June 2015

BACKGROUND READING FOR IMMIGRATION: THE MUSICAL!

TAB 1: Arizona Senate Bill 1070 (2010): "FOR ANY LAWFUL CONTACT MADE BY A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE WHERE REASONABLE SUSPICION EXISTS THAT THE PERSON IS AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES, A REASONABLE ATTEMPT SHALL BE MADE, WHEN PRACTICABLE, TO DETERMINE THE IMMIGRATION STATUS OF THE PERSON."

TAB 2: 2013 Pamphlet published by U.S. Chamber of Commerce, "Immigration: Myths and Facts."

TAB 3: A. Cox & T. Miles, "Policing Immigration," 80 *The University of Chicago Law Review*, at 87 (2013). Discusses federal "Secure Communities" program.

TAB 4: A. Avorn, "Why They Come: The Real Reason for the Surge of Unaccompanied Children in the United States," *Huffington Post* (Oct. 30, 2014).

TAB 5: November 20, 2014 U.S. Department of Homeland Security ("DHS")'s Memorandum regarding Policies for Apprehension, Detention and Removal of Undocumented Immigrants.

TAB 6: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations," DHS Office of Inspector General (Dec. 24, 2014). Questions effectiveness of drone program in context of immigration.

TAB 7: *State of Texas v. United States*, No. 15-40238 (5th Cir. May 26, 2015): Fifth Circuit Court of Appeals Opinion on U.S. Department of Homeland Security's Deferred Action for Childhood Arrivals program, setting forth how officers should exercise "prosecutorial discretion" before enforcing "immigration laws against certain young people." The District Court entered a preliminary injunction against the program, and the Fifth Circuit denied the United States' motion to stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 26, 2015

Lyle W. Cayce
Clerk

No. 15-40238

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA;
STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS;
STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA;
STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA;
STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN;
PAUL R. LEPAGE, Governor, State of Maine;
PATRICK L. MCCRORY, Governor, State of North Carolina;
C. L. "BUTCH" OTTER, Governor, State of Idaho;
PHIL BRYANT, Governor, State of Mississippi;
STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS;
ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA;
STATE OF TENNESSEE,

Plaintiffs–Appellees,

versus

UNITED STATES OF AMERICA;
JEH CHARLES JOHNSON, Secretary, Department of Homeland Security;
R. GIL KERLIKOWSKE,
Commissioner of U.S. Customs and Border Protection;
RONALD D. VITIELLO,
Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection;
SARAH R. SALDANA,
Director of U.S. Immigration and Customs Enforcement;
LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants–Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Twenty-six states (the "states") are challenging the government's[1] Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA") as violative of the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution. The district court determined that the states are likely to succeed on their procedural APA claim, so it temporarily enjoined implementation of the program. *Texas v. United States*, Civ. No. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). The United States appealed the preliminary injunction and moved for a stay of the injunction pending resolution of the merits of that appeal. Because the government is unlikely to succeed on the merits of its appeal of the injunction, we deny the motion for stay and the request to narrow the scope of the injunction.

I.

In 2012, then-Department of Homeland Security ("DHS") Secretary Janet Napolitano announced the Deferred Action for Childhood Arrivals program ("DACA"), setting forth how officers should exercise "prosecutorial discretion" before enforcing "immigration laws against certain young people."[2] She instructed agency heads that five criteria "should be satisfied before an individual is considered for an exercise of prosecutorial discretion"[3] but that

---

[1] This opinion refers to the defendants collectively as "the United States" or "the government" unless otherwise indicated.

[2] Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al., at 1 (June 15, 2012) (the "DACA Memo"), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[3] *Id.* (stating that the individual may be considered if he "[1] came to the United States under the age of sixteen; [2] has continuously resided in the United States for a [sic] least five years preceding [June 15, 2012] and is present in the United States on [June 15]; [3] is

"requests for relief . . . are to be decided on a case by case basis."[4] "For individuals who are granted deferred action . . . [U.S. Citizenship and Immigration Services ("USCIS")] shall accept applications to determine whether these individuals qualify for work authorization," but the DACA Memo purported to "confer[] no substantive right, immigration status or pathway to citizenship."[5] Of the at least 1.2 million persons who qualify for DACA, approximately 636,000 have been accepted through 2014.[6]

In November 2014, DHS Secretary Jeh Johnson instructed the same agencies to expand DACA in three areas.[7] He also "direct[ed] USCIS to establish a process, similar to DACA," known as DAPA. He set forth six criteria "for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis."[8] Although "[d]eferred action does not confer any form

---

currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the [military]; [4] has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and [5] is not above the age of thirty").

[4] *Id.* at 2.

[5] *Id.* at 3.

[6] *See Texas*, 2015 WL 648579, at *4.

[7] Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al., at 3–4 (Nov. 20, 2014) (the "DAPA Memo"), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. First, the "age restriction exclud[ing] those who were older than 31 on the date of the [DACA] announcement . . . will no longer apply." *Id.* at 3. Second, "[t]he period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments." *Id.* Third, "the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010." *Id.* at 4. The district court enjoined implementation of those expansions, and they are included in the term "DAPA" in this opinion.

[8] *Id.* at 4 (stating that individuals may be considered if they "[1] have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident; [2] have continuously resided in the United States since before January 1, 2010; [3] are physically present in the United States on [November 20, 2014], *and* at the time of making a request

of legal status in this country, much less citizenship[,] it [does] mean[] that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States."[9]

That designation makes aliens who were not otherwise qualified for most federal public benefits eligible for "social security retirement benefits, social security disability benefits, [and] health insurance under Part A of the Medicare program."[10] Further, "[e]ach person who applies for deferred action pursuant to the [DAPA] criteria . . . shall also be eligible to apply for work authorization for the [renewable three-year] period of deferred action."[11] "An alien with work authorization may obtain a Social Security Number"; "accrue quarters of covered employment"; and "correct wage records to add prior covered employment within approximately three years of the year in which the wages were earned or in limited circumstances thereafter."[12] The district court

---

for consideration of deferred action with USCIS; [4] have no lawful status on [November 20, 2014]; [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.").

[9] *Id.* at 2 (emphasis added). As the United States admits in its opening brief at 45–46, "lawful presence," unlike "legal status," is not an enforceable right to remain in the United States and can be revoked at any time. But "lawful presence" does have significant legal consequences, as we will explain.

[10] Brief for the United States at 48–49 (citing 8 U.S.C. § 1611(b)(2)–(3)). With limited exceptions, "an alien who is not a qualified alien . . . is not eligible for any Federal public benefit," § 1611(a), but that prohibition does "not apply to any benefit payable under title II of the Social Security Act [42 U.S.C. § 401 *et seq.*] to an alien who is lawfully present in the United States as determined by the Attorney General," § 1611(b)(2), or "to any benefit payable under title XVIII of the Social Security Act (relating to the medicare program) [42 U.S.C. § 1395 *et seq.*] to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title [42 U.S.C. § 1395c *et seq.*], who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits," § 1611(b)(3) (alterations in original).

[11] DAPA Memo, *supra* note 7, at 4.

[12] Brief of the United States at 49 (citations omitted) (citing 42 U.S.C. § 405(c)(1)(B),

determined that "DAPA recipients would be eligible for earned income tax credits once they received a Social Security number."[13] Texas maintains that DAPA recipients become eligible for driver's licenses and unemployment benefits.[14] Of the approximately 11.3 million illegal aliens[15] in the United States, 4.3 million are eligible for DAPA. *Texas*, 2015 WL 648579, at *7 & n.11, *15.

The states sued to prevent implementation of the program. First, they claimed that DAPA is procedurally unlawful under the APA because it is a substantive rule that is required to undergo notice and comment, but DHS had

---

(4), (5)(A)–(J); 8 C.F.R. § 1.3(a)(4)(vi); 20 C.F.R. §§ 422.104(a)(2), 422.105(a)).

[13] *Texas*, 2015 WL 648579, at *44 n.64; *see also* 26 U.S.C. § 32(c)(1)(E), (m) (stating that eligibility for earned income tax credit is limited to individuals with Social Security numbers); 20 C.F.R. §§ 422.104(a)(2), 422.107(a), (e)(1).

[14] *See* TEX. TRANSP. CODE § 521.142(a) ("An applicant who is not a citizen of the United States must present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license."); TEX. LAB. CODE § 207.043(a)(2) ("Benefits are not payable based on services performed by an alien unless the alien . . . was lawfully present for purposes of performing the services . . . ."); *see also* 26 U.S.C. § 3304(a)(14)(A) (approval of state laws making compensation payable to aliens who are "lawfully present for purposes of performing such services").

[15] There is some confusion—not necessarily in this case but generally—regarding the proper term for non-citizens who are in the United States unlawfully. The leading legal lexicographer offers the following compelling explanation:

> The usual and preferable term in [American English] is *illegal alien*. The other forms have arisen as needless euphemisms, and should be avoided as near-gobbledygook. The problem with *undocumented* is that it is intended to mean, by those who use it in this phrase, "not having the requisite documents to enter or stay in a country legally." But the word strongly suggests "unaccounted for" to those unfamiliar with this quasi-legal jargon, and it may therefore obscure the meaning.
>
> More than one writer has argued in favor of *undocumented alien* . . . [to] avoid[ ] the implication that one's unauthorized presence in the United States is a crime . . . . But that statement is only equivocally correct: although illegal aliens' presence in the country is no crime, their *entry* into the country is. . . . Moreover, it is wrong to equate illegality with criminality, since many illegal acts are not criminal. *Illegal alien* is not an opprobrious epithet: it describes one present in a country in violation of the immigration laws (hence "illegal").

BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 912 (Oxford 3d ed. 2011) (citations omitted).

not followed those procedures. *See* 5 U.S.C. § 553. Second, the states asserted that DAPA was substantively unlawful under the APA because DHS lacked the authority to implement the program even if it did follow the correct process. *See* 5 U.S.C. § 706(2)(A)–(C). Third, the states contended that DAPA violated the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The district court held that Texas had standing because it would be required to issue driver's licenses to DAPA beneficiaries, and the costs of doing so would constitute a cognizable injury. *Texas*, 2015 WL 648579, at *11–17. Alternatively, the court held that Texas had standing based on a theory it called "abdication standing," under which a state has standing if the government has exclusive authority over a particular policy area but declines to act. *Id.* at *28–34.[16] The court entered the preliminary injunction after concluding that Texas had shown a substantial likelihood of success on its claim that DAPA's implementation would violate the APA's notice-and-comment requirements. *Id.* at *62. The court did not "address[] Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine." *Id.* at *61. The government's motion for a stay pending appeal is based on its insistence that the states do not have standing or a right to judicial review under the APA and, alternatively, that DAPA is exempt from the notice-and-comment requirements. The government also urges that the injunction's nationwide scope is an abuse of discretion.[17]

---

[16] The court considered but ultimately did not rely on two other theories. The first was that the states could sue as *parens patriae* on behalf of citizens injured by economic competition from DAPA beneficiaries. *Texas*, 2015 WL 648579, at *18–20. The second was that, in light of *Massachusetts v. EPA*, 549 U.S. 497 (2007), the states could sue based on the losses they suffer from illegal immigration generally. *Texas*, 2015 WL 648579, at *21–28.

[17] The issues in this case were not resolved by *Crane v. Johnson*, 783 F.3d 244, 247

II.

"We consider four factors in deciding whether to grant a stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'"[18] To succeed on the merits, the government must show that the district court abused its discretion by entering a preliminary injunction.[19] A decision "grounded in erroneous legal principles is reviewed *de novo*," and findings of fact are reviewed for clear error.[20] "A stay 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'"[21]

III.

We begin by deciding whether the government has made a strong showing that it is likely to succeed on the merits of its claim that the states

---

(5th Cir. 2015), which held "that neither the [Immigration and Customs Enforcement] Agents nor the State of Mississippi has demonstrated the concrete and particularized injury required to give them standing" to challenge DACA. Mississippi lacked standing because it failed to allege facts indicating that its costs had increased or would increase as a result of DACA. *Id.* at 252. The agents lacked standing because, *inter alia*, they had not alleged a sufficient factual basis for their claim that an employment action against them was "certainly impending" if they "exercise[d] [their] discretion to detain an illegal alien." *Id.* at 254. That conclusion was informed by the express delegation of discretion on the face of the DACA Memo and the fact that no sanctions or warnings had yet been issued. *Id.* at 254–55. We expressly declined to address the driver's license theory, *id.* at 252 n.34, and did not hold that deferred action under DACA was an exercise of prosecutorial discretion or that the criteria were not binding, *id.* at 254–55.

[18] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)) (internal quotation marks omitted).

[19] *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014).

[20] *Id.* at 418 (quoting *Janvey v. Alguire*, 647 F.3d 585, 592 (5th Cir. 2011)).

[21] *Planned Parenthood*, 734 F.3d at 410 (quoting *Nken*, 556 U.S. at 427).

lack standing. It has not done so. We reach only the district court's first basis for standing—the driver's license rationale—because it is dispositive.[22]

The states have the burden of establishing that at least one of them has Article III standing.[23] First, they must assert an injury that is "concrete, particularized, and actual or imminent."[24] "'[T]hreatened injury must be *certainly impending* to constitute injury in fact,' and . . . '[a]llegations of *possible* future injury' are not sufficient."[25] Second, the injury must be "fairly traceable to the challenged action." *Clapper*, 133 S. Ct. at 1147 (quoting *Monsanto*, 561 U.S. at

---

[22] The United States cites several cases for the proposition that DAPA is not justiciable. None of them resolved the question at issue here, so we consider them only to the extent that they are relevant to our analysis of the standing requirements. *See Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (where standing was not at issue); *Heckler v. Chaney*, 470 U.S. 821, 823 (1985) (addressing availability of judicial review under APA but not standing); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886 (1984) (where standing was not at issue); *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (same); *Fiallo v. Bell*, 430 U.S. 787, 788 (1977) (same); *Mathews v. Diaz*, 426 U.S. 67, 69 (1976) (same); *Linda R.S. v. Richard D.*, 410 U.S. 614, *passim* (1973) (addressing standing in a different context); *Henderson v. Stalder*, 287 F.3d 374, *passim* (5th Cir. 2002) (same); *Texas v. United States*, 106 F.3d 661, 664 n.2 (5th Cir. 1997) (assuming but not deciding that Texas had standing to seek payment from government for expenses associated with illegal immigration); *United States v. Cox*, 342 F.2d 167, 170 (5th Cir. 1965) (en banc) (where standing was not at issue).

[23] *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) ("'The party invoking federal jurisdiction bears the burden of establishing' standing . . . ." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992))); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."). The decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), casts doubt on whether the limitations often described as prudential standing requirements should be considered as part of the standing inquiry. *See id.* at 1386–88; *see also Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc.*, 778 F.3d 502, 505–06 (5th Cir. 2015) (discussing *Lexmark*'s impact). We need not address that, because there is no suggestion that the states are attempting to assert a third party's rights or to seek adjudication of a generalized grievance, and we must apply the zone-of-interests test to determine whether judicial review is available under the APA. *See generally Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (listing prudential-standing requirements).

[24] *Amnesty Int'l*, 133 S. Ct. at 1147 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

[25] *Id.* (second alteration in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

149). The states may establish standing based on costs they incur as a reasonable reaction to a risk of harm only if that harm is certainly impending. *See id.* at 1151. Third, the injury must be "redressable by a favorable ruling." *Id.* at 1147 (quoting *Monsanto*, 561 U.S. at 149). "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518.

A.

The first requirement is likely satisfied by Texas's proof of the costs of issuing driver's licenses to DAPA beneficiaries. "An applicant who is not a citizen of the United States must present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license." TEX. TRANSP. CODE § 521.142(a). Documentation confirming lawful presence pursuant to DAPA would qualify.[26] The district court found that Texas would lose at least $130.89 on each license it issues to a DAPA beneficiary,[27] and the United States does not dispute that calculation on appeal. It is well established

---

[26] *See* TEX. DEP'T OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE 4 (2013), *available at* https://www.txdps.state.tx.us/DriverLicense/documents/verifyingLawfulPresence.pdf (listing acceptable document for "[p]erson granted deferred action" as "[i]mmigration documentation with an alien number or I-94 number"); *supra* text accompanying note 9.

[27] *Texas*, 2015 WL 648579, at *11. The court noted that some of those costs are attributable to Texas's participation in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified as amended in scattered sections of 8 and 49 U.S.C.). *Id.* To comply with that law, a state must, *inter alia*, use the federal Systematic Alien Verification for Entitlements system to verify an applicant's immigration status. 6 C.F.R. § 37.13(b)(1). The court found that the average fee Texas pays to use that system is $0.75 per applicant. Although states are not required to participate in the REAL ID Act, nonparticipating states' licenses are not valid for access to certain federal facilities and eventually will not be valid for commercial air travel without a secondary form of identification. *REAL ID Enforcement in Brief*, U.S. DEPARTMENT OF HOMELAND SECURITY (Mar. 30, 2015), http://www.dhs.gov/real-id-enforcement-brief.

that a financial loss generally constitutes an injury,[28] so Texas is likely to meet its burden.

The government attacks that conclusion on two grounds. First, it claims that Texas will be required neither to issue licenses nor to subsidize them. Texas responds that it will have to do so in light of *Arizona DREAM Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), which held that DACA beneficiaries were likely to succeed on their equal-protection challenge to Arizona's policy of issuing licenses to some noncitizens but not to them, *id.* at 1067, and suggested but did not decide that the policy was preempted, *id.* at 1063. Although *Arizona DREAM Act* supports Texas's position that it cannot legally deny licenses to DAPA beneficiaries, it is not dispositive. Even if we were bound by the decision of another circuit, that court said nothing about subsidizing licenses, and Texas could avoid financial injury by raising its application fees to cover the full cost of issuing and administering a license.

But that does not resolve the matter. The flaw in the government's reasoning is that Texas's forced choice between incurring costs and changing its fee structure is itself an injury: A plaintiff suffers an injury even if it can avoid that injury by incurring other costs.[29] And being pressured to change state law constitutes an injury.

"[S]tates have a sovereign interest in 'the power to create and enforce a legal code.'"[30] Based on that interest, we held that Texas had standing to

---

[28] *See, e.g.*, *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473–74 (5th Cir. 2013); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 699 (5th Cir. 2011).

[29] *See Texas v. United States*, 497 F.3d 491, 497 (5th Cir. 2007) ("Texas's only alternative to participating in this allegedly invalid process is to forfeit its sole opportunity to comment upon Kickapoo gaming regulations, a forced choice that is itself sufficient to support standing.").

[30] *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

challenge the FCC's assertion of authority over an aspect of telecommunications regulation that the state believed it controlled[31]; three other circuits held that the preemption of an existing state law constitutes an injury[32]; and the Sixth Circuit held that making the enforcement of an existing state law more difficult qualifies.[33] Reviewing that caselaw, the Fourth Circuit explained that a state has standing based on a conflict between federal and state law if "the state statute at issue regulate[s] behavior or provide[s] for the administration of a state program," *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011), but not if "it simply purports to immunize [state] citizens from federal law," *id.* at 270.

That well-established caselaw is dispositive because if pressure to change state law in some substantial way were not injury, states would have no standing to challenge *bona fide* harms because they could offset most financial losses by raising taxes or fees. Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing.[34]

---

[31] *Id.*

[32] *See, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443–44 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting in *dictum* that "a State has standing to defend the constitutionality of its statute").

[33] *Celebrezze*, 766 F.2d at 232–33; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.").

[34] The government relies on *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), for the proposition that Texas's injury is self-inflicted. There, several states alleged that other states had unconstitutionally taxed nonresidents' incomes. *Id.* at 661–63. The plaintiffs said the challenged practices had caused them to lose tax revenue. *Id.* at 663. The Court held that the plaintiffs' injuries were self-inflicted because they were caused by the plaintiffs' decisions to give their residents credits for taxes paid to other states, so there was no cognizable injury. *See id.* at 664. The Court later held, however, that Wyoming had

Second, the government urges that Texas will suffer no injury, because the costs of issuing licenses will be outweighed by countervailing economic benefits, including increased tax revenue, decreased reliance on state-subsidized health care, better financial support for DAPA beneficiaries' children, increased revenue from vehicle-registration fees, and decreased auto insurance costs. All that may be true, but those benefits are not properly weighed in evaluating standing here. We have addressed the question of offsetting benefits only to a limited extent, holding that individuals lacked taxpayer standing to challenge Louisiana's issuance of pro-life license plates in part because the extra fees paid by drivers who purchased the plates could have covered the expenses associated with offering them and distributing the funds they raised. *Henderson*, 287 F.3d at 379–81.

That approach is appropriate, if at all, where the costs and benefits are of the same type and arise from the same transaction because the plaintiff has suffered no real injury. By contrast, other circuits have declined to consider offsetting benefits of different types or from different transactions.[35] Our sister

---

standing to challenge an Oklahoma statute that decreased Wyoming's severance-tax revenue by requiring some Oklahoma power plants to burn at least 10% Oklahoma-mined coal. *See Wyoming v. Oklahoma*, 502 U.S. 437, 447–50 (1992).

Wyoming controls here. The plaintiffs in *Pennsylvania* chose to base their tax credits on other states' tax policies; they could have used other methods to accomplish a similar result, such as basing the credits on residents' out-of-state incomes, rather than taxes actually paid to other states. By contrast, Wyoming did nothing to tie its severance tax to Oklahoma law. Like Wyoming, Texas has few options to avoid being affected by what it believes are unlawful changes to federal immigration policies: It must rely on federal immigration classifications if it seeks to issue licenses only to those lawfully present in the United States. The government acknowledges this in its motion for stay, noting that "[s]tates may choose to issue driver's licenses to deferred action recipients or not, as long as they base eligibility on federal immigration classifications rather than creating new state-law classifications of aliens." Because Texas does not have the level of choice the plaintiffs in *Pennsylvania* enjoyed, its injury is not self-inflicted.

[35] *See, e.g.*, *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013); *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 656–59 (9th Cir. 2011); *Ross v. Bank of Am., N.A.*

circuits' approach makes sense in that context because attempting to balance all costs and benefits associated with a challenged policy would leave plaintiffs without standing to challenge legitimate injuries, given that defendants could point to unrelated benefits, improperly shifting to the plaintiffs the burden of showing that the costs outweigh them.

Most of the benefits the government cites—increased tax revenue, decreased reliance on state-subsidized health care, and better financial support for DAPA beneficiaries' children—are wholly separate from the costs of issuing licenses. The other benefits it identifies—increased revenue from vehicle fees and decreased auto insurance costs—are more closely associated with the costs of issuing licenses, but the caselaw illustrates that they are still too far removed to be applied as offsets.

