how and when they should be exercised." [*Heckler*, 470 U.S. at 835.] The INA, in contrast, is not structured in such a way that DHS and ICE have complete discretion to decide when to initiate removal proceedings. Instead, Section 1225(b)(2)(A) of the INA requires immigration officers to initiate removal proceedings whenever they encounter applicants for admission who are not "clearly and beyond a doubt entitled to be admitted," and nothing in the INA or related regulations suggests that Congress's use of the term "shall" imposes anything other than a mandatory duty.

Crane, slip op. at 19-20. The district court correctly applied *Heckler* to conclude that Congress had acted in unambiguous terms to restrict executive discretion.

In response, the Obama Administration protests that the DACA and DAPA Directives enable them to prioritize their allocation of limited enforcement resources more efficiently than the automatic approach of IIRIRA. They may or may not have a good policy argument. But they no longer have the legal authority to set policy in that respect – Congress has done it for them. If the DHS does not like the way IIRIRA forces it to utilize its limited enforcement resources, then it has two choices: (1) ask Congress for more resources, or (2) ask Congress to change the law. The Administration cannot circumvent the requirements of federal law through executive fiat. However, even if these provisions of federal law did not exist, the Administration's actions would still be impermissible, because they are unconstitutional.

III. Violation of the Constitutional Separation of Powers

Article I, § 1, of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." DACA and DAPA constitute an exercise of legislative power by an executive agency and represent an aggrandizement of the executive branch at the expense of the legislative branch. Consequently, the Directives plainly violate the constitutional separation of powers.

The Development, Relief, and Education for Alien Minors Act (DREAM Act), in various forms, has been proposed in Congress at least 24 times.[2] DACA is a mirror image of the

[2]It was introduced in the following bills: S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-13 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-32 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-32 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-32 (2007) (as amended by S.A. 1150 §§ 612-19); S. 1639, 110th Cong. §§ 612-20 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-42 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842,

DREAM Act, conferring non-removal and employment authorization upon substantially the same class of illegal aliens covered by the DREAM Act.[3] The DREAM Act has never been passed by both houses of Congress and signed into law by the President. But the fact that the Act has been proposed in Congress two dozen times, and has been voted on by the House of Representatives and Senate, indicates Congress's plain understanding that federal legislation is required in order to achieve these objectives. Congress is correct in this understanding.

The constitutional separation of powers is fundamental to the Republic:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 951 (1983). The Supreme Court recognizes two types of separation-of-powers violations: (1) an attempt by one branch to exercise the powers entrusted by the Constitution to another, and (2) unconstitutional aggrandizement of one branch at the expense of another. The DACA and DAPA Directives represent both.

First, the Directives are legislative in nature. They attempt to confer continued presence in the United States, as well as employment authorization, on all aliens meeting specified criteria. The conferral of legal rights and privileges to a large class of persons meeting certain criteria is a legislative act. The Supreme Court has defined an action as "essentially legislative in purpose and effect" if it "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons." *Chadha*, 462 U.S. at 952. The Directives alter the rights and duties of a class of some 5.8 million persons, collectively, by giving them the legal rights to remain present in the United States and to be employed in the United States.

112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 112th Cong. (2012).

[3]The principal provisions of the DREAM Act, as reiterated in the two dozen DREAM Act bills introduced in Congress, are that it establishes a class of unlawfully present aliens who may apply for cancellation of removal and either temporary or conditional lawful residence, and then may adjust to lawful permanent resident status or have the conditions removed. The class is generally defined as those aliens who arrived in the United States as minors, have been physically present in the United States for a period of years (typically five years) prior to enactment, have not been convicted of a felony or two or more misdemeanors and do not pose a threat to national security or public safety, have earned a high school diploma or a general education development certificate in the United States, and are below a certain age (typically early to mid-thirties) on the date of enactment. Qualifying aliens whose removal is cancelled and who are granted temporary or conditional residence then must be admitted to, or earn a certain number of credits in, an institution of higher education or serve honorably in the U.S. Armed Forces for a certain period in order to adjust to lawful permanent resident status or have the conditions on their status removed.