For example, in *NCAA*, 730 F.3d at 222–23, the Third Circuit held that sports leagues had standing to challenge New Jersey's plan to license sports betting even though the damage to the leagues' reputations could have been outweighed by increased interest in watching sports. Likewise, in *Markva*, 317 F.3d at 557–58, the Sixth Circuit held that grandparents who cared for dependent children had standing to challenge a requirement that they spend more of their own money before obtaining Medicaid benefits, as compared to similarly situated parents, even though the grandparents arguably received more of other types of welfare benefits. Here, as in those cases and others,[36]

(USA), 524 F.3d 217, 222 (2d Cir. 2008); *Markva v. Haveman*, 317 F.3d 547, 557–58 (6th Cir. 2003); *see also* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2015) ("Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused injury.").

[36] *See, e.g.*, *L.A. Haven Hospice*, 638 F.3d at 656–57 (holding that hospice had standing to challenge regulation that allegedly increased its liability even though regulation may have also saved it money); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570–75 (6th Cir. 2005)

the benefits the government cites concern the same subject matter as the costs but do not arise from the same transaction, so we cannot consider them. Accordingly, Texas has likely asserted an injury that is "concrete, particularized, and actual or imminent." *Clapper*, 133 S. Ct. at 1147 (quoting *Monsanto*, 561 U.S. at 149).

B.

Texas is likely to satisfy the second requirement by showing that its injury is "fairly traceable to the challenged action." *Id.* (quoting *Monsanto*, 561 U.S. at 149). As we have explained,[37] it is undeniable that DAPA would enable beneficiaries to apply for licenses, but the United States asserts that DAPA's incidental consequences are not cognizable injuries because the causal link is too attenuated. *Massachusetts v. EPA* establishes, much to the contrary, that Texas's injury suffices.

In *Massachusetts*, 549 U.S. at 526, the Court held that the erosion of the state's shoreline gave it standing to challenge the EPA's decision not to regulate greenhouse-gas emissions from new motor vehicles. The Court noted that the Clean Air Act authorizes judicial review of the EPA's denial of a rulemaking petition, a fact that "is of critical importance to the standing inquiry [because] 'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* at 516 (quoting *Defenders of Wildlife*, 504 U.S. at 580). Moreover, "States are not normal litigants for the purposes of invoking federal jurisdiction," *id.* at 518, because they surrendered some of the sovereign powers necessary to protect themselves from harms such as climate change when they

---

(holding that patient had standing based on increased risk from defective medical device even though his device had not malfunctioned and had benefited him).

[37] *See supra* note 26 and accompanying text.

joined the union, *id.* at 519. That point was especially relevant because the EPA's inaction had caused the erosion of Massachusetts's sovereign territory. *See id.* "Given that procedural right and Massachusetts's stake in protecting its quasi-sovereign interests, the Commonwealth [was] entitled to special solicitude in [the] standing analysis." *Id.* at 520.

This case implicates the same concerns. Texas is exercising a procedural right: Just as the Clean Air Act ("CAA") authorizes judicial review of "final action taken[] by the Administrator," 42 U.S.C. § 7607(b)(1), the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704.[38] And Texas is protecting its quasi-sovereign interest in not being forced to choose between incurring costs and changing its driver's license regime.[39] Therefore, it is entitled to the same

[38] The fact that the CAA's review provision is more specific than the APA's is relevant to, but not dispositive of, our "special solicitude" analysis. The former's specificity may suggest that Congress meant for plaintiffs to have standing to challenge procedural violations of the CAA even if they would not have standing to challenge some analogous violations of the APA. That said, we routinely hold that plaintiffs have standing to challenge failures to comply with the APA's notice-and-comment requirements, *see, e.g.*, *United States v. Johnson*, 632 F.3d 912, 920–27 (5th Cir. 2011), and the Tenth Circuit treats the APA's review provision as sufficient to entitle a state to "special solicitude," at least in some circumstances, *see New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 694, 696 n.13 (10th Cir. 2009) (holding that the state was entitled to special solicitude where one of its claims was based on APA); *Crank*, 539 F.3d at 1241–42 (same where only claim was based on APA). Moreover, Texas's interest in not being pressured to change its law is more directly related to its sovereignty than was Massachusetts's interest in preventing the erosion of its shoreline. *See supra* notes 30–33 and accompanying text. Because of Texas's substantial interest, it is entitled to "special solicitude" here even though a state may not always be entitled to that presumption when seeking review under the APA—an issue we need not decide.

[39] *See Crank*, 539 F.3d at 1241–42 (reasoning that the state was entitled to special solicitude where its asserted injury was interference with enforcement of state law); *Tex. Office of Pub. Util. Counsel*, 183 F.3d at 449 ("[S]tates have a sovereign interest in 'the power to create and enforce a legal code.'" (quoting *Snapp*, 458 U.S. at 601)); *cf. Richardson*, 565 F.3d at 696 n.13 (state was entitled to special solicitude where its asserted injury was both harm to its land and financial loss).

"special solicitude" as was Massachusetts.[40]

The analysis of the "fairly traceable" requirement in *Massachusetts* is also highly relevant. The main causation issue was whether the connection between the EPA's inaction and the state's injury was too remote. *See Massachusetts*, 549 U.S. at 523. The EPA maintained that the injury was not cognizable, because regulating greenhouse-gas emissions from new motor vehicles would have done little to prevent the erosion of the state's land. *Id.* at 523–24. The Court rejected that theory, explaining that the fact "[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law" and that "reducing domestic automobile emissions [was] hardly a tentative step," in any event. *Id.* at 524.

The answer here is the same. Although Texas would not be directly regulated by DAPA, the program would have a direct and predictable effect on the state's driver's license regime, and the impact would be significant because at least 500,000 potential beneficiaries live in the state. Alternatively, Texas could change its law, but being pressured to do so is itself a substantial injury, as already discussed.

By contrast, where the Supreme Court has found that an injury is not fairly traceable, the intervening, independent act of a third party has been a necessary condition of the harm's occurrence, or the challenged action has played a minor role. For instance, the plaintiffs in *Clapper* lacked standing to challenge a section of the Foreign Intelligence Surveillance Act that they

[40] This panel heard over two hours of oral argument on this motion for stay. Government counsel was specifically asked to explain how the United States avoids the "special solicitude" language in its effort to defeat standing. Counsel acknowledged that he had no explanation.

alleged would lead to the monitoring of their communications. *Clapper*, 133 S. Ct. at 1155. For the asserted injury to occur, the Attorney General and the Director of National Intelligence would have had to authorize the collection of communications to which the plaintiffs were a party, the Foreign Intelligence Surveillance Court would have had to approve the surveillance, and the government would have had to succeed in intercepting the communications. *Id.* at 1148. Emphasizing its "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," the Court held that the plaintiffs had not satisfied the "fairly traceable" requirement.[41] Separately, the Court rejected the theory "that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013). Myriad factors determine market shares, so it is difficult to trace a competitive injury to a particular decision benefiting a competitor.[42]

Texas's claim regarding driver's licenses suffers from neither of those deficiencies. The only intervening act of a third party is the beneficiaries'

---

[41] *Clapper*, 133 S. Ct. at 1150; *see also, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447–48 (2011) (stating that taxpayers lacked standing to challenge tax credits that indirectly benefited religious schools in part because private individuals decided whether to use credits for religious schools); *Whitmore*, 495 U.S. at 156–57 (concluding that death-row inmate lacked standing to challenge another inmate's death sentence in part because it was unclear whether courts would rule favorably).

[42] *See also, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (deciding that candidates lacked standing to challenge increased hard-money limits because their inability to compete was also caused by their decisions not to accept large contributions), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *Allen v. Wright*, 468 U.S. 737, 756–59 (1984) (holding that parents lacked standing to challenge tax exemptions for racially discriminatory private schools in part because effect on their children's ability to receive education in racially integrated public school depended on whether withdrawal of exemption would cause private schools to change policies and on the number of students who would transfer to public schools if they did so), *abrogated on other grounds by Lexmark*, 134 S. Ct. at 1388.

decisions to apply for licenses, but it is hardly speculative that they will do so—driving is a practical necessity in most of Texas, especially to get and hold a job, so many beneficiaries will be eager to obtain licenses. Further, DAPA is the only substantial cause of Texas's injury. In short, given the "special solicitude" that the Supreme Court directs us to afford to Texas, the parallels between this case and *Massachusetts*, and the differences between this case and those in which the Supreme Court has not found standing, the states are likely to satisfy the "fairly traceable" requirement.

C.

The third requirement, that the injury be "redressable by a favorable ruling," *Clapper*, 133 S. Ct. at 1147 (quoting *Monsanto*, 561 U.S. at 149), is easily met here. Enjoining the implementation of DAPA until it undergoes notice and comment could prompt DHS to reconsider its decision, which is all a litigant must show when asserting a procedural right. *See Massachusetts*, 549 U.S. at 518.

Thus, the government has not made a strong showing that it is likely to succeed on the merits of its notion that the states lack standing. At least one state—Texas—is likely to satisfy all three requirements, so the government's challenge to standing is without merit.

IV.

In addition to having standing, the states must seek to protect interests that are "arguably within the zone of interests to be protected or regulated by the statute . . . in question."[43] Under "the 'generous review provisions' of the

[43] *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

APA,"[44] that "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."[45] "We apply the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable,'" and "the benefit of any doubt goes to the plaintiff."[46] The states would fail the test only if their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[47]

The government has not made a strong showing that the interests the states seek to protect fall outside the zone of interests of the Immigration and Nationality Act ("INA"). "The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States," which "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). In recognition of that fact, Congress permits states to deny many benefits to illegal aliens.[48] Knowing that they may not enforce laws that conflict with federal law, *see, e.g.*, *Arizona*, 132 S. Ct. at 2510, the states seek only to be heard in the formulation of immigration policy before it imposes substantial costs on them. "Consultation between federal and state officials is an important feature of the immigration system," *id.* at 2508, and

---

[44] *Id.* at 400 n.16 (quoting *Data Processing*, 397 U.S. at 156).

[45] *Id.* at 399–400 (footnote omitted).

[46] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Sec. Indus. Ass'n*, 479 U.S. at 399–400).

[47] *Id.* (quoting *Sec. Indus. Ass'n*, 479 U.S. at 399).

[48] *See* 8 U.S.C. § 1621 (identifying aliens ineligible "for any State or local public benefit," § 1621(a) and noting that "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible," § 1621(d)); *United States v. Alabama*, 691 F.3d 1269, 1298 (11th Cir. 2012) (noting that driver's licenses fall within definition of "public benefit" in § 1621(c)).

the notice-and-comment process, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making,"[49] facilitates such communication. The states easily satisfy the zone-of-interests test.

V.

In deciding whether the United States has made a strong showing that judicial review is precluded, we are mindful that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[50] But judicial review is unavailable "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

A.

"[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350 (1984) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). That "standard is not a rigid evidentiary test but a useful reminder . . . that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Id.* at 351. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action

---

[49] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

[50] 5 U.S.C. § 702. The government does not dispute that DAPA is a "final agency action." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

involved." *Id.* at 345.

The United States maintains that 8 U.S.C. § 1252(g)[51] expressly prohibits judicial review, but that provision is not "a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review'"; instead, it "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"[52] It is inapplicable here because (1) the states are not bringing a "cause or claim by or on behalf of any alien," and (2) the action does not "aris[e] from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." § 1252(g).

Nor does the government's broad and exclusive authority over immigration policy mean that review is implicitly barred.[53] The INA has numerous specific jurisdiction-stripping provisions[54] that would be rendered superfluous

---

[51] With limited exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g).

[52] *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 482 (1999) (quoting § 1252(g)).

[53] Although "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws," *Sure-Tan*, 467 U.S. at 897; *accord Fiallo*, 430 U.S. at 792 (emphasizing government's authority over immigration), neither the preliminary injunction nor the notice-and-comment process requires the government to enforce the immigration laws.

[54] *See AAADC*, 525 U.S. at 486–87 (listing "8 U.S.C. § 1252(a)(2)(A) (limiting review of any claim arising from the inspection of aliens arriving in the United States), [(B)] (barring review of denials of discretionary relief authorized by various statutory provisions), [(C)] (barring review of final removal orders against criminal aliens), [(b)(4)(D)] (limiting review of asylum determinations)"); *see also, e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v) (barring review of waiver of reentry restrictions); 1226a(b)(1) (limiting review of detention of terrorist aliens); 1229c(e) (barring review of regulations limiting eligibility for voluntary departure), (f) (limiting review of denial of voluntary departure).

by application of an implied, overarching principle prohibiting review.[55] Such a conclusion would be contrary to *AAADC*, 525 U.S. at 482, in which the Court noted that § 1252(g) does not "impose a general jurisdictional limitation; and that those who enacted IIRIRA were familiar with the normal manner of imposing such a limitation."[56]

Moreover, judicial review of an action brought by states to enforce procedural rights under the APA is consistent with the protections Congress affords to states that decline to provide benefits to illegal aliens. As we have explained,[57] Texas, as permitted by § 1621, subsidizes driver's licenses to, *inter alia*, lawfully present aliens but declines to issue them to those unlawfully present. And the state seeks to participate in notice and comment before the Secretary changes the designation of 500,000 aliens residing there in such a way that would cause the state to incur substantial costs.

The Supreme Court's discussion of deferred action in *AAADC* suggests that judicial review may be available if there is an indication that deferred-action decisions are not made on a case-by-case basis. There, a group of aliens sought to stop deportation proceedings against them, but § 1252(g) deprived the courts of jurisdiction. *AAADC*, 525 U.S. at 487. Noting that § 1252(g) codified the Secretary's discretion to decline "the initiation or prosecution of various stages in the deportation process," *id.* at 483, the Court observed that "[p]rior to 1997, deferred-action decisions were governed by internal

---

[55] *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[56] "The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ('IIRIRA'), Pub. L. 104–208, 110 Stat. 3009, amended the INA's provisions pertaining to removal of aliens and enacted new judicial review provisions, codified at 8 U.S.C. § 1252." *Mejia Rodriguez v. DHS*, 562 F.3d 1137, 1142 n.12 (11th Cir. 2009) (per curiam).

[57] *See supra* note 48 and accompanying text.

[Immigration and Naturalization Service ("INS")] guidelines which considered [a variety of factors]," *id.* at 484 n.8. Although those guidelines had since been rescinded, the Court noted that "there [was] no indication that the INS has ceased making this sort of determination on a case-by-case basis." *Id.* The United States has not rebutted the strong presumption of reviewability with clear and convincing evidence that the INA precludes review.[58]

B.

The Secretary does, nonetheless, have broad enforcement discretion and maintains that deferred action under DAPA—a grant of "lawful presence" and subsequent eligibility for otherwise unavailable benefits—is a presumptively unreviewable exercise of that discretion.[59] "The general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise."[60] When, however, "an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Chaney*, 470 U.S. at 832.

Some features of DAPA are similar to prosecutorial discretion: DAPA

---

[58] *See, e.g.*, *Gulf Restoration Network v. McCarthy*, No. 13-31214, 2015 WL 1566608, at *4 (5th Cir. Apr. 7, 2015) ("[T]here is a 'strong presumption,' subject to Congressional language, that 'action taken by a federal agency is reviewable in federal court.'" (quoting *RSR Corp. v. Donovan*, 747 F.2d 294, 299 n.23 (5th Cir. 1984))).

[59] *See Arizona*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." (citation omitted)).

[60] *Chaney*, 470 U.S. at 838 (citation omitted); *see Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993).

amounts to the Secretary's decision—at least temporarily— not to enforce the immigration laws as to a class of what he deems to be low-priority aliens.[61] If that were all DAPA involved, we would have a different case. DAPA's version of deferred action, however, is more than nonenforcement: It is the affirmative act of conferring "lawful presence" on a class of unlawfully present aliens.[62] Though revocable, that new designation triggers eligibility for federal[63] and state[64] benefits that would not otherwise be available.[65]

"[A]lthough prosecutorial discretion is broad, it is not 'unfettered.'"[66] Declining to prosecute does not convert an act deemed unlawful by Congress into a lawful one and confer eligibility for benefits based on that new

---

[61] The preliminary injunction does not require the Secretary to deport any alien or to alter his enforcement priorities, and the states have not challenged the priority levels he has established. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Thomas Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014) (the "Prioritization Memo"), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[62] *See* DAPA Memo, *supra* note 7, at 2; *supra* note 9 and accompanying text. Although "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," it is a civil offense. *Arizona*, 132 S. Ct. at 2505; *see* 8 U.S.C. §§ 1182(a)(9)(B)(i), 1227(a)(1)(A)–(B).

[63] *See supra* notes 10–143 and accompanying text. DAPA also tolls the recipients' unlawful presence under the INA's reentry bars, which will benefit aliens who receive lawful presence as minors because the unlawful-presence clock begins to run only at age 18. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Tolling will not help most adult beneficiaries because one must have continuously resided in the United States since before January 1, 2010, to be eligible for DAPA, and therefore will likely already be subject to the reentry bar for aliens who have "been unlawfully present in the United States for one year or more." § 1182(a)(9)(B)(i)(II), (C)(i)(I).

[64] *See supra* notes 14 and 26 and accompanying text.

[65] *Cf.* Memorandum from James Cole, Deputy Att'y Gen., to All United States Attorneys (Aug. 29, 2013) (the "Cole Memo"), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf. The Cole Memo does not direct an agency to grant any type of affirmative benefit to anyone engaged in unlawful conduct, whereas the DAPA Memo directs an agency to grant lawful presence and provides eligibility for employment authorization and other federal and state benefits to certain illegally present aliens.

[66] *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)) (internal quotation mark omitted).

classification. Regardless of whether the Secretary has the authority to offer those incentives for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion.[67] And as shown above,[68] neither the preliminary injunction nor compliance with the APA requires the Secretary to prosecute deportable aliens or change his enforcement priorities.

Our conclusion is bolstered by the Supreme Court's description of deferred action in *AAADC*:

> To ameliorate a harsh and unjust outcome, the INS may *decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation*. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. . . . *Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien*, even on grounds normally regarded as aggravated.[69]

Unlike the claim in *AAADC*, the states' procedural claim does not involve a

---

[67] Offering lawful presence and other benefits may ultimately help the Secretary enforce immigration laws more efficiently because those benefits make deportable aliens likely to self-identify, but not all inducements fall within the narrow exception for actions "committed to agency discretion." *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("An agency confronting resource constraints may change its own conduct, but it cannot change the law."). As discussed in part V.C, *infra*, we do not interpret the INA, at least at this early stage of the case, as conferring unreviewable discretion on the Secretary to grant the class-based lawful presence and eligibility for benefits at issue in DAPA.

[68] *See supra* note 61.

[69] *AAADC*, 525 U.S. at 484 (emphasis added) (quoting 6 C. GORDON, S. MAILMAN & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (1998)); *accord Johns v. Dep't of Justice*, 653 F.2d 884, 890 (5th Cir. 1981) ("The Attorney General also determines whether (1) to refrain from (or, in administrative parlance, to defer in) executing an outstanding order of deportation, or (2) to stay the order of deportation." (footnote omitted)); *see also Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (per curiam). Those decisions do not address the unique features of DAPA—class-wide eligibility, derived from a child's legal status, for lawful presence and accompanying eligibility for work authorization and other benefits. *See Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 n.27 (5th Cir. 1995) ("[T]he fact that we previously found another FDA compliance policy guide to be a policy statement is not dispositive whether [this guide] is a policy statement."); *infra* note 92 (discussing factual disputes in comparison between DAPA and previous deferred-action programs).

challenge to the Secretary's decision to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation," nor does deferred action pursuant to DAPA mean merely that "no action will thereafter be taken to proceed against an apparently deportable alien." Under DAPA, "[d]eferred action . . . means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States,"[70] a change in designation that confers eligibility for federal and state benefits on a class of aliens who would not otherwise qualify.[71] Therefore, DAPA "provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."[72]

C.

"There is no judicial review of agency action 'where statutes [granting agency discretion] are drawn in such broad terms that in a given case there is no law to apply.'"[73] For example, "[t]he allocation of funds from a lump-sum appropriation," *Vigil*, 508 U.S. at 192, is one of "those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"[74] The district court did not rule on the substantive APA claims, and we do not decide

---

[70] DAPA Memo, *supra* note 7, at 2 (emphasis added).

[71] *See supra* notes 10–14 and accompanying text.

[72] *Chaney*, 470 U.S. at 832. Having concluded that DAPA's version of deferred action—at least to the extent that it confers lawful presence—is not an exercise of enforcement discretion committed to agency action, we do not reach the issue of whether the presumption against review of such discretion is rebutted. *See id.* at 832–34; *Adams v. Richardson*, 480 F.2d 1159, 1161–62 (D.C. Cir. 1973) (en banc) (per curiam).

[73] *Perales v. Casillas*, 903 F.2d 1043, 1047 (5th Cir. 1990) (alteration in original) (quoting *Overton Park*, 401 U.S. at 410) (internal quotation marks omitted).

[74] *Vigil*, 508 U.S. at 191 (quoting *Chaney*, 470 U.S. at 830).

whether the Secretary has the authority to implement DAPA. We do note, however, that even granting "special deference,"[75] the INA provisions cited by the government for that proposition cannot reasonably be construed, at least at this early stage of the case, to confer *unreviewable* discretion.

The INA expressly identifies legal designations allowing defined classes of aliens to reside lawfully in the United States[76] and eligibility for "discretionary relief allowing [aliens in deportation proceedings] to remain in the country,"[77] including narrow classes of aliens eligible for deferred action.[78] The Act also specifies classes of aliens eligible[79] and ineligible[80] for work

---

[75] *Texas*, 106 F.3d at 666 ("Courts must give special deference to congressional and executive branch policy choices pertaining to immigration.").

[76] *E.g.,* lawful-permanent-resident ("LPR") status, *see* 8 U.S.C. §§ 1101(a)(20), 1255; nonimmigrant status, *see* §§ 1101(a)(15), 1201(a)(1); refugee and asylum status, *see* §§ 1101(a)(42), 1157–59, 1231(b)(3); humanitarian parole, *see* § 1182(d)(5); temporary protected status, *see* § 1254a. *Cf.* §§ 1182(a) (inadmissible aliens), 1227(a)–(b) (deportable aliens).

[77] *Arizona*, 132 S. Ct. at 2499 (citing 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure)); *see also* § 1227(d) (administrative stay of removal for T- and U-visa applicants (victims of human trafficking, or of various serious crimes, who assist law enforcement)).