The grounds for removal or dispensation from removal are set out in the INA. Because the establishment of those grounds has "the purpose and effect of altering the legal rights, duties and relations of persons," it is a legislative act. *Chadha*, 462 U.S. at 952. The granting of deferred action and employment authorization to millions of aliens who are unlawfully present in the United States is not an exercise of executive branch discretion permitted by the Constitution. Rather, it is a legislative act of amnesty, the granting of a legislative benefit. Only Congress has the authority to make such a large class of individuals eligible for employment authorization in the United States. In sum, the Directives are the product of an executive officer attempting to use executive authority to effect change that is legislative in nature. They therefore constitute an attempt by one branch to exercise the powers of another.

Second, the Directives unconstitutionally aggrandize the executive branch at the expense of Congress. Congress has repeatedly considered and rejected enactment of essentially the same provisions embodied by the Directive. Rather than wait for Congress to adopt the executive branch's way of thinking regarding the proposed DREAM Act and other amnesties, the Administration usurped Congress's role and attempted to impose the same legislative changes under the guise of "prosecutorial discretion." It is noteworthy that in 2011, the President himself stated that, as the chief executive, he lacked the power to provide such benefits to illegal aliens unilaterally without congressional action. In his words, while it was "very tempting" to "bypass Congress and change the laws on my own," he could not do so because "that's not how our system works."[4] The President's assessment of his constitutional authority was correct. It is highly likely that the Article III courts will reach the same conclusion.

IV. Possible Congressional Responses

In summary, the illegality and unconstitutionality of the DACA and DAPA Directives are difficult to dispute. One might then ask what Congress should do in response to the executive branch's violation of federal law and the Constitution.

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[4]The full section of the President's speech was as follows:

> THE PRESIDENT: … Now, I know some people want me to bypass Congress and change the laws on my own. (Applause.) And believe me, right now dealing with Congress –
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> AUDIENCE: Yes, you can! Yes, you can! Yes, you can! Yes, you can! Yes, you can!
>
> THE PRESIDENT: Believe me – believe me, the idea of doing things on my own is very tempting. (Laughter.) I promise you. Not just on immigration reform. (Laughter.) But that's not how – that's not how our system works.
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> AUDIENCE MEMBER: Change it!
>
> THE PRESIDENT: That's not how our democracy functions. That's not how our Constitution is written ..

Remarks by the President to the National Council of La Raza, Washington D.C. (July 25, 2011), available at www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza.

One possible reaction might be to attempt to amend the substantive provisions of the INA compelling removal of these aliens. I believe that this would be an unwarranted and unwise response. The provisions of federal law are clear; Congress need not restate what is already plain in the text of the law. Indeed, amending these unmistakable commands in the law might suggest that there is some ambiguity, when in fact there is none.

Another response is far more advisable: exercising Congress's power of the purse to restrict any appropriations that might be used to fund the Directives. Although this approach has recently faltered in the Senate, it is unquestionably the strongest response that Congress has available.

Finally, Congress should also consider taking steps to ensure that the federal courts retain jurisdiction over the cases challenging the Directives. Because of the weakness of the Administration's position on the merits, the Department of Justice has been particularly aggressive in challenging the jurisdiction of the federal courts in both *Texas* and *Crane*. If the Department of Justice is successful in this regard, it will have persuaded the federal courts that they cannot review the constitutionality and legality of what is arguably the greatest executive usurpation of legislative power in the past century. In the *Crane* case, the Department succeeded in persuading the district court that the Civil Service Reform Act (CSRA) precluded the ICE agents from even bringing their case in federal court. This was an incorrect interpretation of the CSRA, but the preclusive scope of the CSRA could be clarified. A helpful amendment to the CSRA would state that "the preclusive effect of this section does not extend to constitutional or statutory challenges to federal laws, regulations, or policies brought by federal employees or officers seeking declaratory or injunctive relief in the courts of the United States." In cases such as these, federal officers who want to faithfully enforce the law are among the plaintiffs who are best situated to challenge unlawful executive branch actions. The CSRA was never intended to preclude such litigation.