[78] *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (certain petitioners for immigration status under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, § 40701(a), 108 Stat. 1796, 1953–54); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (immediate family members of LPRs killed by terrorism); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (immediate family members of LPRs killed in combat and granted posthumous citizenship); *see also* 8 U.S.C. § 1227(d)(2) ("The denial of a request for an administrative stay of removal [for T- and U-visa applicants] shall not preclude the alien from applying for . . . deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws . . . .").

[79] *E.g.*, 8 U.S.C. §§ 1101(i)(2) (human-trafficking victims in lawful-temporary-resident status pursuant to a T visa), 1105a(a) (nonimmigrant battered spouses), 1154(a)(1)(K) (grantees of VAWA self-petitions), 1158(c)(1)(B), (d)(2) (asylum applicants and grantees), 1160(a)(4) (certain agricultural workers in lawful-temporary-resident status), 1184(c)(2)(E), (e)(6) (spouses of L- and E-visa holders), (p)(3)(B) (certain victims of criminal activity in lawful-temporary-resident status pursuant to a U visa), 1254a(a)(1)(B) (temporary-protected-status holders), 1255a(b)(3)(B) (temporary-resident-status holders).

[80] *E.g.*, 8 U.S.C. §§ 1226(a)(3) (limits on work authorizations for aliens with pending

authorization, including those "eligible for work authorization and deferred action," *supra* note 78. Although the Secretary is given discretion to make immigration decisions based on humanitarian concerns, that discretion is authorized for particular family relationships and specific forms of relief.[81] Congress has developed an intricate process for unlawfully present aliens to reside lawfully (albeit with legal status as opposed to lawful presence) in the United States on account of their child's citizenship.[82] Moreover, judicial review of many decisions is expressly limited or precluded, *supra* note 54, including some that are made in the Secretary's "sole and unreviewable discretion."[83]

Against that background, we would expect to find an explicit delegation of authority to implement DAPA—a program that makes 4.3 million otherwise removable aliens eligible for lawful presence, work authorization, and associated benefits—but no such provision exists.[84] Perhaps the closest is

---

removal proceedings), 1231(a)(7) (limits on work authorizations for aliens ordered removed).

[81] *See e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v), (C)(iii) (authorizing waiver of reentry bars for particular classes of inadmissible aliens), 1227(a)(1)(E)(iii) (authorizing waiver of inadmissibility for smuggling by particular classes of aliens), 1229b(b)(1)(A), (D) (authorizing cancellation of removal and adjustment of status if, *inter alia*, "the alien has been physically present in the United States for a continuous period of *not less than 10 years* immediately preceding the date of such application" and "removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence" (emphasis added)).

[82] In general, an applicant must (i) have a child who is at least 21 years old, (ii) leave the United States, (iii) wait 10 years, and then (iv) obtain a family-preference visa from a United States consulate. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255. DAPA allows a parent to derive lawful presence from his or her child's LPR status, although the INA does not contain a family-sponsorship process for parents of an LPR child. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1152(a)(4), 1153(a).

[83] *E.g.*, 8 U.S.C. §§ 1613(c)(2)(G), 1621(b)(4), 1641.

[84] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

§ 1324a(h)(3),[85] a definitional provision[86] that does not mention lawful presence or deferred action.

Likewise, we do not construe the broad grants of authority in 6 U.S.C. § 202(5),[87] 8 U.S.C. § 1103(a)(3),[88] or § 1103(g)(2)[89] as assigning unreviewable "decisions of vast 'economic and political significance'"[90] to an agency. Presumably because there is no specific statutory basis for DAPA, the United States suggests that its authority is grounded in historical practice, but that "does not, by itself, create power."[91] Even assuming that an amalgamation of

---

[85] "As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."

[86] *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[87] "The Secretary . . . shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities."

[88] "The Secretary . . . shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."

[89] "The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."

[90] *Util. Air*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*); *accord id.* ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159)); *Perales*, 903 F.2d at 1051 ("The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." (quoting *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam)).

[91] *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); *but see NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government,' can inform our determination of 'what the law is.'"

historical practice,[92] congressional acquiescence, the immigration context, and the INA provide authority for DAPA, it would be bold and premature for us to conclude that an as-yet-undefined delegation is beyond the scope of judicial review.

Our decision in *Perales* is not to the contrary. There, we recognized that the INS's decision *not* to grant pre-hearing voluntary departures and work authorizations to a group of aliens was committed to agency discretion because "there is nothing in the [INA] expressly providing for the grant of employment authorization or pre-hearing voluntary departure . . . to [that class of aliens]." *Perales*, 903 F.2d at 1047. "An agency's inaction in such a situation is necessarily exempt from judicial review because there are no meaningful standards against which to judge the agency's exercise of discretion." *Id.* In this case, however, issuing work authorizations to DAPA beneficiaries is an affirmative action, and whether the Secretary has the authority to do so remains an open question.

And even assuming the Secretary has that power, it is the designation of lawful presence *itself*—the prerequisite for work authorization under DAPA—that causes Texas's injury because a document showing legal presence makes one eligible for a driver's license.[93] The Secretary's authority to grant lawful

---

(quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401, and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176)).

[92] Many aspects of previous deferred-action programs have not been precisely explained at this early stage of the litigation, particularly whether they granted "lawful presence" or were purely non-enforcement decisions, whether the beneficiaries were merely given a temporary reprieve while transitioning from one lawful status to another, whether the programs were interstitial to a statutory legalization scheme, whether they are comparable in scale and scope to DAPA, and whether Congress's failure to enact the DREAM Act bears on its acquiescence to DAPA. Because the district court has not yet resolved those factual issues, historical practice does not clarify our understanding of the reviewability of DAPA.

[93] *See supra* notes 14 and 26 and accompanying text.

presence was not at issue in *Perales*. Moreover, in *Perales*, *id.* at 1048, the Attorney General had explicit statutory discretion to authorize pre-hearing voluntary departures—discretion the INA does not specifically confer here.

The government asserts that 8 C.F.R. § 274a.12(c)(14),[94] rather than DAPA, makes aliens granted deferred action eligible for work authorizations. But if DAPA's class-based deferred action program, on which work authorizations are contingent, must be subjected to the notice-and-comment process, then work authorizations may not be validly issued pursuant to it until that process has been completed. And again, it is DAPA's version of deferred action *itself*—the designation of "lawful presence"—that causes Texas's injury.[95]

VI.

Because the United States has not made a strong showing that judicial review is precluded, we must decide whether it has made a strong showing that DAPA does not require notice and comment. The government does not dispute that DAPA is a rule[96]; it urges instead that DAPA is exempt as an "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice," § 553(b)(A), or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," § 553(a)(2). "The 'APA's notice-and-comment exemptions must be

---

[94] "An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, [may be able to obtain work authorization upon application] if the alien establishes an economic necessity for employment."

[95] *See supra* notes 14 and 26 and accompanying text. Moreover, it would be reasonable to construe § 274a.12(c)(14) as pertaining only to those classes of aliens identified by Congress as eligible for deferred action and work authorization. *See supra* note 78.

[96] The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

narrowly construed'" and if a rule is "substantive," all "notice-and-comment requirements must be adhered to scrupulously."[97]

A.

The government's main argument is that DAPA is a policy statement. We consider two criteria to determine whether a purported policy statement is actually a substantive rule: whether it (1) "impose[s] any rights and obligations" and (2) "genuinely leaves the agency and its decisionmakers free to exercise discretion."[98] There is some overlap between those criteria "because '[i]f a statement denies the decisionmaker discretion in the area of its coverage . . . then the statement is binding, and creates rights or obligations.'"[99] "While mindful but suspicious of the agency's own characterization, we . . . focus[] primarily on whether the rule has binding effect on agency discretion or severely restricts it."[100]

---

[97] *Prof'ls & Patients*, 56 F.3d at 595 (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)); *see Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) ("[T]he interested public should have an opportunity to participate, and the agency should be fully informed, before rules having . . . substantial impact are promulgated.").

[98] *Prof'ls & Patients*, 56 F.3d at 595 (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam)); *see also Vigil*, 508 U.S. at 197 (describing general statements of policy "as 'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979))); *id.* ("Whatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement . . . that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." (alteration in original)); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim, in determining the resolution of a [s]ubstantive question of regulation.").

[99] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

[100] *Prof'ls & Patients*, 56 F.3d at 595 (footnote omitted); *accord id.* ("[W]e are to give some deference, 'albeit not overwhelming,' to the agency's characterization of its own rule." (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d at 946) (internal quotation marks omitted)); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) ("This court, however, must determine the category into which the rule falls: '[T]he label that the particular agency

Extrapolating from the implementation of DACA,[101] the district court determined that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion,'"[102] a finding that is reviewed for clear error. Although the DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, the court found that those statements were "merely pretext" because only around 5% of the 723,000 applications have been denied.[103] "Despite a request by the [district] [c]ourt, the [g]overnment's counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant met the DACA criteria . . . ."[104] The court's finding was also based on a declaration by

---

puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.'" (alteration in original) (quoting *Brown Express*, 607 F.2d at 700)).

[101] *See Gen. Elec.*, 290 F.3d at 383 ("[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding."); 3 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 15.05[3] (2014) ("In general, the agency's past treatment of a rule will often indicate its nature.").

[102] *Texas*, 2015 WL 648579, at *55 (second alteration in original) (quoting *Prof'ls & Patients*, 56 F.3d at 595). To the extent that the government maintains that the proper focus of the inquiry into the binding nature of the DAPA Memo is on whether the agency has bound itself—rather than on whether agency officials have bound their subordinates—the government confuses the test for determining whether a purported policy statement is actually a substantive rule with the notice-and-comment exception for internal directives, discussed *infra* part VI.B. An agency action is not exempt as a policy statement just because the agency purports to retain discretion; whether the agency in fact retains discretion is determined, at least in part, by whether its decisionmakers are actually free to exercise discretion. *See supra* notes 98—100 and accompanying text. Of course, as discussed *infra* part VI.B, a lack of discretion by subordinates does not necessarily mean that a directive is subject to notice and comment; subordinates are expected to adhere to internal directives.

[103] *See id.* at *4–5, *55 n.101. Of the at least 1.2 million persons who qualify for DACA, approximately 723,000 had applied through 2014. About 636,000 had been accepted, some decisions were still pending, and only about 5% had been denied, with the top reasons being the following: "(1) the applicant used the wrong form; (2) the applicant failed to provide a valid signature; (3) the applicant failed to file or complete Form I-765 or failed to enclose the fee; and (4) the applicant was below the age of fifteen and thus ineligible to participate in the program." *Id.* at *4–5.

[104] *Id.* at *5. The parties submitted over 200 pages of briefing over a two-month period,

Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DACA applications are simply rubberstamped if the applicants meet the necessary criteria," *id.*; DACA's Operating Procedures, which "contains nearly 150 pages of specific instructions for granting or denying deferred action," *id.* at *55 (footnote omitted); and mandatory language in the DAPA Memo, *id.* at *39, *56 n.103.

The agency's characterization of both the DACA and DAPA criteria exudes discretion—using terms such as "guidance," "case-by-case," and "prosecutorial discretion."[105] But a rule can be binding if it is "applied by the agency in a way that indicates it is binding,"[106] and the states offered evidence from DACA's implementation that DAPA's discretionary language was pretextual. The programs are not completely analogous, however: Many more persons are eligible for DAPA,[107] and eligibility for DACA was restricted to a younger population—suggesting that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial. The DAPA Memo also contains more discretionary criteria: Applicants must not be "an enforcement priority as reflected in the [Prioritization Memo]; and [must] present no other factors that, in the exercise of discretion, makes the grant of deferred action

---

supported by more than 80 exhibits. The district court held a hearing on the motion for a preliminary injunction and heard extensive argument from both sides and "specifically asked for evidence of individuals who had been denied for reasons other than not meeting the criteria or technical errors with the form and/or filing." *Id.* at *55 n.101.

[105] *See* DACA Memo, *supra* note 2; DAPA Memo, *supra* note 7.

[106] *Gen. Elec.*, 290 F.3d at 383; *accord McLouth Steel*, 838 F.2d at 1321–22 (reviewing historical conformity as part of determination of whether rule was substantive or non-binding policy, despite language in rule indicating that it was policy statement); *id.* at 1321 ("More critically than EPA's language . . . its later conduct applying it confirms its binding character.").

[107] Approximately 1.2 million persons are eligible for DACA and 4.3 million for DAPA. *See Texas*, 2015 WL 648579, at *4, *55.

inappropriate."[108] Despite those differences, there are important similarities: The Secretary "direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion,"[109] and there was evidence that the DACA application process *itself* did not allow for discretion, regardless of the approval rate.

We are attentive to the difficulty of evaluating an agency's discretion where the action involves issuing benefits to self-selecting applicants, as distinguished from imposing obligations on a regulated industry. Although a person who expected to be denied DACA relief for discretionary reasons would be unlikely to apply, the self-selection issue is mitigated by the district court's finding that "the [g]overnment has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances)." *Texas*, 2015 WL 648579 at *50.

Moreover, the court did not rely exclusively on DACA's approval rate. It also considered the detailed nature of the DACA Operating Procedures and the declaration from Palinkas that, as with DACA, the DAPA application process itself would preclude discretion: "[R]outing DAPA applications through service centers instead of field offices . . . created an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers" and "prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped."

There was conflicting evidence on the degree to which DACA allowed for discretion. Donald Neufeld, the Associate Director for Service Center

---

[108] DAPA Memo, *supra* note 7, at 4.

[109] *Id.* (emphasis added).

Operations for USCIS, declared that "deferred action under DACA is a . . . case-specific process" that "necessarily involves the exercise of the agency's discretion" and purported to identify several instances of discretionary denials.[110] Although he stated that officials made approximately 200,000 requests for more evidence after receiving DACA applications, the government does not know the number, if any, that pertained to discretionary factors rather than the objective criteria. Likewise, the government did not offer the number of cases service center officials referred to field offices for interviews.[111] The United States has not made a strong showing that it was clearly erroneous to find that DAPA would not genuinely leave the agency and its employees free to exercise discretion.[112]

B.

A lack of discretion does not trigger notice-and-comment rulemaking if the rule is one "of agency organization, procedure, or practice," § 553(b)(A); agencies and their employees are of course expected to adhere to such rules.

---

[110] The states dispute whether those denials were actually discretionary or instead were required because of failures to meet DACA's objective criteria.

[111] Neufeld stated that "[u]ntil very recently, USCIS lacked any ability to automatically track and sort the reasons for DACA denials." Although the district court did not hold an evidentiary hearing or make a formal credibility determination as to the conflicting statements by Neufeld and Palinkas, the record indicates that it did not view the Neufeld declaration as creating a material factual dispute. Following a hearing on the preliminary injunction, the government filed a surreply containing the Neufeld declaration. Although the government did not seek an evidentiary hearing, the states requested one if the "new declarations create a fact dispute of material consequence to the motion." No such hearing was held, and the court cited the Palinkas declaration favorably, *Texas*, 2015 WL 648579 at *5, *8 n.13, *38 n.55, but described the Neufeld declaration as providing insufficient detail, *id.* at *5, 55 n.101.

[112] Because DAPA is much more than a nonenforcement policy, which is presumptively committed to agency discretion, *see supra* part V.B, requiring it to go through notice and comment does not mean that a traditional nonenforcement policy would also be subject to those requirements, assuming that a party even had standing to challenge it. Moreover, a nonenforcement policy may be exempted as a rule "of agency organization, procedure, or practice." *See infra p*art VI.B.

We use "the substantial impact test [as] the primary means . . . [to] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation."[113] "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply."[114] DAPA modifies substantive rights and interests—conferring lawful presence on 500,000 illegal aliens in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and changing its law.

The District of Columbia Circuit has enunciated a more intricate process for distinguishing between procedural and substantive rules.[115] The court first looks at the "effect on those interests ultimately at stake in the agency proceeding."[116] "Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive."[117] Further, "a procedural rule generally may not 'encode [] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior,'"[118] but "the fact that the agency's decision

---

[113] *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); *accord* STEIN, *supra* note 101, §15.05[5] ("Procedural and practice rules have been distinguished from substantive rules by applying the substantial impact test.").

[114] *Kast Metals*, 744 F.2d at 1153; *accord Brown Express*, 607 F.2d at 701–03.

[115] *Compare Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (recognizing that the D.C. Circuit has expressly rejected "the Fifth Circuit's 'substantial impact' standard for notice and comment requirements"), *with City of Arlington, Tex. v. FCC*, 668 F.3d 229, 245 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) ("The purpose of notice-and-comment rulemaking is to assure fairness and mature consideration of rules having a substantial impact on those regulated." (quoting *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011))), *and Phillips Petroleum*, 22 F.3d at 620 (reaffirming substantial impact test announced in *Brown Express*).

[116] *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013) (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984)).

[117] *Id.* (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987)).

[118] *Id.* (alterations in original) (quoting *Am. Hosp.*, 834 F.2d at 1047).

was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one."[119] "A corollary to this principle is that rules are generally considered procedural so long as they do not 'change the *substantive standards* by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide."[120]

Applying those standards here yields the same result as does the substantial-impact test. Although the burden DAPA imposes on Texas is derivative of issuing lawful presence to beneficiaries, it is still substantial—Texas has a quasi-sovereign interest in not being forced to choose between incurring millions of dollars in costs and changing its laws. Moreover, DAPA establishes the "*substantive standards* by which the [agency] evaluates applications which seek a benefit that the agency has the power to provide"—a critical fact requiring notice and comment.[121] Further, receipt of those benefits implies a "stamp of approval" from the government.

C.

Section 553(a)(2) exempts rules "to the extent that there is involved . . . a matter relating to . . . public property, loans, grants, benefits, or contracts." § 553(a)(2). We construe the public-benefits exception very narrowly as applying only to agency action that "clearly and directly relate[s] to 'benefits' as that

---

[119] *Id.* (quoting *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 282 (D.C. Cir. 2000)).

[120] *Id.* (alteration in original) (quoting *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994)).

[121] *Id.* (alteration in original) (quoting *JEM Broad.*, 22 F.3d at 327) (internal quotation marks omitted). *Compare JEM Broad.*, 22 F.3d at 327 ("The critical fact here, however, is that the 'hard look' rules did not change the substantive standards by which the FCC evaluates license applications . . . ."), *with Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (per curiam) (stating that notice and comment is required for "rules [that] changed substantive criteria for" evaluating station allotment counter-proposals).

word is used in section 553(a)(2)."[122]

To the extent that DAPA relates to public benefits, it does not do so "clearly and directly." Although § 553(a)(2) suggests that "rulemaking requirements for agencies managing benefit programs are . . . voluntarily imposed,"[123] USCIS, which is the agency tasked with evaluating DAPA applications, is not such an agency. Neither USCIS nor any other agency within DHS confers public benefits on DAPA beneficiaries. Further, lawful presence is an immigration classification, not a grant of money, goods, services, or any other kind of public benefit that has been recognized, or was likely to have been recognized,[124] under this exception.[125] To the extent that lawful presence triggers eligibility for public benefits, receipt of those benefits depends on compliance with programs managed by other agencies. *See supra* notes 10–14 and accompanying text.

In summary, the United States has not made a strong showing that it is

---

[122] *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1061 (5th Cir. 1985); *accord Hous. Auth. of Omaha, Neb. v. U.S. Hous. Auth.*, 468 F.2d 1, 9 (8th Cir. 1972) ("The exemptions of matters under Section 553(a)(2) relating to 'public benefits,' could conceivably include virtually every activity of government. However, since an expansive reading of the exemption clause could easily carve the heart out of the notice provisions of Section 553, it is fairly obvious that Congress did not intend for the exemptions to be interpreted that broadly.").

[123] *Alcaraz v. Block*, 746 F.2d 593, 611 (9th Cir. 1984).

[124] The Departments of Agriculture, Health and Human Services, and Labor have waived the exemption for matters relating to public property, loans, grants, benefits, or contracts. *See* 29 C.F.R. § 2.7 (Department of Labor); Public Participation in Rule Making, 36 Fed. Reg. 13,804, 13,804 (July 24, 1971) (Department of Agriculture); Public Participation in Rule Making, 36 Fed. Reg. 2532, 2532 (Jan. 28, 1971) (Department of Health and Human Services, then known as Health, Education, and Welfare).

[125] *See e.g.*, *Vigil*, 508 U.S. at 184, 196 (clinical services provided by Indian Health Service for handicapped children); *Hoerner v. Veterans Admin.*, No. 88-3052, 1988 WL 97342 at *1–2 & n.10 (4th Cir. July 8, 1988) (per curiam) (unpublished) (benefits for veterans); *Baylor Univ. Med. Ctr.*, 758 F.2d at 1058–59 (Medicare reimbursement regulations issued by Secretary of Health and Human Services); *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 813 (D.C. Cir. 1975) (food stamp allotment regulations).

likely to succeed on the merits. We proceed to examine the remaining factors of the test for obtaining a stay pending appeal.

VII.

The remaining factors also favor the states. The United States has not demonstrated that it "will be irreparably injured absent a stay." *Planned Parenthood*, 734 F.3d at 410 (quoting *Nken*, 556 U.S. at 426). It claims that the injunction offends separation of powers and federalism, but it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles.

The government urges that DHS will not be able to determine quickly whether illegal aliens it encounters are enforcement priorities, but even under the injunction, DHS can choose whom to remove first; the only thing it cannot do is grant class-wide lawful presence and eligibility for accompanying benefits as incentives for low-priority aliens to self-identify in advance. And the government's allegation that the injunction is delaying preparatory work is unpersuasive. Injunctions often cause delays, and the government can resume work if it prevails on the merits.

The states have shown that "issuance of the stay will substantially injure" them. *Id.* (quoting *Nken*, 556 U.S. at 426). A stay would enable DAPA beneficiaries to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits. That is particularly true in light of the district court's findings regarding the large number of potential beneficiaries, including at least 500,000 in Texas alone.

The last factor, "where the public interest lies," *id.* (quoting *Nken*, 556 U.S. at 426), leans in favor of the states. The government identifies several

important interests: It claims a stay would improve public safety and national security, provide humanitarian relief to the family members of citizens and lawful permanent residents, and increase tax revenue for state and local governments. To the contrary, however, and only by way of example, on March 16, 2015, the Attorney General, in opposing a motion to stay removal in an unrelated action, argued to this very panel that "granting a stay of removal . . . would impede the government's interest in expeditiously . . . controlling immigration into the United States."[126] Presumably, by referring to "the government's interest," the United States is referring to "the public interest."

The states say the injunction maintains the separation of powers and ensures that a major new policy undergoes notice and comment. And as a prudential matter, if the injunction is stayed but DAPA is ultimately invalidated, deportable aliens would have identified themselves without receiving the expected benefits. The public interest favors maintenance of the injunction, and even if that were not so, in light of the fact that the first three factors favor the states and that the injunction merely maintains the status quo while the court considers the issue,[127] a stay pending appeal is far from justified.[128]

---

[126] Respondent's Opposition to Petitioner's Motion To Stay Removal at 8, *El Asmar v. Holder*, No. 15-60155 (5th Cir. filed Mar. 16, 2015) (citing *Nken*, 556 U.S. at 436).

[127] *Cf., e.g.*, *Veasey v. Perry*, 769 F.3d 890, 892–95 (5th Cir. 2014) (discussing the importance of maintaining the status quo in the election context because a change could cause substantial disruption that would be difficult to undo).

[128] An invalid rule does not necessarily result in vacatur; depending on the circumstance, the appropriate remedy may be remand to the agency. That determination is made by evaluating whether "(1) the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly." *N. Air Cargo v. USPS*, 674 F.3d 852, 860–61 (D.C. Cir. 2012). The government has not asked for remand, and it would be premature for us to weigh those considerations at this early stage.

VIII.

The government maintains that the nationwide scope of the injunction is an abuse of discretion, so it asks that the injunction be confined to Texas or the plaintiff states. But partial implementation of DAPA would undermine the constitutional imperative of "a *uniform* Rule of Naturalization"[129] and Congress's instruction that "the immigration laws of the United States should be enforced vigorously and *uniformly*."[130] A patchwork system would "detract[] from the 'integrated scheme of regulation' created by Congress."[131] Further, there is a substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between states.

The motion to stay the preliminary injunction or narrow its scope pending appeal is DENIED.

---

[129] U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

[130] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added).

[131] *Arizona*, 132 S. Ct. at 2502 (quoting *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 288–289 (1986)).

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

Agreeing with the district court, the plaintiff-states recognize that removal and deportation of non-citizens is a power exclusively of the federal government. *See Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012). Their complaint, however, is that the federal government isn't doing its job; that whereas Congress, through unambiguous law, requires the identification, apprehension, and removal of non-citizens who lack documentation to be in the United States, *see* 8 U.S.C. § 1225(a)(3) (inspection); *id.* § 1225(b)(2)(A) (detention); *id.* § 1227(a) (removal), the President is thwarting that law. According to the plaintiffs, the President refuses to remove immigrants Congress has said must be removed and has memorialized that obstruction in a Department of Homeland Security ("DHS") memorandum. This, plaintiffs contend, is a Take Care Clause violation, a *Youngstown* scenario courts must correct; furthermore, because deferring removal of immigrants causes states injury and has substantive impact, the plaintiffs contend that the DHS memorandum is invalid without the full apparatus of rulemaking, notice and comment and public participation, under the Administrative Procedure Act ("APA"). 5 U.S.C. § 553. The district court offered extensive viewpoints on the first point, but ruled in plaintiffs' favor only on the second. The government seeks to stay that ruling, which is the matter before us.

My colleagues conclude that the government has not made a "strong showing" of likelihood of success on the merits. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). I am grateful to them for their analysis and collegiality, and our exchange has informed my views, although I dissent as follows.

Introduction: The Challenged Executive "Action"

On November 20, 2014, the Secretary of the Department of Homeland Security sent to the Director of U.S. Citizenship and Immigration Services, and

the Acting Director of the U.S. Immigration and Customs Enforcement, and the Commissioner of the U.S. Customs and Border Protection a memorandum with the subject heading, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents," which aims to focus resources on illegal immigration at the border and prioritize deporting felons while lesser priority, but removable, immigrants are encouraged to self-report, pass background checks, and pay taxes on any employment they might obtain under preexisting law. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al. (Nov. 20, 2014) ("Nov. 20 Memo"), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. The Office of Legal Counsel at the Department of Justice terms the memorandum "prioritization policy," and the government in briefing to us terms it "deferred action guidance." By contrast, plaintiffs label it a "directive," a term adopted by the district court, which further describes the memorandum as a "program" "to award legal presence status to over four million illegal aliens."

The November 20 memorandum, on its face, gives notice of expanded eligibility criteria used by DHS to assess whether undocumented immigrants who seek "deferred action" should "for a specified period of time . . . [be] permitted to be lawfully present in the United States." This memorandum, expanding on pre-existing guidance, permits undocumented immigrants who are "hard-working," "integrated members of American society," and "otherwise not enforcement priorities" to self-report and become a lower removal priority. The immigrant explicitly stays removable, but is not a removal priority. *See Reno v. Am.–Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (recognizing that deferred action, which was originally known as "nonpriority,"

is an appropriate exercise of the Executive's removal discretion); *see also* 8 C.F.R. § 274a.12(c)(14) (defining "deferred action" as "an act of administrative convenience to the government which gives some cases lower priority"). The parties have offered argument and submissions, but to date without adversarial and evidentiary testing, disagreeing about consequences that could follow from executive adherence to the November 20 memorandum.

I. Non-Justiciability

I would hold that Supreme Court and Fifth Circuit caselaw forecloses plaintiffs' arguments challenging in court this internal executive enforcement guideline. In an earlier *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997), we summarized and resolved the following statutory argument:

> [T]he State alleges that the Attorney General has breached a nondiscretionary duty to control immigration under the Immigration and Nationality Act. The State candidly concedes, however, that section 1103 places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion.
>
> The State's allegation that defendants have failed to enforce the immigration laws and refuse to pay the costs resulting therefrom is not subject to judicial review. An agency's decision not to take enforcement actions is unreviewable under the Administrative Procedure Act because a court has no workable standard against which to judge the agency's exercise of discretion. We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty. The State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty.

Id. at 667 (citations omitted). The authority our court relied on was Chief Justice Rehnquist's opinion for a unanimous Supreme Court in *Heckler v. Chaney*, which held "that an agency's decision not to prosecute or enforce,

whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. 821, 831 (1985); *see also Perales v. Casillas*, 903 F.2d 1043, 1047–48 (5th Cir. 1990); *see generally* 5 U.S.C. § 701(a)(2); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, — F.3d —, No. 13-1316, 2015 WL 2145776, at *1–4 (D.C. Cir. May 8, 2015) (holding that the court was without jurisdiction to review an internal guidance document that "inform[s] the exercise of discretion by agents and officers in the field").[1]

The district court repeatedly acknowledged the controlling authority of *Heckler* and *Texas* that "'[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty,'" but

[1] Because I believe that *Heckler* compels the conclusion that the November 20 memorandum is non-justiciable, I would not reach the issue of standing. At this emergency-stay point, I would note only that there has been little developed guidance from lower courts on how far *Massachusetts v. EPA*'s logic extends for plaintiff-states beyond the facts of that case, which involved a state that asserted an injury based on its own property interests and the relevant statute provided an explicit right to challenge the denial of a rulemaking petition. *See* 549 U.S. 497, 518–20 (2007). Furthermore, Texas's inability to articulate a limiting principle to its drivers' license theory of standing—triggered, it appears, by any federal executive policy that leads to the grant of even one deferred action request—as well as countervailing developments in this court and others, suggest to me that *Massachusetts v. EPA* may not apply here. *See Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (holding that the State of Mississippi had not "demonstrated the concrete and particularized injury required to give [it] standing to maintain [its] suit" against the precursor DHS memorandum); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014) (holding that Sheriff Arpaio did not have standing to challenge the precursor DHS memorandum); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (holding that plaintiffs do not have standing by virtue of their status as taxpayers to challenge the conferral of tax credits on third parties); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that Pennsylvania lacked standing to challenge a New Jersey tax that triggered a Pennsylvania tax credit because "nothing prevent[ed] Pennsylvania from withdrawing that credit for taxes paid to New Jersey" and explaining that "[n]o State can be heard to complain about damage inflicted by its own hand"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (emphasizing that a third party "lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); *Henderson v. Stalder*, 287 F.3d 374, 384 (5th Cir. 2002) (Jones, J., concurring) ("[A] plaintiff who complains merely that a benefit has been unconstitutionally granted to others is asserting only a 'generalized grievance' that does not allow the plaintiff standing to obtain judicial relief for the alleged wrong in federal court."). Given the debatability of the plaintiff-states' attenuated theory of standing, I would therefore resolve this matter on the threshold issue of non-justiciability.

held "[t]hat is not the situation here" because the November 20 memorandum is "an *announced* program of non-enforcement of the law that contradicts Congress' statutory *goals*." *Texas v. United States*, — F. Supp. 3d —, No. B-14-254, 2015 WL 648579, at *50 (S.D. Tex. Feb. 16, 2015) (emphases added). This twofold extrapolation—focusing not on the memorandum itself set against current law, but instead on an embellishment of it set against a perceived imperative to remove all illegal immigrants—rests on sublimer intelligences than existing law allows. The district court distinguished *Heckler* and *Texas* by drawing an inference of executive overreaching from two sources: first, public statements by the President, and second, the district court's negative assessment of the earlier DACA 2012 memorandum, an assessment that our court has since rejected in *Crane v. Johnson*. The district court's inferences from these two sources led it to characterize the November 20 memorandum as a presidentially "announced program" that thwarts Congress's "goals" to remove all undocumented immigrants.[2]

This characterization is the essential point of disagreement I have with the district court's ruling. Congress could, but has not, removed discretion from DHS as to which undocumented immigrants to apprehend and remove first. *See* 6 U.S.C. § 202(5) (directing Secretary to "[e]stablish[] national immigration enforcement policies and priorities"); 8 U.S.C. § 1103(a)(3)

[2] The district court's April 7, 2015 order, revisiting its stay, reinforces, in my opinion, this error. The April 7 order rests even more determinatively on press statements of the President to re-emphasize both that "[t]his is not merely ineffective enforcement[,] [t]his is total non-enforcement," and also, contrary to our intervening *Crane* decision, that "[i]f there were any doubts that the 2014 DHS Directive is correctly characterized as 'substantive,' the President's warning to DHS employees of adverse consequences for failing to follow the Directive should clearly extinguish those." *Compare* April 7 Memorandum Opinion & Order (observing that immigration officers not only lack discretion but will suffer consequences), *with Crane*, 783 F.3d at 254–55 (holding that DACA 2012's guidelines and the November 20 memorandum's guidelines afford immigration officers discretion to grant or withhold deferred action on a case-by-case basis).

(vesting the Secretary with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (describing immigration law as "'a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program'" (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948))). Indeed, the Supreme Court recently revisited the interplay between Congressional law and coordinate Executive enforcement responsibility, clarifying that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," who "must decide whether it makes sense to pursue removal at all," taking into consideration, for example, "immediate human concerns," such as "[u]nauthorized workers trying to support their families . . . [who] likely pose less danger than alien smugglers or aliens who commit a serious crime." *Arizona*, 132 S. Ct. at 2499; *see also Crane*, 783 F.3d at 249 (8 U.S.C. § 1225 "does not limit the authority of DHS to determine whether to pursue removal of the immigrant").[3] Even specifically as to deferred action, the Supreme Court

[3] As with criminal law enforcement generally, there is no one immigration imperative and blueprint the Executive must follow. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463, 510–11 (2009) (contending that the "detailed, rule-bound immigration code" developed by Congress "has had counterintuitive consequences of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive"). Prosecution, as a core executive duty, has elasticity, ranging from nonprosecution altogether, variable and selected charges, guilty plea flexibility, and recommendations for sentencing leniency or severity. *See, e.g.*, *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 n.3 (5th Cir. 1981) (Although "the word 'shall' is normally interpreted to impose a mandatory duty, . . . when duties within the traditional realm of prosecutorial discretion are involved, the courts have not found this maxim controlling." (internal citation omitted)); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973) (holding that mandatory statutory language directing that each United States attorney "shall . . . prosecute for all offenses against the United States" "has never been thought to preclude the exercise of prosecutorial discretion"). This elasticity was described over a half century ago by the Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935) (a

has recognized that the Executive may choose to take no action "to proceed against an apparently deportable alien" because of "humanitarian reasons." *Reno*, 525 U.S. at 484; *see also id.* at 483 (noting that "[a]t each stage" of removal, the "Executive has discretion to abandon the endeavor"). And in *Crane*, this court held that the DHS memorandum does not preclude the agency's exercise of enforcement discretion, a ruling that the district court of course did not have the benefit of. *Compare Texas*, 2015 WL 648579, at *55 ("Nothing about DAPA genuinely leaves the agency and its employees free to exercise discretion." (internal quotation marks, alterations, and emphasis omitted)), *with Crane*, 783 F.3d at 254–55 & n.42 (emphasizing that DACA 2012 "makes it clear that the Agents shall exercise their discretion in deciding to grant deferred action" and that the November 20 memorandum's case-by-case review of applicants makes it "highly unlikely that the agency would impose an employment sanction against an employee who exercises his discretion to detain an illegal alien").

---

prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done."). Even more so in the immigration context, the Supreme Court has been sensitive to unique concerns beyond humanitarian circumstances and limited resources, especially foreign policy. *See Arizona*, 132 S. Ct. at 2499 ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy . . . ."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); *cf.* 8 U.S.C. § 1252(g) (recognizing the executive branch's authority to exercise prosecutorial discretion by generally stripping courts' jurisdiction to hear any claim "by or on behalf of any alien" arising from the Executive's decision to "commence proceedings, adjudicate cases, or execute removal orders against any alien"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 547 (1990) ("[C]ourts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.").

The plaintiffs point to no statutory removal of the executive discretion that the Supreme Court and our court emphasize vitally exists in the law. Regardless, it is undisputed that the Executive presently is deporting a total number of immigrants at a faster rate than any administration before, ever; that the Executive is and should allocate limited resources to deport violent and dangerous immigrants, ahead of citizen–children's parents who self-report to DHS acknowledging their illegal presence; and finally, that even categories of persons, like immigrants cooperating with the government in criminal cases or who contribute to our Armed Forces, historically receive deferrals.[4]

---

[4] The Executive's granting of temporary reprieve from prosecution to categories of individuals is neither new nor uncommon. This occurred, to begin with an example in the immigration context, with the Family Fairness program. In 1987, the INS announced a policy of deferring the deportations of certain children whose parents received legal status under recent legislation. *See Legalization and Family Fairness—An Analysis*, 64 Interpreter Releases 1190, 1200–1204 (Oct. 26, 1987) (containing policy by Alan C. Nelson, INS Commissioner, providing that "indefinite voluntary departure shall be granted" to these children). In 1990, the INS expanded its deferral program to include certain spouses of legalized persons. Memorandum from Gene McNary, Comm'r, Immigration and Naturalization Serv., to Regional Commissioners, *Family Fairness: Guidelines for Voluntary Departure* (Feb. 2, 1990) (providing that "[v]oluntary departure will be granted for a one-year period"). The Family Fairness program was effectively codified by Congress later that year. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). The practice of immigration parole, which "permits a person's physical presence in the United States even when she could not legally be granted formal admission," also "originated as a purely administrative innovation." David A. Martin, *A Defense of Immigration-Enforcement Discretion*, 122 Yale L.J. Online 167, 178 (2012) (noting that "[t]he practice was well established by the time parole gained explicit statutory sanction in the original 1952 Immigration and Nationality Act"). In the larger criminal context—such as the recent nonprosecution of banks that self-report regarding overseas tax infractions, or nonprosecution of possession of personal use amounts of marijuana—deferred prosecution is common (and more consequential because statutes of limitations make it binding legally). Indeed, the practice of pretrial diversion, set forth in the United States Attorney's Manual, began as an executive initiative, without express statutory authorization, announced by Assistant Attorney General Burke Marshall in 1964, and then expanded in 1974 by then–Deputy Attorney General Laurence Silberman, before the Pretrial Services Act of 1982 was enacted. *See Pre-Trial Diversion: Hearing on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 127–28 (1974); Stephen J. Rackmill, *Printzlien's Legacy, the "Brooklyn Plan," A.K.A. Deferred Prosecution*, 60 Fed. Probation 1, 8, 10, 14 (June 1996). Such clear and announced enforcement guidelines do several things. They channel limited resources by prioritizing

The district court did not view the November 20 memorandum as a non-prosecution policy. Instead, the district court reads the memorandum as agency action that affirmatively confers legal status and other benefits on undocumented immigrants. The district court, however, failed to recognize the important distinction between lawful "status" and lawful "presence." Whereas legal *status* implies "a right protected by law," legal *presence* simply reflects an "exercise of discretion by a public official." *See Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013); *see also Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) ("[U]nlawful presence and unlawful status are distinct concepts."). The November 20 memorandum like its precursors, dating back to 1975, contemplates categorizing deferred action recipients as being present for a temporary period of time, but does not change the applicant's lawful "status." Congress, separately through 8 U.S.C. § 1255, has codified exact ways non-citizens may gain lawful "status," but has left lawful "presence" broadly defined to include a discretionary "period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii); *see also Black's Law Dictionary* 565 (10th ed. 2014) (defining "prosecutorial discretion" in the immigration context as "[a] federal authority's discretion not to immediately arrest or endeavor to remove an illegal immigrant because the immigrant does not meet the federal government's immigration-enforcement priorities"). When DHS exercises its discretion to grant a qualified and temporary reprieve from removal, the immigrants' now-identified "presence" is thus consistent with, and furthers,

---

targeted felons. They animate the political process so that executive policy-setting either proves its worth and becomes embodied in law, as with pretrial diversion or the Family Fairness program, or oppositely, for myriad reasons—unworkability, unpopularity, or budgetary realities—policies are rescinded or countermanded by law. Third, nonprosecution necessarily means that persons not being prosecuted, arrested, and detained will seek work according to pre-existing law, pay taxes, and parent children. *See* Nov. 20 Memo at 3 (case-by-case exercises of deferred action will "encourage [people] to come out of the shadows . . . and be counted").

Congressional enactments. *See Chaudhry*, 705 F.3d at 292. Non-citizens who only have lawful presence, but not lawful status, are not entitled to remain in the United States; their presence is revocable at any time. The non-citizen thus remains in the country at the discretion of DHS, who may remove the individual whenever it pleases.

The plaintiff-states draw a further flavor of doubt from eligibility for work authorization, whereas amici-states see advantage and financial windfall. That choice is exclusively a task for Congress, however. *See Perales*, 903 F.2d at 1045, 1047 (holding that the INS's decision to grant work authorization has been "committed to agency discretion by law" and is therefore not subject to judicial review). Moreover, the November 20 memorandum does not itself "award" work authorization. *See U.S. Dep't. of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1156 (5th Cir. 1984) (finding a rule non-substantive because its substantive effect was "purely derivative" of another statute and rules). Work authorization for deferred-action recipients is expressly authorized under a 1981 regulation that was promulgated through notice-and-comment rulemaking. *See* 8 C.F.R. § 274a.12(c)(14). That authorization has since been reinforced in the United States Code. *See* 8 U.S.C. § 1324a(h)(3). If an influx of applications makes the statutory availability of work authorization inadvisable, it is for Congress, not the courts, to recalibrate. *See, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (directing the Secretary to grant work authorization to certain categories of non-citizens); *id.* § 1226(a)(3) (directing the Secretary *not* to grant work authorization to a certain category of non-citizens).

On this record, as well as focusing below on the four corners of the November 20 memorandum, I would say DHS is adhering to law, not derogating from it. The Supreme Court in *Heckler* noted that derogation and

abdication occur rarely, where there is statutory language removing non-enforcement discretion yet still "a refusal by the agency to institute proceedings" or "'consciously and expressly adopt[ing] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)). Neither exists here. The DHS memorandum guides executive policy that has allowed enforcement and more removals per year than under any prior presidency. Although executive abdication, if renunciatory of Congress, extreme and diametric, must be checked, courts should not truncate the myriad political processes whereby most executive intention, good and bad, is ever balanced. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[W]e hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences."); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543–44 (1978) ("[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Indeed our cases could hardly be more explicit in this regard." (internal quotation marks and citations omitted)). *See generally* Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61 (2006).

In fact, if the Supreme Court has insisted on any one constant as it relates to immigration disputes, it is to redirect disputes from the multiplicity of state reactions back to dialogue between our coequal federal political branches so that nationwide concerns and practicalities are weighed, Congress's purse dispensed as it chooses, and the Executive refines its enforcement priorities or is compelled by Congress to do so. If internal executive policy-setting authority—adjusting to limited resources and making

critical offender severity determinations, all superintended by Congress—now instead becomes challengeable in courts and forced into "the often cumbersome and time-consuming mechanisms of public input," *Kast Metals*, 744 F.2d at 1152, this case, as precedent, may well rise, swell, and burst with clutter beyond judicial control over immigration removal (in)action. *Id.* at 1156 (noting that notice and comment "would foresee aeons of rulemaking proceedings when all the agency seeks to do is operate in a rational manner"). *See generally Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1353, 1354 (Silberman, J., dissenting) (cautioning courts against "teas[ing] statutory law out of a vacuum" created by Congress and ignoring "the zero sum game" of limited Congressional appropriations which require executive agencies to communicate prioritizations via policies).

II. Executive Policy-Setting

For the foregoing reasons, I would grant a stay of the district court's preliminary injunction because I believe the policy articulated in the November 20 memorandum is non-justiciable.[5] *See supra* Part I; *see also* 5 U.S.C.

[5] Absent non-justiciability, I would agree that there is a reason to maintain the status quo pending the government's approaching appeal on the merits. *Compare INS v. Legalization Assistance Project of the L.A. Cnty. Fed'n of Labor*, 510 U.S. 1301, 1306 (1993) (O'Connor, Circuit Justice) (granting an application to stay the district court's order that required enforcement of INS regulations when the district court's order was "an improper intrusion by a federal court in the workings of a coordinate branch of the Government"), *with Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) ("[I]t is a mistake to disrupt the status quo so seriously before the Fifth Circuit has arrived at a considered decision on the merits."), *and Campaign for S. Equality v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014) (granting a stay pending appeal in part because "a temporary maintenance of the status quo" prevents the "inevitable disruption that would arise from a lack of continuity and stability in [an] important area of law"). *See generally* Jill Wieber Lens, *Stays Pending Appeal: Why the Merits Should Not Matter*, Fla. St. U. L. Rev. (forthcoming) (manuscript at 35), *available at* http://ssrn.com/abstract=2571003 (arguing that panels reviewing motions for stay pending appeal should consider "whether the circumstances would (irreparably change) in a way that would interfere with the appellate court's ability to make a decision meaningful to the parties").

§ 701(a)(2); *Perales*, 903 F.2d at 1045–47. However, because the district court's injunction rested solely on the district court's classification of the November 20 memorandum as agency action issued without adhering to the notice and comment requirements of the APA, I articulate my disagreement on that point as well.

The district court highlighted that "well-developed" caselaw exists to distinguish executive action that is internal policy-setting from executive action that is a procedurally invalid legislative rule because it binds members of the public, the agency, and even courts. *See Hudson v. FAA*, 192 F.3d 1031, 1035–36 (D.C. Cir. 1999); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). Judge Kavanaugh's well-reasoned opinion in *National Mining Association v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014), succinctly articulates the § 553 framework. Step 1, he explains, is whether the agency has said it is imposing a legally binding rule on regulatees. *Id.* at 251–52. Even if the agency says it is not, Step 2 asks whether the policy nonetheless draws a line in the sand, coercing conformity. *Id.* at 252. Finally, Step 3 asks whether post-guidance events show that agency action has become "binding on regulated parties." *Id.* at 253. The district court correctly noted that "the analysis substantially relies on the specific facts of a given case." *Texas*, 2015 WL 648579, at *52. Because the November 20 memorandum has yet to go into effect, and no evidentiary hearing was held, the record is undeveloped and contains considerable conjecture, and conjecture is guided by feeling.

A. Step 1: Agency Characterization

The starting point for analysis under § 553(b), though not the deciding factor, is an agency's own characterization of its action, and specifically whether the agency itself seeks to impose binding obligations as a basis for enforcement action. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *see also Kast Metals*, 744 F.2d at 1149; *Pac. Gas &*

Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 39 (D.C. Cir. 1974). DHS titles its memorandum as internal policy statements expanding prosecutorial discretion for undocumented immigrants who seek "deferred action" instead of removal from the United States. That description is neither a boilerplate beginning nor a final caveat, weak bookends around an imposed regulatory regime. *See Huerta*, 2015 WL 2145776, at *5 ("The language employed by the agency may play an important role [in determining whether a document is a policy statement or legislative rule]; a document that reads like an edict is likely to be binding, while one riddled with caveats is not."); *Nat'l Mining Ass'n*, 758 F.3d at 251–53. No fewer than ten times, the November 20 memorandum instructs immigration officers that: (1) "DHS must exercise prosecutorial discretion in the enforcement of the law"; (2) "[immigration laws] are not designed to be blindly enforced without consideration given to the individual circumstances of each case"; (3) "[d]eferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission"; (4) "deferred action is legally available so long as it is granted on a case-by-case, and it may be terminated at any time at the agency's discretion"; (5) "[c]ase-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense"; (6) "this Department's limited enforcement resources . . . must continue to be focused on those who represent threats to national security"; (7) "USCIS [should] establish a process, similar to DACA [2012], for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis"; (8) "ICE is further instructed to review pending removal cases . . . and to refer [certain] individuals to USCIS for case-by-case determinations"; (9) "immigration officers will be provided with specific

eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis"; and (10) "[i]t remains within the authority of the Executive Branch . . . to set forth policy for the exercise of prosecutorial discretion and deferred action . . . . This memorandum is an exercise of that authority."[6]

B. Step 2: Intent to Bind

Looking behind an agency's stated purpose claiming or disclaiming the force and effect of law, courts also give a close, four-corners look for language that reads like an edict, commanding language, to discern if a priority statement nonetheless will operate bindingly on regulatees. *Nat'l Mining Ass'n*, 758 F.3d at 252 ("The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.").

---

[6] In this regard, also, the November 20 memorandum is consistent with prior deferred action guidance dating back to at least 1975, which structure executive discretion to delay removal of immigrants who are not priorities for removal. *See* Immigration and Naturalization Service Operating Instruction 103.1(a)(1)(ii) (1975); Memorandum from Sam Bernsen, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976); Memorandum from Bo Cooper, *INS Exercise of Prosecutorial Discretion* (July 11, 2000); Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors et al., *Exercising Prosecutorial Discretion* (Nov. 17, 2000); Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor Chief Counsel, *Prosecutorial Discretion* (Oct. 24, 2005); Memorandum from Julie L. Myers, Assistant Secretary of Homeland Security, to All Field Office Directors and Special Agents in Charge of U.S. Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion* (Nov. 7, 2007); Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011). In several instances, prior policies on deferred action were held to be exempt from requirements in § 553. *See Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1009 (9th Cir. 1987) (rejecting claim that the 1981 version of INS Operating Instruction 103.1(a)(1)(ii) "violated the notice-and-comment requirements of the APA, because the amended Operating Instruction qualifies under the APA's exception for 'general statements of policy'"); *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983) (concluding that Operating Instruction 103.1(a)(1)(ii) was exempt from § 553(b) because it was "only general guidance for service employees" (internal quotation marks and citation omitted)).

As a preliminary matter, it is undisputed that any "directing" here is internal only, not binding with respect to regulated entities. And to the extent that DHS directs internally, it directs immigration officers to "establish a *process*, similar to DACA [2012], for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," (emphasis added), containing features common to nonbinding statements of policy (exempt from notice and comment procedure), and dissimilar from binding substantive regulations (requiring APA rulemaking and public participation).

First, the memorandum guides only as to when to exercise broad lenity, i.e. delayed enforcement. The memorandum channels when DHS will *not* act, much like longstanding Department of Justice internal prosecution guidelines, such as the "Petite Policy," which "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) . . . . This policy constitutes an exercise of the Department's prosecutorial discretion, and applies even where a prior state prosecution would not legally bar a subsequent federal prosecution . . . ." Dual and Successive Prosecution Policy ("Petite Policy"), United States Attorneys' Manual, Title 9-2.031;[7] *see also Heckler*, 470 U.S. at 832 ("[W]e note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.").

[7] The Petite Policy, like many other law enforcement policies, is a policy governing prosecutorial discretion as to an undefined class of similarly situated persons that has no express statutory authorization and has never been challenged as ultra vires, either violative of APA rulemaking or as an abdication from the Take Care duty to enforce the federal criminal code. *See Heckler*, 470 U.S. at 832 ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (citation omitted)).

The pretext cases relied on by plaintiffs, *see, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (per curiam), involve, contrastingly, affirmative agency action or exact nonenforcement tolerances, such as food contamination set to parts per billion specificity, not, as here, a nonprosecution memorandum built around offenders who self-report, confirm their whereabouts, submit to background checks, and stay subject to prosecution and removal while seeking employment according to law.

Second, the memorandum neither continues nor imposes a regulatory regime. There is no threat to conform. No obligation or prohibition is placed on regulated entities. Instead, DHS has expanded on its preexisting guidance, allowing immigrants to self-report their illegal presence but show they fall outside DHS's "enforcement priorities" and also are not otherwise "inappropriate" for deferred action. The memorandum describes opt-in procedures, whose incontestable accomplishment is that persons illegally here will be identified and located and submit to a criminal background check, all the while allowing DHS to tighten border interdiction and target violent and dangerous felons. It goes without saying that to prosecute a fugitive, the government must first find him. Every applicant under the November 20 memorandum voluntarily will self-report as illegally present and provide information DHS then will use in a criminal background check coordinated with Immigration and Customs Enforcement ("ICE") to effectuate priority removals. Nov. 20 Memo at 3 ("Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and

make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, . . . and be counted.").

Third, plaintiffs cite no § 553 caselaw relating to a statutory regime whose flexibility the Supreme Court has highlighted, *Arizona*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); 6 U.S.C. § 202(5) (affording the Secretary authority to "[e]stablish[] national immigration enforcement policies and priorities"), set against agency policy guidance that incorporates this same flexibility, such as the criteria that the applicant (1) not be an "enforcement priority"; and (2) "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." Any invalidating logic must postulate the opposite of these broad caveats, therefore, both that the Supreme Court's yes (broad discretion over removal) means no (no removal discretion), and also that DHS's no (no blanket approvals to be *present*) means yes (give lawful *status* to millions).[8] Also illogical, future policy-setting would seem possible only when executive fiat is absolute, which in turn would maximize executive arbitrariness—unwritten and individualized assessments for deferred action applicants—and minimize information Congress has to perform day-to-day oversight and funding. *See* Richard J. Pierce, Jr., *Administrative Law Treatise*, § 6.3, at 424–25 (5th ed. 2010) (warning of the "horrible incentives" if agencies are unable to direct their employees without "the expensive and time-consuming notice and comment procedure").

[8] In its April 7, 2015 supplemental order, the district court construes remarks by the President as a threat to immigration officers to conform to the November 20 memorandum. However, the memorandum instructs officials to use discretion and make case-by-case determinations, so any invalidating logic must actually be that officials understand the threat to mean they must do the opposite of what is in writing, and apply criteria blindly, ignore discretionary criteria, and decline to make case-by-case determinations.

C. Step 3: Implementation Facts

Behind label and language, courts vigilantly will look to any post-guidelines implementation data to assure, again, that an agency policy announcement does not inadvertently or strategically cause binding effect equivalent to a legislative rule. The concern is to not allow an agency speak one way—claiming resource constraints and discretion—yet carry out de facto regulation, binding regulatees. Put delicately, is the announced discretion "pretext"? Put indelicately, as the district court held, is the Executive being "disingenuous"? *Texas*, 2015 WL 648579, at *53.

The district court held that "[d]espite the [November 20] memorandum's use of phrases such as 'case-by-case' and 'discretion'" the criteria set forth in the November 20 memorandum were actually "binding." But because it enjoined the November 20 memorandum before it went into effect, no post-guidance evidence exists to help determine "whether the agency has applied the guidance as if it were binding." *Nat'l Mining Ass'n*, 758 F.3d at 253. Instead, as noted earlier, the district court looked above DHS, the executive agency, to President Obama, the executive-in-chief to find contradiction to DHS stated purpose and emphasis on case-by-case discretion. For good reason, however, the Supreme Court has not relied on press statements to discern government motivation and test the legality of governmental action, much less inaction. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006) ("We have not heretofore, in evaluating the legality of executive action, deferred to comments made by such officials to the media."). Presidents, like governors and legislators, often describe law enthusiastically yet defend the same law narrowly. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J.) (noting "[t]he claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy" yet warning against the use of such "unadjudicated claims of

power" to answer constitutional questions). In addition, our court has noted that "informal communications often exhibit a lack of 'precision of draftsmanship'" and therefore "are generally entitled to limited weight" in the analysis of whether a rule is substantive. *Prof'ls & Patients*, 56 F.3d at 599 (quoting *Cmty. Nutrition*, 818 F.2d at 948).[9]

More significant, the district court discerned pretext—inferred intent to bind—from the fact that the majority of DACA 2012 deferred action applications have been granted. I disagree for factual and legal reasons.

First, without evidence-taking and testing, I question the relevance of DACA 2012 implementation data. The DACA 2012 memorandum purports to guide the exercise of prosecutorial discretion "with respect to individuals who came to the United States as children," a subset of undocumented immigrants who are particularly inculpable as they "were brought to this country as children" and, thus, "lacked the intent to violate the law." That memorandum, in its original form, applies only to individuals who came to the United States under the age of sixteen, have not yet reached the age of thirty, and who have achieved a certain level of education. The November 20 memorandum being challenged here, and specifically its DAPA provisions, on the other hand, casts a much wider net, applying to a larger and broader group of individuals, but then narrows its deferred-action-availability reach through the use of more discretionary criteria than in DACA 2012. Despite these dissimilarities, the district court concluded that "[t]here is no reason to believe that DAPA will be implemented any differently than DACA [2012]" and there was no "suggestion that DAPA will be implemented in a fashion different from DACA [2012]."

[9] Much less informally, Presidents often in presidential signing statements say they will not enforce aspects of law, yet no court has used such statements to classify subsequent agency inaction as an intent to bind triggering the APA rulemaking process.

Texas, 2015 WL 648579, at *39, *55 n.96. The court did not explore, however, the government's contention that a significant difference existed between the two programs, specifically, the catch-all discretionary exception that was added to the November 20 memorandum—"present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." The district court rejected this distinction because, the court contended, using circular reasoning, that the approval rate under the DACA 2012 program persuaded the Court that "this 'factor' is merely pretext." *Id.* at *55 n.101.

Second, the district court placed the burden on the government to put forth "evidence of individuals who had been denied [under DACA 2012] for reasons other than not meeting the criteria or technical errors with the form and/or filing." *Id.* But "[t]he plaintiff has the burden of introducing sufficient evidence to justify the grant of a preliminary injunction." *See PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 545 (5th Cir. 1985). The district court then reached its conclusions about the agency's binding intent without giving any weight to the government's contrary evidence or justification for discrediting that evidence. *See Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr*, S.A., 320 F.3d 1205, 1211 (11th Cir. 2003) (holding that the district court abused its discretion when it "effectively issued and upheld the injunction based on evidence presented by only one party" and without holding an evidentiary hearing); *cf. Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558–59 (5th Cir. 1987) (finding that the district court did not abuse its discretion by declining to hold an evidentiary hearing where there were no material factual disputes). Especially because this case touches on the sensitive issues of immigrant presence in the United States, as well as when one branch of government may invalidate internal guidelines of another branch, I do not think it should come resolved on inferences of disingenuousness made from press statements and untested inferences from a

precursor program whose challenge on similar grounds our court has rejected. *See Crane*, 783 F.3d 244. No evidentiary hearing was held. For example, Kenneth Palinkas's contention that DACA 2012 applicants are "rubber-stamped" was not tested against Donald Neufeld's specific examples of discretionary denials.[10] *See Sims v. Greene*, 161 F.2d 87, 88 (3rd Cir. 1947) ("Such conflict [between allegations in competing pleadings and affidavits] must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations . . . made by the respective parties. If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another."); *Heil v. Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 334 n.17 (5th Cir. 2013) ("[I]t is fundamental that, '[i]f there is a factual controversy, . . . oral testimony is preferable to affidavits because of the opportunity it provides to observe the demeanor of the witnesses.'" (citation omitted)); *see also Four Seasons*, 320 F.3d at 1211 ("Where conflicting factual information place[s] in serious dispute issues central to [a party's] claims and much depends upon the accurate presentation of numerous facts, the trial court err[s] in not holding an evidentiary hearing to resolve these hotly contested issues." (citations and internal quotation marks omitted)); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2949 (3d ed.) ("When the outcome of a Rule 65(a)

[10] The government presented a 13-page affidavit of Donald Neufeld, USCIS Associate Director for Service Center Operations, accompanied by over 40 pages of exhibits, which purported to show that USCIS maintains authority and discretion to grant deferred action to non-DAPA applicants and to deny deferred action to applicants who meet the November 20 memorandum's listed criteria. The affidavit describes specific examples of instances when USCIS denied DACA 2012 requests for discretionary reasons that were not contemplated by the DACA 2012 guidelines. This affidavit was based on Neufeld's personal knowledge gained during the course of his official duties. Significantly, the district court never mentions Neufeld, and its only reference to his proof was its early rejection of the entire declaration and exhibits, without any detailed discussion, as not providing "the level of detail that the Court requested." *Texas*, 2015 WL 648579, at *5.

application depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits."). As a second example, Jeh Johnson, the author of what is held disingenuous, was not heard from. His ten instructions requiring individualized, case-by-case assessment were not tested as pretext. When a court assesses unlawful motive and declares executive action invalid nationwide, highest government officials whose veracity is entirely discredited should be heard. Indeed, the District of Columbia Circuit commendably has developed a "curative option" short of complete invalidation for such circumstances. *McLouth*, 838 F.2d at 1324 (remanding to permit agency to demonstrate that it is "truly exercis[ing] discretion in individual" cases). This intermediate remedy seems especially noteworthy because of our intervening *Crane* decision, which calls into doubt the district court's basis for inferring disingenuousness.[11]

Third, DACA 2012 itself contains classic markers of discretion, including the ability to interview applicants, request additional evidence, and contact the applicant's educational institution, other government agencies, employers, or other entities to verify documents and facts. This discretion was actually exercised by DHS; the executive made nearly 200,000 requests for additional evidence under the DACA 2012 program, a fact the district court does not mention. Applications have been denied after an official exercised discretion in applying the criteria set forth in the DACA 2012 memorandum (i.e., making

[11] If a concern is that the unanimous panel in *Crane* itself lacked evidentiary foundation, it would seem even more advisable to require actual and adversarial evidence-taking, avoiding either agency action that is feared to be disingenuous or, an opposite extreme, requiring DHS to prioritize its limited resources only through full public participation.

a subjective determination that the applicant posed a public safety risk), and for reasons not expressly set forth in the DACA 2012 memorandum.

Fourth, and especially significant, placing determinative weight on the approval rate of applicants under DACA 2012 fails to take into account the crucial voluntary aspect of this memorandum, that applicants will *not* apply if they are ineligible—essentially self-reporting for removal—or, if eligible, when they have any other flaw they do not want revealed. In light of this manifest self-selection bias, it is unclear why the appropriate piece of data would be the approval rate of only applicants, crucially relied on by the district court to infer pretext, rather than the approval rate of all those who qualify. Again, the district court did not address at all this self-selection bias inherent in DACA 2012 and the November 20 memorandum.

Finally, as a leading administrative law scholar has observed, it is to be expected and encouraged that subordinate executive officers will follow enforcement guidelines. *See* Pierce, *Administrative Law Treatise*, § 6.3, at 424–25; *see also Prof'ls & Patients*, 56 F.3d at 599 (agents' conformance with agency guidance is "not particularly probative whether the rule is substantive" because "what purpose would an agency's statement of policy serve if agency employees could not refer to it for guidance?"). This positive should not become a negative to invalidate the very delineation of executive authority the APA exists to assure.

D. Commonsense

Judge Kavanaugh brackets his *National Mining Association* framework for the § 553 analysis applied above with commonsense. First, he offers that "agency action that merely explains how the agency will enforce a statute . . . in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy." *Nat'l Mining Ass'n*, 758 F.3d at 252. The Supreme Court,

in *Arizona*, resolved that immigration officials have "broad discretion" to enforce the federal immigration laws, including the "deci[sion] whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. Second, Judge Kavanaugh notes that a token of a general statement of policy is that the agency would have legal authority to undertake the action absent the guidance document. *See Nat'l Mining Ass'n*, 758 F.3d at 253 ("[W]hen the agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." (internal quotation marks and citation omitted)). As described earlier, deferred action has existed for half a century, reflected in longstanding regulations as an "act of administrative convenience," *see* 8 C.F.R. § 274a.12(c)(14), and recognized by the Supreme Court as an appropriate exercise of the Executive's removal discretion, *see Reno*, 525 U.S. at 483–84. Indeed, the same deferred action decisions for which the November 20 memorandum provides guidance already are permissible under the unchallenged 2014 enforcement priorities memorandum, which is explicitly incorporated into the November 20 memorandum. *See* Memorandum from Jeh Charles Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014). The November 20 memorandum, by incorporating a framework the plaintiffs admit is discretionary, necessarily contains at least that identical level of discretion.

Conclusion

I would hold that the underlying issue presented to us—the order in which non-citizens without documentation must be removed from the United States—must be decided, presently is being decided, and always has been decided, by the federal political branches. *See Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors

has been committed to the political branches of the Federal Government."). On the expedience of immigration measures, sensible things can be said on all sides, mindful that our country is an immigrant society itself.[12] The political nature of this dispute is clear from the names on the briefs: hundreds of mayors, police chiefs, sheriffs, attorneys general, governors, and state legislators—not to mention 185 members of Congress, 15 states and the District of Columbia on the one hand, and 113 members of Congress and 26 states on the other. I would not affirm intervention and judicial fiat ordering what Congress has never mandated.

[12] Over twenty years ago, Judith Shklar observed in her book *American Citizenship*, aptly subtitled *The Quest for Inclusion*, that the United States has an "extremely complicated" history of "exclusions and inclusions, in which xenophobia, racism, religious bigotry, and fear of alien conspiracies have played their part." Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 4 (1991). And over two hundred years ago, our non-citizen forebears grieved against their king that, "[h]e has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither." *The Declaration of Independence* (U.S. 1776).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 26, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 15-40238 State of Texas, et al v. USA, et al
USDC No. 1:14-CV-254

Enclosed is an opinion entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Jamei R. Schaeffer, Deputy Clerk

Mr. Alexandre I. Afanassiev
Mr. Chirag Gopal Badlani
Mr. J. Campbell Barker
Mr. Michael Bekesha
Mr. James Davis Blacklock
Mr. David J. Bradley
Ms. Beth S. Brinkmann
Mr. Joseph Conrad Chapelle
Mr. Jeffrey A. Clair
Mrs. Angela Veronica Colmenero
Mrs. April L. Farris
Mr. Matthew Hamilton Frederick
Mr. Kyle R. Freeny
Mr. Matthew James Ginsburg
Ms. Kathleen Roberta Hartnett
Mr. William Ernest Havemann
Mr. Michael Hethmon
Mr. Lawrence John Joseph
Mr. Scott A. Keller
Mr. Stephen Blake Kinnaird
Mr. Adam Paul KohSweeney
Mr. Steven James Lechner
Mr. Gabriel Markoff
Mr. Scott R. McIntosh
Mr. Benjamin C. Mizer
Ms. Angelique Marie Montano

Mr. Leif A. Olson
Mr. William Jeffery Olson
Mr. Paul Orfanedes
Ms. Nina Perales
Mr. James Peterson
Mr. Bradley S. Phillips
Mr. Alex Potapov
Mr. Matthew E. Price
Mr. Noah Guzzo Purcell
Mr. Charles Eugene Roy
Mr. Jay A. Sekulow
Mr. Ilya Shapiro
Mr. Benjamin Gross Shatz
Mr. Jeremy W. Shweder
Mr. Clifford M. Sloan
Ms. Linda J. Smith
Ms. Karen Cassandra Tumlin
Mr. Seth Paul Waxman
Mr. Jonathan Weissglass
Mr. Dale Wilcox
Mr. Paul Reinherz Wolfson
Ms. Elizabeth Bonnie Wydra
Mr. Ernest Young

Senate Engrossed

State of Arizona
Senate
Forty-ninth Legislature
Second Regular Session
2010

SENATE BILL 1070

AN ACT

AMENDING TITLE 11, CHAPTER 7, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 8; AMENDING TITLE 13, CHAPTER 15, ARIZONA REVISED STATUTES, BY ADDING SECTION 13-1509; AMENDING SECTION 13-2319, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 29, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-2928 AND 13-2929; AMENDING SECTIONS 23-212, 23-212.01, 23-214 AND 28-3511, ARIZONA REVISED STATUTES; AMENDING TITLE 41, CHAPTER 12, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 41-1724; RELATING TO UNLAWFULLY PRESENT ALIENS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Intent

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

Sec. 2. Title 11, chapter 7, Arizona Revised Statutes, is amended by adding article 8, to read:

ARTICLE 8. ENFORCEMENT OF IMMIGRATION LAWS

11-1051. Cooperation and assistance in enforcement of immigration laws; indemnification

A. NO OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY ADOPT A POLICY THAT LIMITS OR RESTRICTS THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS TO LESS THAN THE FULL EXTENT PERMITTED BY FEDERAL LAW.

B. FOR ANY LAWFUL CONTACT MADE BY A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE WHERE REASONABLE SUSPICION EXISTS THAT THE PERSON IS AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES, A REASONABLE ATTEMPT SHALL BE MADE, WHEN PRACTICABLE, TO DETERMINE THE IMMIGRATION STATUS OF THE PERSON. THE PERSON'S IMMIGRATION STATUS SHALL BE VERIFIED WITH THE FEDERAL GOVERNMENT PURSUANT TO 8 UNITED STATES CODE SECTION 1373(c).

C. IF AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES IS CONVICTED OF A VIOLATION OF STATE OR LOCAL LAW, ON DISCHARGE FROM IMPRISONMENT OR ASSESSMENT OF ANY FINE THAT IS IMPOSED, THE ALIEN SHALL BE TRANSFERRED IMMEDIATELY TO THE CUSTODY OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES CUSTOMS AND BORDER PROTECTION.

D. NOTWITHSTANDING ANY OTHER LAW, A LAW ENFORCEMENT AGENCY MAY SECURELY TRANSPORT AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES AND WHO IS IN THE AGENCY'S CUSTODY TO A FEDERAL FACILITY IN THIS STATE OR TO ANY OTHER POINT OF TRANSFER INTO FEDERAL CUSTODY THAT IS OUTSIDE THE JURISDICTION OF THE LAW ENFORCEMENT AGENCY.

E. A LAW ENFORCEMENT OFFICER, WITHOUT A WARRANT, MAY ARREST A PERSON IF THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED ANY PUBLIC OFFENSE THAT MAKES THE PERSON REMOVABLE FROM THE UNITED STATES.

F. EXCEPT AS PROVIDED IN FEDERAL LAW, OFFICIALS OR AGENCIES OF THIS STATE AND COUNTIES, CITIES, TOWNS AND OTHER POLITICAL SUBDIVISIONS OF THIS STATE MAY NOT BE PROHIBITED OR IN ANY WAY BE RESTRICTED FROM SENDING, RECEIVING OR MAINTAINING INFORMATION RELATING TO THE IMMIGRATION STATUS OF ANY INDIVIDUAL OR EXCHANGING THAT INFORMATION WITH ANY OTHER FEDERAL, STATE OR LOCAL GOVERNMENTAL ENTITY FOR THE FOLLOWING OFFICIAL PURPOSES:

1. DETERMINING ELIGIBILITY FOR ANY PUBLIC BENEFIT, SERVICE OR LICENSE PROVIDED BY ANY FEDERAL, STATE, LOCAL OR OTHER POLITICAL SUBDIVISION OF THIS STATE.

2. VERIFYING ANY CLAIM OF RESIDENCE OR DOMICILE IF DETERMINATION OF RESIDENCE OR DOMICILE IS REQUIRED UNDER THE LAWS OF THIS STATE OR A JUDICIAL ORDER ISSUED PURSUANT TO A CIVIL OR CRIMINAL PROCEEDING IN THIS STATE.

3. CONFIRMING THE IDENTITY OF ANY PERSON WHO IS DETAINED.

4. IF THE PERSON IS AN ALIEN, DETERMINING WHETHER THE PERSON IS IN COMPLIANCE WITH THE FEDERAL REGISTRATION LAWS PRESCRIBED BY TITLE II, CHAPTER 7 OF THE FEDERAL IMMIGRATION AND NATIONALITY ACT.

G. A PERSON MAY BRING AN ACTION IN SUPERIOR COURT TO CHALLENGE ANY OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE THAT ADOPTS OR IMPLEMENTS A POLICY THAT LIMITS OR RESTRICTS THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS TO LESS THAN THE FULL EXTENT PERMITTED BY FEDERAL LAW. IF THERE IS A JUDICIAL FINDING THAT AN ENTITY HAS VIOLATED THIS SECTION, THE COURT SHALL ORDER ANY OF THE FOLLOWING:

1. THAT THE PERSON WHO BROUGHT THE ACTION RECOVER COURT COSTS AND ATTORNEY FEES.

2. THAT THE ENTITY PAY A CIVIL PENALTY OF NOT LESS THAN ONE THOUSAND DOLLARS AND NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH DAY THAT THE POLICY HAS REMAINED IN EFFECT AFTER THE FILING OF AN ACTION PURSUANT TO THIS SUBSECTION.

H. A COURT SHALL COLLECT THE CIVIL PENALTY PRESCRIBED IN SUBSECTION G AND REMIT THE CIVIL PENALTY TO THE DEPARTMENT OF PUBLIC SAFETY FOR DEPOSIT IN THE GANG AND IMMIGRATION INTELLIGENCE TEAM ENFORCEMENT MISSION FUND ESTABLISHED BY SECTION 41-1724.

I. A LAW ENFORCEMENT OFFICER IS INDEMNIFIED BY THE LAW ENFORCEMENT OFFICER'S AGENCY AGAINST REASONABLE COSTS AND EXPENSES, INCLUDING ATTORNEY FEES, INCURRED BY THE OFFICER IN CONNECTION WITH ANY ACTION, SUIT OR PROCEEDING BROUGHT PURSUANT TO THIS SECTION TO WHICH THE OFFICER MAY BE A PARTY BY REASON OF THE OFFICER BEING OR HAVING BEEN A MEMBER OF THE LAW ENFORCEMENT AGENCY, EXCEPT IN RELATION TO MATTERS IN WHICH THE OFFICER IS ADJUDGED TO HAVE ACTED IN BAD FAITH.

J. THIS SECTION SHALL BE IMPLEMENTED IN A MANNER CONSISTENT WITH FEDERAL LAWS REGULATING IMMIGRATION, PROTECTING THE CIVIL RIGHTS OF ALL PERSONS AND RESPECTING THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENS.

Sec. 3. Title 13, chapter 15, Arizona Revised Statutes, is amended by adding section 13-1509, to read:

13-1509. Trespassing by illegal aliens; assessment; exception; classification

A. IN ADDITION TO ANY VIOLATION OF FEDERAL LAW, A PERSON IS GUILTY OF TRESPASSING IF THE PERSON IS BOTH:

1. PRESENT ON ANY PUBLIC OR PRIVATE LAND IN THIS STATE.

2. IN VIOLATION OF 8 UNITED STATES CODE SECTION 1304(e) OR 1306(a).

B. IN THE ENFORCEMENT OF THIS SECTION, THE FINAL DETERMINATION OF AN ALIEN'S IMMIGRATION STATUS SHALL BE DETERMINED BY EITHER:

1. A LAW ENFORCEMENT OFFICER WHO IS AUTHORIZED BY THE FEDERAL GOVERNMENT TO VERIFY OR ASCERTAIN AN ALIEN'S IMMIGRATION STATUS.

2. A LAW ENFORCEMENT OFFICER OR AGENCY COMMUNICATING WITH THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES BORDER PROTECTION PURSUANT TO 8 UNITED STATES CODE SECTION 1373(c).

C. A PERSON WHO IS SENTENCED PURSUANT TO THIS SECTION IS NOT ELIGIBLE FOR SUSPENSION OR COMMUTATION OF SENTENCE OR RELEASE ON ANY BASIS UNTIL THE SENTENCE IMPOSED IS SERVED.

D. IN ADDITION TO ANY OTHER PENALTY PRESCRIBED BY LAW, THE COURT SHALL ORDER THE PERSON TO PAY JAIL COSTS AND AN ADDITIONAL ASSESSMENT IN THE FOLLOWING AMOUNTS:

1. AT LEAST FIVE HUNDRED DOLLARS FOR A FIRST VIOLATION.

2. TWICE THE AMOUNT SPECIFIED IN PARAGRAPH 1 OF THIS SUBSECTION IF THE PERSON WAS PREVIOUSLY SUBJECT TO AN ASSESSMENT PURSUANT TO THIS SUBSECTION.

E. A COURT SHALL COLLECT THE ASSESSMENTS PRESCRIBED IN SUBSECTION D OF THIS SECTION AND REMIT THE ASSESSMENTS TO THE DEPARTMENT OF PUBLIC SAFETY, WHICH SHALL ESTABLISH A SPECIAL SUBACCOUNT FOR THE MONIES IN THE ACCOUNT ESTABLISHED FOR THE GANG AND IMMIGRATION INTELLIGENCE TEAM ENFORCEMENT MISSION APPROPRIATION. MONIES IN THE SPECIAL SUBACCOUNT ARE SUBJECT TO LEGISLATIVE APPROPRIATION FOR DISTRIBUTION FOR GANG AND IMMIGRATION ENFORCEMENT AND FOR COUNTY JAIL REIMBURSEMENT COSTS RELATING TO ILLEGAL IMMIGRATION.

F. THIS SECTION DOES NOT APPLY TO A PERSON WHO MAINTAINS AUTHORIZATION FROM THE FEDERAL GOVERNMENT TO REMAIN IN THE UNITED STATES.

G. A VIOLATION OF THIS SECTION IS A CLASS 1 MISDEMEANOR, EXCEPT THAT A VIOLATION OF THIS SECTION IS:

1. A CLASS 3 FELONY IF THE PERSON VIOLATES THIS SECTION WHILE IN POSSESSION OF ANY OF THE FOLLOWING:

(a) A DANGEROUS DRUG AS DEFINED IN SECTION 13-3401.

(b) PRECURSOR CHEMICALS THAT ARE USED IN THE MANUFACTURING OF METHAMPHETAMINE IN VIOLATION OF SECTION 13-3404.01.

(c) A DEADLY WEAPON OR A DANGEROUS INSTRUMENT, AS DEFINED IN SECTION 13-105.

(d) PROPERTY THAT IS USED FOR THE PURPOSE OF COMMITTING AN ACT OF TERRORISM AS PRESCRIBED IN SECTION 13-2308.01.

2. A CLASS 4 FELONY IF THE PERSON EITHER:

(a) IS CONVICTED OF A SECOND OR SUBSEQUENT VIOLATION OF THIS SECTION.

(b) WITHIN SIXTY MONTHS BEFORE THE VIOLATION, HAS BEEN REMOVED FROM THE UNITED STATES PURSUANT TO 8 UNITED STATES CODE SECTION 1229a OR HAS ACCEPTED A VOLUNTARY REMOVAL FROM THE UNITED STATES PURSUANT TO 8 UNITED STATES CODE SECTION 1229c.

Sec. 4. Section 13-2319, Arizona Revised Statutes, is amended to read:

13-2319. Smuggling; classification; definitions

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.

B. A violation of this section is a class 4 felony.

C. Notwithstanding subsection B of this section, a violation of this section:

1. Is a class 2 felony if the human being who is smuggled is under eighteen years of age and is not accompanied by a family member over eighteen years of age or the offense involved the use of a deadly weapon or dangerous instrument.

2. Is a class 3 felony if the offense involves the use or threatened use of deadly physical force and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any other basis except pursuant to section 31-233, subsection A or B until the sentence imposed by the court is served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

D. Chapter 10 of this title does not apply to a violation of subsection C, paragraph 1 of this section.

E. NOTWITHSTANDING ANY OTHER LAW, A PEACE OFFICER MAY LAWFULLY STOP ANY PERSON WHO IS OPERATING A MOTOR VEHICLE IF THE OFFICER HAS REASONABLE SUSPICION TO BELIEVE THE PERSON IS IN VIOLATION OF ANY CIVIL TRAFFIC LAW AND THIS SECTION.

~~E.~~ F. For the purposes of this section:

1. "Family member" means the person's parent, grandparent, sibling or any other person who is related to the person by consanguinity or affinity to the second degree.

2. "Procurement of transportation" means any participation in or facilitation of transportation and includes:

(a) Providing services that facilitate transportation including travel arrangement services or money transmission services.

(b) Providing property that facilitates transportation, including a weapon, a vehicle or other means of transportation or false identification, or selling, leasing, renting or otherwise making available a drop house as defined in section 13-2322.

3. "Smuggling of human beings" means the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.

Sec. 5. Title 13, chapter 29, Arizona Revised Statutes, is amended by adding sections 13-2928 and 13-2929, to read:

13-2928. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. IT IS UNLAWFUL FOR AN OCCUPANT OF A MOTOR VEHICLE THAT IS STOPPED ON A STREET, ROADWAY OR HIGHWAY TO ATTEMPT TO HIRE OR HIRE AND PICK UP PASSENGERS FOR WORK AT A DIFFERENT LOCATION IF THE MOTOR VEHICLE BLOCKS OR IMPEDES THE NORMAL MOVEMENT OF TRAFFIC.

B. IT IS UNLAWFUL FOR A PERSON TO ENTER A MOTOR VEHICLE THAT IS STOPPED ON A STREET, ROADWAY OR HIGHWAY IN ORDER TO BE HIRED BY AN OCCUPANT OF THE MOTOR VEHICLE AND TO BE TRANSPORTED TO WORK AT A DIFFERENT LOCATION IF THE MOTOR VEHICLE BLOCKS OR IMPEDES THE NORMAL MOVEMENT OF TRAFFIC.

C. IT IS UNLAWFUL FOR A PERSON WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES AND WHO IS AN UNAUTHORIZED ALIEN TO KNOWINGLY APPLY FOR WORK, SOLICIT WORK IN A PUBLIC PLACE OR PERFORM WORK AS AN EMPLOYEE OR INDEPENDENT CONTRACTOR IN THIS STATE.

D. A VIOLATION OF THIS SECTION IS A CLASS 1 MISDEMEANOR.

E. FOR THE PURPOSES OF THIS SECTION:

1. "SOLICIT" MEANS VERBAL OR NONVERBAL COMMUNICATION BY A GESTURE OR A NOD THAT WOULD INDICATE TO A REASONABLE PERSON THAT A PERSON IS WILLING TO BE EMPLOYED.

2. "UNAUTHORIZED ALIEN" MEANS AN ALIEN WHO DOES NOT HAVE THE LEGAL RIGHT OR AUTHORIZATION UNDER FEDERAL LAW TO WORK IN THE UNITED STATES AS DESCRIBED IN 8 UNITED STATES CODE SECTION 1324a(h)(3).

13-2929. Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment; classification

A. IT IS UNLAWFUL FOR A PERSON WHO IS IN VIOLATION OF A CRIMINAL OFFENSE TO:

1. TRANSPORT OR MOVE OR ATTEMPT TO TRANSPORT OR MOVE AN ALIEN IN THIS STATE IN A MEANS OF TRANSPORTATION IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

2. CONCEAL, HARBOR OR SHIELD OR ATTEMPT TO CONCEAL, HARBOR OR SHIELD AN ALIEN FROM DETECTION IN ANY PLACE IN THIS STATE, INCLUDING ANY BUILDING OR ANY MEANS OF TRANSPORTATION, IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

3. ENCOURAGE OR INDUCE AN ALIEN TO COME TO OR RESIDE IN THIS STATE IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT SUCH COMING TO, ENTERING OR RESIDING IN THIS STATE IS OR WILL BE IN VIOLATION OF LAW.

B. A MEANS OF TRANSPORTATION THAT IS USED IN THE COMMISSION OF A VIOLATION OF THIS SECTION IS SUBJECT TO MANDATORY VEHICLE IMMOBILIZATION OR IMPOUNDMENT PURSUANT TO SECTION 28-3511.

C. A PERSON WHO VIOLATES THIS SECTION IS GUILTY OF A CLASS 1 MISDEMEANOR AND IS SUBJECT TO A FINE OF AT LEAST ONE THOUSAND DOLLARS, EXCEPT THAT A VIOLATION OF THIS SECTION THAT INVOLVES TEN OR MORE ILLEGAL ALIENS IS A CLASS 6 FELONY AND THE PERSON IS SUBJECT TO A FINE OF AT LEAST ONE THOUSAND DOLLARS FOR EACH ALIEN WHO IS INVOLVED.

Sec. 6. Section 23-212, Arizona Revised Statutes, is amended to read:

23-212. Knowingly employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly knowingly employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in the county in which the alleged unauthorized alien is or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or section 23-212.01, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court:

(a) Shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall order the employer to be subject to a three year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in section 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney. Notwithstanding any other law, on filing of the affidavit the suspended licenses shall be reinstated immediately by the appropriate agencies. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are all licenses that

are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days. The court shall base its decision to suspend under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a probationary period ordered by the court under this subsection or section 23-212.01, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under

this subsection or section 23-212.01, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code section 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

K. IT IS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF SUBSECTION A OF THIS SECTION THAT THE EMPLOYER WAS ENTRAPPED. TO CLAIM ENTRAPMENT, THE EMPLOYER MUST ADMIT BY THE EMPLOYER'S TESTIMONY OR OTHER EVIDENCE THE SUBSTANTIAL ELEMENTS OF THE VIOLATION. AN EMPLOYER WHO ASSERTS AN ENTRAPMENT DEFENSE HAS THE BURDEN OF PROVING THE FOLLOWING BY CLEAR AND CONVINCING EVIDENCE:

1. THE IDEA OF COMMITTING THE VIOLATION STARTED WITH LAW ENFORCEMENT OFFICERS OR THEIR AGENTS RATHER THAN WITH THE EMPLOYER.

2. THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

3. THE EMPLOYER WAS NOT PREDISPOSED TO COMMIT THE VIOLATION BEFORE THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

L. AN EMPLOYER DOES NOT ESTABLISH ENTRAPMENT IF THE EMPLOYER WAS PREDISPOSED TO VIOLATE SUBSECTION A OF THIS SECTION AND THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY PROVIDED THE EMPLOYER WITH AN OPPORTUNITY TO COMMIT THE VIOLATION. IT IS NOT ENTRAPMENT FOR LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY TO USE A RUSE OR TO CONCEAL THEIR IDENTITY. THE CONDUCT OF LAW ENFORCEMENT OFFICERS AND THEIR AGENTS MAY BE CONSIDERED IN DETERMINING IF AN EMPLOYER HAS PROVEN ENTRAPMENT.

Sec. 7. Section 23-212.01, Arizona Revised Statutes, is amended to read:

23-212.01. Intentionally employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not intentionally employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer intentionally contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly intentionally employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in the county in which the alleged unauthorized alien is or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or section 23-212, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court shall:

(a) Order the employer to terminate the employment of all unauthorized aliens.

(b) Order the employer to be subject to a five year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in section 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Order the appropriate agencies to suspend all licenses described in subdivision (d) of this paragraph that are held by the employer for a minimum of ten days. The court shall base its decision on the length of the suspension under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

(d) Order the employer to file a signed sworn affidavit with the county attorney. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all

licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision for failing to file a signed sworn affidavit shall remain suspended until the employer files a signed sworn affidavit with the county attorney. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a probationary period ordered by the court under this subsection or section 23-212, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under this subsection or section 23-212, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to

8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not intentionally employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not intentionally employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code section 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

K. IT IS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF SUBSECTION A OF THIS SECTION THAT THE EMPLOYER WAS ENTRAPPED. TO CLAIM ENTRAPMENT, THE EMPLOYER MUST ADMIT BY THE EMPLOYER'S TESTIMONY OR OTHER EVIDENCE THE SUBSTANTIAL ELEMENTS OF THE VIOLATION. AN EMPLOYER WHO ASSERTS AN ENTRAPMENT DEFENSE HAS THE BURDEN OF PROVING THE FOLLOWING BY CLEAR AND CONVINCING EVIDENCE:

1. THE IDEA OF COMMITTING THE VIOLATION STARTED WITH LAW ENFORCEMENT OFFICERS OR THEIR AGENTS RATHER THAN WITH THE EMPLOYER.

2. THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

3. THE EMPLOYER WAS NOT PREDISPOSED TO COMMIT THE VIOLATION BEFORE THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

L. AN EMPLOYER DOES NOT ESTABLISH ENTRAPMENT IF THE EMPLOYER WAS PREDISPOSED TO VIOLATE SUBSECTION A OF THIS SECTION AND THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY PROVIDED THE EMPLOYER WITH AN OPPORTUNITY TO COMMIT THE VIOLATION. IT IS NOT ENTRAPMENT FOR LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY TO USE A RUSE OR TO CONCEAL THEIR IDENTITY. THE CONDUCT OF LAW ENFORCEMENT OFFICERS AND THEIR AGENTS MAY BE CONSIDERED IN DETERMINING IF AN EMPLOYER HAS PROVEN ENTRAPMENT.

Sec. 8. Section 23-214, Arizona Revised Statutes, is amended to read:

23-214. Verification of employment eligibility; e-verify program; economic development incentives; list of registered employers

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program AND SHALL KEEP A RECORD OF THE VERIFICATION FOR THE DURATION OF THE EMPLOYEE'S EMPLOYMENT OR AT LEAST THREE YEARS, WHICHEVER IS LONGER.

B. In addition to any other requirement for an employer to receive an economic development incentive from a government entity, the employer shall register with and participate in the e-verify program. Before receiving the economic development incentive, the employer shall provide proof to the government entity that the employer is registered with and is participating in the e-verify program. If the government entity determines that the employer is not complying with this subsection, the government entity shall notify the employer by certified mail of the government entity's determination of noncompliance and the employer's right to appeal the determination. On a final determination of noncompliance, the employer shall repay all monies received as an economic development incentive to the government entity within thirty days of the final determination. For the purposes of this subsection:

1. "Economic development incentive" means any grant, loan or performance-based incentive from any government entity that is awarded after September 30, 2008. Economic development incentive does not include any tax provision under title 42 or 43.

2. "Government entity" means this state and any political subdivision of this state that receives and uses tax revenues.

C. Every three months the attorney general shall request from the United States department of homeland security a list of employers from this state that are registered with the e-verify program. On receipt of the list of employers, the attorney general shall make the list available on the attorney general's website.

Sec. 9. Section 28-3511, Arizona Revised Statutes, is amended to read:

28-3511. Removal and immobilization or impoundment of vehicle

A. A peace officer shall cause the removal and either immobilization or impoundment of a vehicle if the peace officer determines that a person is driving the vehicle while any of the following applies:

1. The person's driving privilege is suspended or revoked for any reason.

2. The person has not ever been issued a valid driver license or permit by this state and the person does not produce evidence of ever having a valid driver license or permit issued by another jurisdiction. This paragraph does not apply to the operation of an implement of husbandry.

3. The person is subject to an ignition interlock device requirement pursuant to chapter 4 of this title and the person is operating a vehicle without a functioning certified ignition interlock device. This paragraph does not apply to a person operating an employer's vehicle or the operation of a vehicle due to a substantial emergency as defined in section 28-1464.

4. THE PERSON IS IN VIOLATION OF A CRIMINAL OFFENSE AND IS TRANSPORTING, MOVING, CONCEALING, HARBORING OR SHIELDING OR ATTEMPTING TO TRANSPORT, MOVE, CONCEAL, HARBOR OR SHIELD AN ALIEN IN THIS STATE IN A VEHICLE IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

B. A peace officer shall cause the removal and impoundment of a vehicle if the peace officer determines that a person is driving the vehicle and if all of the following apply:

1. The person's driving privilege is canceled, suspended or revoked for any reason or the person has not ever been issued a driver license or permit by this state and the person does not produce evidence of ever having a driver license or permit issued by another jurisdiction.

2. The person is not in compliance with the financial responsibility requirements of chapter 9, article 4 of this title.

3. The person is driving a vehicle that is involved in an accident that results in either property damage or injury to or death of another person.

C. Except as provided in subsection D of this section, while a peace officer has control of the vehicle the peace officer shall cause the removal and either immobilization or impoundment of the vehicle if the peace officer has probable cause to arrest the driver of the vehicle for a violation of section 4-244, paragraph 34 or section 28-1382 or 28-1383.

D. A peace officer shall not cause the removal and either the immobilization or impoundment of a vehicle pursuant to subsection C of this section if all of the following apply:

1. The peace officer determines that the vehicle is currently registered and that the driver or the vehicle is in compliance with the financial responsibility requirements of chapter 9, article 4 of this title.

2. The spouse of the driver is with the driver at the time of the arrest.

3. The peace officer has reasonable grounds to believe that the spouse of the driver:

(a) Has a valid driver license.

(b) Is not impaired by intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances.

(c) Does not have any spirituous liquor in the spouse's body if the spouse is under twenty-one years of age.

4. The spouse notifies the peace officer that the spouse will drive the vehicle from the place of arrest to the driver's home or other place of safety.

5. The spouse drives the vehicle as prescribed by paragraph 4 of this subsection.

E. Except as otherwise provided in this article, a vehicle that is removed and either immobilized or impounded pursuant to subsection A, B or C of this section shall be immobilized or impounded for thirty days. An insurance company does not have a duty to pay any benefits for charges or fees for immobilization or impoundment.

F. The owner of a vehicle that is removed and either immobilized or impounded pursuant to subsection A, B or C of this section, the spouse of the

owner and each person identified on the department's record with an interest in the vehicle shall be provided with an opportunity for an immobilization or poststorage hearing pursuant to section 28-3514.

Sec. 10. Title 41, chapter 12, article 2, Arizona Revised Statutes, is amended by adding section 41-1724, to read:

41-1724. Gang and immigration intelligence team enforcement mission fund

THE GANG AND IMMIGRATION INTELLIGENCE TEAM ENFORCEMENT MISSION FUND IS ESTABLISHED CONSISTING OF MONIES DEPOSITED PURSUANT TO SECTION 11-1051 AND MONIES APPROPRIATED BY THE LEGISLATURE. THE DEPARTMENT SHALL ADMINISTER THE FUND. MONIES IN THE FUND ARE SUBJECT TO LEGISLATIVE APPROPRIATION AND SHALL BE USED FOR GANG AND IMMIGRATION ENFORCEMENT AND FOR COUNTY JAIL REIMBURSEMENT COSTS RELATING TO ILLEGAL IMMIGRATION.

Sec. 11. Severability, implementation and construction

A. If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

B. The terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.

C. This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

Sec. 12. Short title

This act may be cited as the "Support Our Law Enforcement and Safe Neighborhoods Act".

IMMIGRATION

MYTHS AND FACTS

U.S. CHAMBER OF COMMERCE
Labor, Immigration & Employee Benefits

October 24, 2013

Dear Reader,

Despite the numerous studies and carefully detailed economic reports outlining the positive effects of immigration, there is a great deal of misinformation about the impact of immigration. It is critical that policymakers and the public are educated about the facts behind these fallacies.

The U.S. Chamber of Commerce's Labor, Immigration & Employee Benefits Division last prepared this pamphlet in May 2011 to refute many of the most common myths about immigrants coming to our country. This report updates our 2011 pamphlet and examines new myths and facts that have emerged during the current immigration reform debate. We summarize the facts on the relationship of immigrants to Jobs, Wages, Taxes, Entrepreneurship, Population, Crime, Integration, Welfare, and Border Security.

Our compilation shows that immigrants significantly benefit the U.S. economy by creating new jobs, and complementing the skills of the U.S. native workforce, with a net positive impact on wage rates overall.

Recognizing that legislative solutions are difficult, the U.S. Chamber is also working to promote regulatory and policy reforms at the relevant federal executive agencies. We hope that these administrative reforms along with much needed legislation that overhauls our broken immigration system, will lead to concrete improvements so that our country can reap the full benefits of immigration.

The U.S. Chamber of Commerce will continue to champion common-sense immigration reforms, and we urge you to join us in our efforts.

Randel K. Johnson

Senior Vice President
Labor, Immigration & Employee Benefits

JOBS

MYTH: Every job filled by an immigrant is a job that could be filled by an unemployed American.

FACT: Immigrants typically do not compete for jobs with native-born workers and immigrants create jobs as entrepreneurs, consumers, and taxpayers.

Employment is not a "zero-sum" game.[1] The U.S. economy does not contain a fixed number of jobs for which immigrants and native-born workers compete. For instance, if the eight million undocumented immigrant workers now in the United States[2] were removed from the country, there would not be eight million job openings for unemployed Americans.[3] The reason for this is two-fold. First, removing eight million undocumented workers from the economy would also remove eight million entrepreneurs, consumers, and taxpayers. This would cause the U.S. economy to lose jobs. Secondly, native-born workers and immigrant workers tend to possess different skills that often complement one another, and are therefore not interchangeable.[4]

One of the principal ways in which immigrants create jobs is through the businesses they establish. Immigrants to our country join native-born Americans in being risk takers. According to the Kauffman Index of Entrepreneurial Activity, "immigrants were more than twice as likely to start businesses each month in 2010 than were the native-born." This reflects an upward trend in immigrant entrepreneurship since 2006.[5] Using census data, the Partnership for a New American Economy estimates that immigrant-owned businesses "generate more than $775 billion in revenue, $125 billion in payroll, and $100 billion in income, employing one out of every 10 workers along the way." Moreover, "immigrants started 28 percent of all new U.S. businesses in 2011."[6]

Immigrants play an important role in job creation in both small and large businesses. A report from the Fiscal Policy Institute found that immigrant-owned small businesses employed 4.7 million people and had $776 billion in receipts in 2007, the last year for which data are available. In addition, 18 percent of all small business owners in the United States are immigrants, higher than the immigrant share of the population (13 percent) or labor force (16 percent).[7] With respect to large businesses, a report from the Partnership for a New American Economy estimated that Fortune 500 companies founded by immigrants account for 18 percent (or 90) of all Fortune 500 companies, generate $1.7 trillion in annual revenue, and employ 3.7 million workers worldwide. These companies include AT&T, Verizon, Procter & Gamble, Pfizer, Kraft, Comcast, Intel, Merck, DuPont, Google, Cigna, Kohl's, Colgate-Palmolive, PG&E, Sara Lee, Sun Microsystems, United States Steel, Qualcomm, eBay, Nordstrom, and Yahoo![8] Similarly, a 2008 study found that one-quarter of all engineering and technology-related companies established in the United States between 1995 and 2005 had an immigrant founder or co-founder, and that these companies had $52 billion in sales and 450,000 employees as of 2005.[9]

Immigrants also create jobs as consumers. Immigrant workers spend their wages buying food,

clothes, appliances, cars, and other products and services from U.S. businesses.[10] Further, businesses respond to the presence of new immigrant workers by investing in new restaurants, stores, and production facilities.[11] The end result is more jobs for more workers. For instance, a study by the University of Nebraska, Omaha, estimated that spending by immigrants generated roughly 12,000 jobs for the state of Nebraska in 2006—including more than 8,000 jobs in the Omaha and Lincoln metropolitan areas.[12]

Leaving aside the role that immigrants play in job creation, the fact remains that most immigrant and native-born workers are not competing with each other, even in times of high unemployment.[13] Most foreign-born workers differ from most native-born workers in terms of what occupations they work in, where in the country they live, and how much education they have. Even among less-educated workers, immigrants and native-born workers tend to work in different occupations and industries. If they do work in the same occupation or industry—or even the same business—they usually specialize in different tasks, with native-born workers taking higher-paid jobs that require better English-language skills than many immigrant workers possess. In other words, immigrants and native-born workers usually complement each other rather than compete.[14]

This dynamic is illustrated by the fact that cities experiencing high levels of immigration tend to have relatively low or average unemployment rates for African Americans. A 2012 analysis of census data by Saint Louis University economist Jack Strauss found that cities with greater immigration from Latin America experience lower unemployment rates, lower poverty rates, and higher wages among African Americans. Latino immigrants and African Americans fill complementary roles in the labor market—they are not simply substitutes for one another. In addition, cities that have suffered the effects of declining population are rejuvenated by an inflow of Latino immigrants.[15]

Immigrants do not "steal" jobs from American workers. Immigrants come to the United States to fill jobs that are available, or to establish their own businesses. Research has found that there is no correlation between immigration and high unemployment at the regional, state, or county level.[16] Nor is there any correlation between immigration and high unemployment among minorities.[17] Immigrants go where the jobs are, or they create jobs on their own.

WAGES

MYTH: Immigrants drive down the wages of American workers.

FACT: Immigrants give a slight boost to the average wages of Americans by increasing their productivity and stimulating investment.

Immigrant workers increase the wages of native-born workers in two ways. First, immigrants and natives tend to differ in the amount of education they have, the occupations in which they work, and the skill sets they possess. The jobs which immigrants and natives perform are often interdependent. This increases the productivity of natives, which increases their wages. Second, the addition of immigrant workers to the labor force

stimulates new investment in the economy, which in turn increases the demand for labor, exerting upward pressure on wages.[18]

The average wage increase that native-born workers experience as a result of immigration is measurable. A 2010 report from the Economic Policy Institute estimated that, from 1994 to 2007, immigration increased the wages of native-born workers by 0.4 percent. The amount of the wage gain varied slightly by the education level of the worker. College graduates received a boost of 0.4 percent; workers with some college 0.7 percent; high school graduates 0.3 percent; and workers without a high school diploma 0.3 percent.[19] Similarly, economist Giovanni Peri has estimated that, from 1990 to 2006, immigration increased the wages of native-born workers by 0.6 percent. College graduates experienced an increase of 0.5 percent, workers with some college 0.9 percent, high school graduates 0.4 percent, and workers without a high school diploma 0.3 percent.[20]

Local-level studies have reached similar conclusions about the positive impact of immigration on wages. Studies of two communities that experienced a large influx of immigrants over a short time period (Dawson County, Nebraska,[21] and Miami, Florida[22]) found that wages increased—even for lesser-skilled workers who were most likely to be in competition for jobs with new immigrants. Likewise, a study of more than 100 cities by economist David Card found that the wages of natives tend to be higher in cities with large immigrant populations.[23]

ECONOMY

MYTH: The sluggish U.S. economy doesn't need more immigrant workers.

FACT: Immigrants will replenish the U.S. labor force as millions of Baby Boomers retire.

The U.S. economy is facing a demographic crisis. Roughly 77 million Baby Boomers (one-quarter of the U.S. population) are now starting to reach retirement age.[24] This wave of aging over the next two decades will have a profound economic impact. Our Social Security and Medicare systems will be stretched to the breaking point. Labor-force growth will fall. And a smaller number of workers and taxpayers will support a growing number of retirees. Under these circumstances, immigrants will play a critical role in replenishing the labor force and, therefore, the tax base.[25]

As the native-born population grows older and the Baby Boomers retire, immigration will prove invaluable in sustaining the U.S. labor force. Projections by the Bureau of Labor Statistics (BLS) indicate that, between 2010 and 2020, the U.S. population age 55 and older will increase by 21.7 million—reaching 96.3 million, or 36.6 percent of all people in the country.[26] As a result, "replacement needs"—primarily retirements—will generate 33.7 million job openings between 2010 and 2020. On top of that, economic growth is expected to create 21.1 million additional job openings.[27] In other words, demand for workers will increase. Yet as more and more older Americans retire, labor-force growth will actually slow, averaging only 0.7 percent between 2010 and 2020 (even with calculating current rates of immigration).[28] The

rate of labor-force growth would be even lower over the coming decade if not for the influx of new immigrants into the labor market.[29]

Immigrant workers will do more than replace retiring native-born workers in the labor force. They will also look after the retirees themselves. BLS expects that the aging of the U.S. population will generate a high demand for healthcare workers of all kinds, both high-skilled and lesser-skilled.[30] Between 2010 and 2020, employment is projected to increase by 34.5 percent in healthcare support occupations, 25.9 percent in healthcare practitioner and technical occupations, and 26.8 percent in personal care and service occupations.[31] Many of these healthcare workers will, of necessity, be immigrants.

UNEMPLOYMENT

MYTH: At a time of high unemployment, the U.S. economy does not need temporary foreign workers.

FACT: Temporary workers from abroad fill specialized needs in specific sectors of the U.S. economy.

Although the unemployment rate for the United States as a whole remains relatively high, the demand for specific kinds of workers in particular sectors of the economy remains high as well. For instance, farm workers, nurses, high-skilled manufacturing workers, and high-skilled technology workers continue to be in short supply.[32] Unemployment for Americans in some of these areas remains remarkably low. For example, unemployment for the native-born is particularly low in science, technology, engineering, and mathematics (STEM) occupations, such as petroleum engineers (0.1 percent), computer network architects (0.4 percent), nuclear engineers (0.5 percent), environmental scientists and geoscientists (1.2 percent), database administrators (1.3 percent), statisticians (1.6 percent), engineering managers (1.6 percent), and aerospace engineers (1.9 percent).[33] Under these circumstances, the U.S. economy would benefit from channels of legal immigration that are flexible enough to respond to labor shortages in particular occupations at a particular time and place. Temporary worker programs provide just the sort of flexibility that is required in many industries.[34] Moreover, evidence indicates that expanding the supply of temporary workers from abroad would not undermine wages or job prospects of native-born workers. This is true at both the high-skilled and lesser-skilled ends of the occupational spectrum.

Among the many types of temporary worker visas, the largest category is the "H," which includes one subcategory for highly skilled workers and two for lesser-skilled workers. The H-1B is for highly educated and skilled professionals and is capped by Congress at 65,000 per year with an additional 20,000 visas available for immigrants with graduate degrees from U.S. universities. The H-2B program is intended for nonagricultural seasonal, peak load, or intermittent workers (landscaping, forestry, amusement parks, etc.) and is capped at a maximum of 66,000 per year. And the H-2A program is designed for seasonal farm workers. While this last program is not subject to any numerical cap, it is too cumbersome to respond to the often rapid fluctuations in agricultural labor

demand and is little used. Given that the kinds of work covered by the H-2A and H-2B programs require jobs that are seasonal or temporary in nature, they most clearly demand a temporary work force. However, in the case of all three programs, demand fluctuates with the condition of the U.S. economy—rising when times are good and falling when they are bad. The caps placed on the H-1B and H-2B programs have proven to be grossly inadequate when economic conditions are favorable.[35] For example, this year the H-1B cap was met within the first few days of the filing period preceding the fiscal year, and for several years the H-1B cap has been met before, or early in, the fiscal year.[36]

Regardless of skill level, where U.S. employers first test the labor market to locate qualified and available workers already here, temporary workers from abroad fill gaps in the U.S. labor force and do not harm the employment prospects of native-born workers. In the case of the H-2A and H-2B programs, the lesser-skilled workers who obtain these visas find themselves in direct competition with few native-born Americans. A 2013 study by the American Enterprise Institute and ImmigrationWorks USA notes that the rising educational attainment of native-born workers suggests that few of them are in the market for the kinds of less-skilled seasonal jobs filled by H-2A and H-2B visa holders. According to this study, "in 1950, more than half of U.S.-born workers had not completed high school. Today the figure is less than 5 percent—compared to nearly one-quarter of immigrant workers." In addition, less-skilled immigrant workers tend to work in different fields than less-skilled native-born workers. The study observes that "low-skilled Americans are twice as likely as low-skilled immigrants to work in offices or administrative support jobs. They're also twice as likely as immigrants to work in sales. In contrast, low-skilled immigrants are three times more likely than low-skilled Americans to fill farming, fishing and forestry jobs."[37]

Moreover, BLS projects that 29.5 percent of job openings from 2010 to 2020 will not require a high-school diploma, while an additional 39.7 percent will require no more than a high school education.[38] In other words, there will be too few less-educated native-born workers willing and able to fill all of the lesser-skilled jobs the U.S. economy creates. Lesser-skilled immigrant workers will fill this gap.[39]

At the other end of the spectrum, the high-skilled recipients of H-1B visas fill available jobs in STEM occupations without "crowding out" or reducing wages for their native-born counterparts.[40] According to a 2013 report by researchers from The Brookings Institution, "evidence suggests that the H-1B program does help fill a shortage in labor supply for the occupations most frequently requested by employers. Most of these are for STEM occupations." The report also found that for "occupations with the most H-1B requests, recent wage growth has been much higher than the national average." On average, in the 100 largest metropolitan areas in the United States, 46 percent of job openings requiring significant STEM knowledge go unfilled for one month or longer. In San Jose, California, for example, two-thirds of job vacancies that remain unfilled after one month, despite advertising the positions, are for STEM occupations. In many other metropolitan areas, that share remains close to half.[41] Significantly, the American Enterprise Institute has found that

each approved H-1B worker is associated with an additional 1.83 jobs among native-born American workers.[42]

A 2013 report from Regional Economic Models, Inc. (REMI) explores the outcomes of an expansion of high-skilled (H-1B) and lesser-skilled (H-2A and H-2B) visas.[43] The report finds that overall economic effects of the policy changes would be positive, increasing gross domestic product (GDP) for the entire country and gross state product (GSP) for each state, as well as increasing net new jobs across industries. Specifically, employment and GSP is estimated to increase for all states and in all years as a result of an H-1B high-skilled program expansion. Nationwide, this would amount to 1.3 million jobs and a GDP increase of more than $158 billion by 2045. An increase in H-2A agricultural visas would result in total employment increases of around 39,600 by 2045. Fully utilizing the H-2B seasonal worker visas up to the cap would increase total U.S. employment by around 24,000–25,000 over the next 30 years. The creation of a lesser-skilled, nonseasonal temporary worker program would lead to a total gain of about 365,000 jobs by 2045, and a rise in GDP of $31 billion.

HIGH-TECH WORKERS

MYTH: There is no shortfall of native-born Americans for open positions in the natural sciences, engineering, and computer science and thus no need for foreign-born high-tech workers.

FACTS: Job openings are expanding at educational levels where demographic data show too few native-born students, so we can expect these shortfalls to persist in the future. Moreover, relative to other economic indicators, wages are increasing in STEM jobs requiring higher education.

Some claim that job creation in STEM fields cannot properly be viewed as outstripping the supply of qualified Americans since higher than desirable unemployment persists for American workers in some STEM occupations, and plenty of STEM grads work in non-STEM positions. Three critical facts belie this approach. First of all, this outlook ignores the fact that over 35 percent of STEM jobs are those that require less than a Bachelor's degree, while immigration reform efforts target, in particular, the approximately 20 percent of STEM jobs that require a Master's degree or higher. Secondly, job growth in positions requiring graduate level STEM training is exploding, far outpacing the American STEM training pipeline. Currently, the number of American students pursuing STEM fields is growing at less than one percent per year, and by 2018 there will be more than 230,000 advanced degree STEM jobs that will not be filled even if every new American STEM grad finds a job.[44] Thirdly, data shows that wages are increasing in STEM jobs requiring

higher education, with wage increases an accepted indicator that the number of qualified Americans is insufficient to fill jobs being created.

First, in assessing which job openings in STEM areas have sufficient numbers of qualified Americans and where there is a shortfall, it is important to be specific about what types of jobs, requiring what type of skills and education, employers are having difficulty filling with sufficient numbers of Americans. For example, in the computer science and mathematical occupations, more than 35 percent of jobs, and some of the STEM job growth, including many production manufacturing jobs, is in jobs that require less than a bachelor's degree. The job distribution in computer science and mathematical jobs is: 6.9 percent of jobs are filled by workers with high school diploma–level skills or less, 18.7 percent with skills based on some college, 10.5 percent with associate-level skills, 43.8 percent with bachelor-level skills, 17.7 percent with master-level skills, 0.8 percent professional degree–level skills, and 1.7 percent doctorate-level skills.[45]

Furthermore, the Bureau of Labor Statistics has projected that 22 percent of new job openings through 2020 will require a master's degree or higher.[46] At the same time that one-fifth of new jobs will require individuals with graduate degrees, there are one-quarter more foreign-born graduate degree holders in the U.S. than native-born. In order to fill these job openings in our economy, employers will be faced with a situation where 10.6 percent of the foreign born in the U.S. age 25 to 34 have earned master's, professional, or doctoral degrees, while 8.5 percent of the native-born population of the same age have the same credentials.[47] Moreover, to the extent job duties are best filled by individuals with STEM degrees, more than 40 percent of master's and doctoral degrees in STEM fields awarded by U.S. universities go the foreign born.[48] With respect to bachelor-level STEM degrees, a notable disparity is displayed among the native-born as compared to foreign-born degree holders. About 19 percent of the native-born pursue bachelor's degrees in STEM fields, while about 35 percent of the foreign born residing in the United States possess a STEM bachelor's, most often earned abroad.[49]

Lastly, wages reflect the existence of a shortfall with regard to the supply of qualified professionals to fill STEM jobs requiring higher education. Engineer wages have risen by seven percent relative to all other occupations since 2003 and by three percent since 2008.[50] Longer-term trends suggest a similar point. For example, from 1999 to 2011, wages grew by 54 percent for computer and information research scientists, 38 percent for computer programmers, 40 percent for software applications engineers, 52 percent for systems software engineers, 31 percent for computer support specialists, and 47 percent for database administrators.[51] Meaningfully, from 1999 to 2011, the consumer price index increased by 36 percent while the average wage for computer and mathematical occupations increased 44 percent.[52]

COMMUNITY IMPACT

MYTH: Immigrants hurt communities that are struggling economically.

FACT: Immigrants have economically revitalized many communities throughout the country.

In addition to boosting the national economy and strengthening America's global competitiveness, immigrants and immigrant entrepreneurs are important for metropolitan regional economies.[53] This is true not only in San Jose and Silicon Valley, but in many regions across the country. In Texas, San Antonio and Austin have built knowledge economies around the universities and research industries located there. Houston attracts high-skilled workers for the area's oil industry. In South Carolina, Greenville and Spartanburg have attracted industries that need high-skilled workers. In Boise, Idaho, knowledge-based employment has spurred the local economy and population growth. The universities and research organizations of the North Carolina piedmont, in Raleigh, Greensboro, and the Research Triangle area, create a high demand for high-skilled workers.

Long-term research shows that in addition to bringing more jobs and higher salaries to communities where they cluster, the impact of innovative industries has a profound multiplier effect on localities.[54] Jobs in the innovation economy generate a disproportionate number of local jobs in other industries. An analysis of 11 million American workers in 320 metropolitan areas shows that each new high-tech job in a metropolitan area creates five additional long-term local jobs outside of the high-tech sector.[55]

Furthermore, the five new jobs created for each new high-tech job benefits a diverse group of workers: two new jobs for professional workers such as attorneys and doctors, and three new positions in nonprofessional occupations such as service industry jobs.[56] In many U.S. metropolitan areas, the innovation economy, and the high-skilled jobs related to it, drive prosperity for a broader base of workers living in the region.[57]

Beyond the Silicon Valleys and Research Triangles of the United States, immigrants and immigrant entrepreneurs are making significant contributions to local economies and communities across America's heartland. In many places, the need for foreign talent is critical. For decades, large numbers of U.S. workers have been migrating from "Rustbelt" cities to the "Sunbelt." The cities and towns experiencing a decline in native-born populations must find ways to maintain a viable workforce. As a result, an increasing number of local communities are recognizing the need to be receptive to immigrants and are officially becoming places of welcome that encourage openness to immigration and support immigrant integration.

In Michigan, for example, while only six percent of the state's population is foreign-born, immigrants founded about one-third of the high-tech companies in the state over the past decade.[58] The state, through its "Welcoming Michigan" campaign of building immigrant-friendly communities, clearly sees the need to attract immigrants to the area.[59] Detroit also recognizes this need. In 2010, the city released the "Global Detroit" report, which documents a start-up rate for immigrant-founded high-tech firms in Michigan that is six times the rate for the native-born population.[60]

Additionally, cities such as Dayton, Ohio[61] have passed "welcoming resolutions"—formal proclamations by local elected leaders expressing their recognition of the importance of immigration to their local economy, and their openness to the continued contributions of immigrants.[62] In Minnesota, local leaders also acknowledge the positive contributions of immigrants. As a member of the Minnesota Chamber of Commerce stated, "Immigrants aren't just an asset because they numerically increase the workforce. They are also playing a key role as entrepreneurs in Minnesota and have transformed neighborhoods in both Minneapolis and St. Paul while helping revitalize downtowns in several regional centers around our state."[63]

TAXES

MYTH: Undocumented immigrants do not pay taxes.

FACT: Undocumented immigrants pay billions of dollars in taxes each year.

Undocumented immigrants pay sales taxes, just like every other consumer in the United States. Undocumented immigrants also pay property taxes—even if they rent housing. More than half of undocumented immigrants have federal and state income, Social Security, and Medicare taxes automatically deducted from their paychecks. However, undocumented immigrants working "on the books" are not eligible for any of the federal or state benefits that their tax dollars help to fund.[64] As a result, undocumented immigrants provide an enormous subsidy to the Social Security system in particular. Each year, Social Security taxes are withheld from billions of dollars in wages earned by workers whose names and Social Security numbers do not match the records of the Social Security Administration (SSA). According to the SSA, undocumented immigrants paid $13 billion in payroll taxes into the Social Security Trust Fund in 2010 alone.[65]

Tax payments by undocumented immigrants and their families are also sizable at the state and local levels. The Institute for Taxation and Economic Policy (ITEP) estimates that households headed by undocumented immigrants paid $10.6 billion in state and local taxes in 2010. That included $1.2 billion in personal income taxes, $1.2 billion in property taxes, and $8.1 billion in sales taxes. The states receiving the most tax revenue from households headed by undocumented immigrants were California ($2.2 billion), Texas ($1.6 billion), New York ($744.3 million), Florida ($706.3 million), and Illinois ($562.1 million).[66]

Other studies have yielded similar findings. The Texas State Comptroller estimated that undocumented immigrants in Texas generate $1.6 billion per year in state tax revenue.[67] In Georgia, the annual tax contributions of undocumented immigrants are estimated at $215.6 million to $252.5 million.[68] In Colorado, undocumented immigrants pay between $159 million and $194 million.[69] In Oregon, they pay between $134 million and $187 million—plus, employers in Oregon pay between $97 million and $136 million in taxes on behalf of undocumented workers.[70] In Iowa, undocumented immigrants pay $40 million to $62 million—and their employers contribute $50 million to $77.8 million on their behalf.[71]

The tax payments of now-undocumented

immigrants would be significantly greater if they had legal status. According to ITEP, if undocumented immigrants were allowed to work legally in the United States, they would pay $12.7 billion in state and local taxes—an increase of $2.1 billion over what they pay now. This would amount to $2.8 billion in income taxes (an increase of $1.6 billion), $1.3 billion in property taxes (an increase of $76.1 million), and $8.5 billion in sales taxes (an increase of $420.5 million).[72]

WELFARE

MYTH: Immigrants come to the United States for welfare benefits.

FACT: Undocumented immigrants are not eligible for federal public benefit programs, and even legal immigrants face stringent eligibility restrictions.

Undocumented immigrants are not eligible for federal public benefits such as Social Security, Supplemental Security Income, Temporary Assistance for Needy Families, Medicaid, Medicare, and food stamps. Even most legal immigrants cannot receive these benefits until they have been in the United States for five years or longer, regardless of how much they have worked or paid in taxes.[73] Given these restrictions, it is not surprising that U.S. citizens are more likely to receive public benefits than are noncitizens.[74]

A number of state studies have demonstrated that, on average, immigrants pay more in taxes than they receive in government services and benefits. For instance, a study in Arizona found that the state's immigrants generate $2.4 billion in tax revenue per year, which more than offsets the $1.4 billion worth of educational, healthcare, and law enforcement resources they utilize.[75] A study in Florida estimated that, on a per capita basis, immigrants in the state pay nearly $1,500 more in taxes than they receive in public benefits.[76]

Nonetheless, some studies have sought to demonstrate that households headed by immigrants make costly use of public-benefits programs. Invariably, most of the "costs" calculated by such studies are for programs utilized by the native-born, U.S.-citizen children of immigrants. These children are counted as a "cost" of immigration if they are under 18, but as part of the native-born population if they are working, taxpaying adults. Yet all people are "costly" as children who are still in school and have not yet entered the workforce. Economists view expenditures on healthcare and education for children as investments that pay off later, when those children become workers and taxpayers. Healthy, well-educated children are more productive, earn higher wages, and pay more in taxes as adults.[77]

INTEGRATION

MYTH: Today's immigrants are not assimilating into U.S. society.

FACT: Today's immigrants are buying homes, becoming U.S. citizens, and learning English.

Throughout U.S. history, each new wave of immigrants has been accused of not "assimilating" into U.S. society. The Italian, Polish, and Eastern European immigrants who came here at the end of the nineteenth century faced this accusation, and subsequently proved it wrong as they and their children learned English, bought homes, got better jobs, became U.S. citizens, and integrated into their communities in many other ways. The Latin American and Asian immigrants who have come here more recently now face the same accusation. As with their predecessors, they are proving that accusation to be false and are integrating into U.S. society and climbing the socioeconomic ladder over time.[78]

A study by demographer Dowell Myers demonstrates the integration and socioeconomic progress of immigrants over the course of two decades. Myers focuses on those immigrants who came to the United States between 1985 and 1989. He uses census data to take a socioeconomic snapshot of these long-term immigrants in 1990 and again in 2008—after they had lived in the United States for 18 years. The data indicate that, since coming here, a growing number of long-term immigrants have bought homes, earned higher wages, and become U.S. citizens. Between 1990 and 2008, the share of these immigrants who owned homes jumped from 16 percent to 62 percent. The share who earned incomes above the "low-income" level rose from 35 percent to 66 percent. The share who were U.S. citizens grew from seven percent to 56 percent.[79]

Likewise, data from the Office of Immigration Statistics at the Department of Homeland Security (DHS) reveal that the number of immigrants applying for U.S. citizenship has been growing for decades. A DHS report found that the average number of immigrants naturalizing each year increased from fewer than 120,000 during the 1950s and 1960s, to 210,000 during the 1980s, 500,000 during the 1990s, and 680,000 between 2000 and 2009. The number of naturalizations grew from 619,913 in 2010, to 694,193 in 2011, to 757,434 in 2012.[80] Moreover, immigrants today are naturalizing at a faster rate than in the past.[81] According to a 2008 DHS report, "approximately one third of immigrants who obtained LPR [legal permanent resident] status from the mid-1970s through the mid-1980s naturalized within 10 years, whereas nearly half the immigrants who obtained status in the mid-to-late-1990s did so."[82]

The economic and social integration of immigrants is an ongoing process that will continue over the decades to come. In a 2011 report, Myers concludes that the share of immigrants who own homes is projected to increase from 25.5 percent in 2000 to 72 percent in 2030. The share that speak English "well" or "very well" is projected to grow from 57.5 percent to 70.3 percent over the same period. And the share living in poverty is projected to decrease from 22.8 percent to 13.4 percent.[83] In other words, immigrants are not settling into "ethnic enclaves" that exist apart from mainstream America. Rather, they are becoming progressively more "American" in every sense of the word.

Integration and upward mobility are most apparent among the children of immigrants. For instance, according to surveys by the Pew Research Center, "adults in the second generation are doing better than those in the first generation in median household income ($58,000 versus $46,000); college degrees (36 percent versus 29 percent); and homeownership (64 percent versus 51 percent). They are less likely to be in poverty (11 percent versus 18 percent) and less likely to have not finished high school (10 percent versus 28 percent)."[84] A study by economist James P. Smith found that the wages and educational attainment of Latino men increase significantly from generation to generation, with wages increasing 15 percent from the first generation and in between the second and third generations, an additional 5.6 percent.[85]

CRIME

MYTH: Immigrants are more likely to commit crimes than native-born Americans.

FACT: Immigration does not cause crime rates to rise, and immigrants are actually less likely to commit crimes or be behind bars than native-born Americans.

High levels of immigration are not associated with more crime. Between 1990 and 2010, the foreign-born share of the U.S. population grew from 7.9 percent to 12.9 percent[86] and the number of unauthorized immigrants tripled from 3.5 million to 11.2 million.[87] During the same period, FBI data indicates that the violent crime rate declined 45 percent and the property crime rate fell 42 percent.[88] Likewise, a report from the conservative Americas Majority Foundation found that crime rates are lowest in states with the highest immigration growth rates. In 2006, the 10 states with the most pronounced, recent increases in immigration had the lowest rates of crime in general and violent crime in particular.[89]

Moreover, immigrants are much less likely to be behind bars than native-born Americans. A study by sociologist Rubén Rumbaut found that, among young men, incarceration rates are lowest for immigrants. This holds true regardless of ethnicity or educational attainment, even for Mexicans, Salvadorans, and Guatemalans who comprise a majority of the undocumented population. In 2000, the incarceration rate for young immigrant men was only 0.7 percent—five times lower than the 3.5 percent incarceration rate among young native-born men.[90] A study by the Public Policy Institute of California yielded similar results. The study found that, in 2005, the incarceration rate for foreign-born adults in California was 297 per 100,000—compared to 813 per 100,000 for native-born adults. Moreover, immigrants made up 35 percent of California's adult population, but only 17 percent of the state prison population.[91]

Similarly, economists Kristin Butcher and Anne Morrison Piehl used data from the 1980, 1990, and 2000 censuses to demonstrate that, during the 1990s, "those immigrants who chose to come to the United States were less likely to be involved in criminal activity than earlier immigrants and the native born." The analysis by Butcher and Piehl established that the lower incarceration rate for immigrants could not be explained away with the argument that there are fewer immigrants in prison because so many of

them are deported. Nor could it be dismissed on the grounds that harsher immigration laws are deterring immigrants from committing crimes because they are afraid of getting deported.[92]

These studies are only the most recent in a very long line of research demonstrating that immigrants are *less* likely than native-born Americans to commit crimes or to be incarcerated.[93]

BORDER SECURITY

MYTH: Reforming the legal immigration system will not help secure the border.

FACT: Immigration reform is an integral part of any effective border security strategy.

Since 1986, after passage of the Immigration Reform and Control Act, the federal government has spent an estimated $186.8 billion on immigration enforcement.[94] Yet during that time, the unauthorized population has tripled in size to 11 million.[95] This did not occur because $186.6 billion was not enough to get the job done. It occurred because this money was spent trying to enforce immigration laws that have consistently failed to match either the U.S. economy's demand for workers or the natural desire of immigrants to be reunited with their families. Therefore, enforcement coupled with commonsense reforms to our legal immigration system is one of the most effective ways to enhance national security. Immigration reform that includes a pathway to legal status for undocumented immigrants already living in the country, with the creation of flexible avenues for future immigration (through temporary worker programs), and mandatory employment verification, would enhance border security and reduce illegal immigration.

Broad immigration reform in the 113th Congress would enhance border security in multiple ways. To begin with, reform would reduce the flow of undocumented immigrants by providing a mechanism for them to legally come and work in the United States by creating more flexible legal limits on employment-based immigration. Workers admitted under employment-based visa programs would be screened against law enforcement databases prior to entering the country. Paired with a workable employment verification system, once their visas expire, these new temporary workers would be unable to work in the United States.

Further, an earned lawful status program for the undocumented would also have a comparable impact on national security as the undocumented come out of the shadows, register with the federal government, and undergo background checks. Additionally, an earned lawful status program for the undocumented would reduce the lucrative fraudulent document and smuggling industry that currently persists as well as "shrink the haystack," allowing law enforcement to concentrate on removing individuals with criminal backgrounds rather than those entering the country legitimately to work.[96]

ENDNOTES

1. See Madeline Zavodny, *Immigration and American Jobs* (Washington, DC: American Enterprise Institute for Public Policy Research and the Partnership for a New American Economy, 2011), <http://www.aei.org/files/2011/12/14/-immigration-and-american-jobs_144002688962.pdf>.

2. Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (Washington, DC: Pew Hispanic Center, February 1, 2011), p. 17, <http://pewhispanic.org/files/reports/133.pdf#page=18>.

3. See testimony of Daniel Griswold, Director, Center for Trade Policy Studies, Cato Institute, before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, January 26, 2011, p. 4, <http://judiciary.house.gov/hearings/pdf/Griswold01262011.pdf#page=4>.

4. See Raúl Hinojosa-Ojeda, *Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform* (Washington, DC: Immigration Policy Center of the American Immigration Council and the Center for American Progress, January 2010), <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf#page=14>; The Perryman Group, An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the U.S. with Estimated Effects by State and by Industry (Waco, TX: April 2008), <http://www.immigrationpolicy.org/sites/default/files/docs/ipc/Impact%20of%20the%20Undocumented%20Workforce%20April%2015%202008.pdf>.

5. Robert W. Fairlie, *Kauffman Index of Entrepreneurial Activity, 1996–2010* (Kansas City, MO: Ewing Marion Kauffman Foundation, March 2011), p. 9, <http://www.kauffman.org/uploadedFiles/KIEA_2011_report.pdf#page=11>.

6. Robert W. Fairlie, *Open for Business: How Immigrants Are Driving Small Business Creation in the United States* (New York, NY: Partnership for a New American Economy, August 2012), p. 3, <http://www.renewoureconomy.org/wp-content/uploads/2013/07/openforbusiness.pdf#page=5>.

7. David Dyssegaard Kallick, *Immigrant Small Business Owners: A Significant and Growing Part of the Economy* (New York, NY: Fiscal Policy Institute, June 2012), p. 1, <http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf#page=5>.

8. Partnership for a New American Economy, *The "New American" Fortune 500* (New York, NY: June 2011), pp. 1–3, <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf>; see also Stuart Anderson, *American Made 2.0: How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy* (Arlington, VA: National Venture Capital Association, 2013), <http://www.nvca.org/index.php?option=com_content&view=article&id=254&Itemid=103>; David Bier, *America Still Needs a True Entrepreneurship Visa: Senate and House Immigration Bills Fall Short in Attracting Entrepreneurs to America* (Washington, DC: Competitive Enterprise Institute, 2013), <http://cei.org/sites/default/files/David%20Bier%20-%20America%20Needs%20a%20True%20Entrepreneurship%20Visa.pdf>.

9. Wadhwa, et al., "Skilled Immigration and Economic Growth," *Applied Research in Economic Development* 5, no. 1 (May 2008), pp.6–14, <http://www.soc.duke.edu/globalengineering/papers_skilledimmigrants.php>.

10. Heidi Shierholz, *Immigration and Wages: Methodological Advancements Confirm Modest Gains for Native Workers* (Washington, DC: Economic Policy Institute, February 4, 2010), p. 22, <http://epi.3cdn.net/7de74ee0cd834d87d4_a3m6ba9j0.pdf#page=22>.

11. Michael Greenstone and Adam Looney, *Ten Economic Facts about Immigration* (Washington, DC: The Hamilton Project, Brookings Institution, September 2010), p. 5, <http://www.brookings.edu/~/media/Files/rc/reports/2010/09_immigration_greenstone_looney/09_immigration.pdf#page=7>.

12. Christopher S. Decker, *Nebraska's Immigrant Population: Economic and Fiscal Impacts* (Omaha, NE: Office of Latino/Latin American Studies, University of Nebraska at Omaha, October 2008), p. 1, <http://www.unomaha.edu/ollas/Econ%20Im%20Report/EconImpact.pdf#page=9>.

13. See Madeline Zavodny, *Immigration and American Jobs* (Washington, DC: American Enterprise Institute for Public Policy Research and the Partnership for a New American Economy, 2011), <http://www.aei.org/files/2011/12/14/-immigration-and-american-jobs_144002688962.pdf>; Madeline Zavodny and Tamar Jacoby, *Filling the Gap: Less-Skilled Immigration in a Changing Economy* (Washington, DC: American Enterprise Institute and ImmigrationWorks USA, 2013), <http://www.aei.org/files/2013/06/10/-zavodny-filling-the-gap-immigration-report_140631709214.pdf>; Demetrios G. Papademetriou and Madeleine Sumption, *The Role of Immigration in Fostering Competitiveness in the United States* (Washington, DC: Migration Policy Institute, 2011), <http://www.migrationpolicy.org/pubs/competitiveness-us.pdf>; Giovanni Peri, "The Effect of Immigrants on U.S. Employment and Productivity," *FRBSF Economic Letter 2010-26* (San Francisco, CA: Federal Reserve Bank of San Francisco, August 30, 2010), <http://www.frbsf.org/economic-research/publications/economic-letter/2010/august/effect-immigrants-us-employment-productivity/>; Michael Fix, Demetrios G. Papademetriou, and Madeleine Sumption, *Immigrants in a Changing Labor Market: Responding to Economic Needs* (Washington, DC: Migration Policy Institute, 2013), <http://www.migrationpolicy.org/bookstore/labormarkets.php>.

14. Michael Greenstone and Adam Looney, *Ten Economic Facts about Immigration* (Washington, DC: The Hamilton Project, Brookings Institution, September 2010), p. 5, <http://www.brookings.edu/~/media/Files/rc/reports/2010/09_immigration_greenstone_looney/09_immigration.pdf#page=7>.

15. Jack Strauss, *Does Immigration, Particularly Increases in Latinos, Affect African American Wages, Unemployment and Incarceration Rates?* (Social Science Research Network, December 8, 2012), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186978>.

16. Rob Paral & Associates, *The Unemployment and Immigration Disconnect: Untying the Knot, Part I of III* (Washington, DC: Immigration Policy Center, American Immigration Law Foundation, May 2009), pp. 4–6, <http://www.immigrationpolicy.org/sites/default/files/docs/Part%201%20-%20Unemployment%20Disconnect%20%2005-19-09.pdf>.

17. Rob Paral & Associates, *Immigration and Native-Born Unemployment across Racial/Ethnic Groups: Untying the Knot, Part II of III* (Washington, DC: Immigration Policy Center, American Immigration Law Foundation, May 2009), p. 7, <http://www.immigrationpolicy.org/sites/default/files/docs/Part%202%20-%20Unemployment%20Race%20Disconnect%2005-19-09.pdf>.

18. Giovanni Peri, *Rethinking the Effects of Immigration on Wages: New Data*

and Analysis from 1990–2004 (Washington, DC: Immigration Policy Center, American Immigration Law Foundation, October 2006), p. 1, <http://www.immigrationpolicy.org/sites/default/files/docs/IPC%20Re-thinking%20Wages,%2011-2006.pdf>.

19. Heidi Shierholz, *Immigration and Wages: Methodological Advancements Confirm Modest Gains for Native Workers* (Washington, DC: Economic Policy Institute, February 4, 2010), p. 12, <http://epi.3cdn.net/7de74e-e0cd834d87d4_a3m6ba9j0.pdf#page=12>.

20. Gianmarco I. P. Ottaviano and Giovanni Peri, *Immigration and National Wages: Clarifying the Theory and the Empirics*, NBER Working Paper No. 14188 (Cambridge, MA: National Bureau of Economic Research, July 2008), p.58, <http://www.nber.org/papers/w14188>. See Giovanni Peri, *The Impact of Immigrants in Recession and Economic Expansion*, MPI Immigrants in a Changing Labor Market (Washington, DC: Migration Policy Institute, March 2013).

21. Örn Bodvarsson and Hendrik Van den Berg, "The Impact of Immigration on a Local Economy: The Case of Dawson County, Nebraska," *Great Plains Research* 13, no. 2 (Fall 2003), pp.291–309, <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1663&context=greatplainsresearch>.

22. Örn B. Bodvarsson, Joshua J. Lewer, and Hendrik F. Van den Berg, *Measuring Immigration's Effects on Labor Demand: A Reexamination of the Mariel Boatlift*, IZA Discussion Paper No. 2919 (Bonn, Germany: IZA-Institute for the Study of Labor, July 21, 2007), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001215>.

23. David Card, *How Immigration Affects U.S. Cities*, CReAM Discussion Paper No 11/07 (London, England: Center for Research and Analysis of Migration, June 2007), <http://www.econ.ucl.ac.uk/cream/pages/CDP/CDP_11_07.pdf>.

24. Dixie Sommers and James C. Franklin, "Overview of Projections to 2020," *Monthly Labor Review*, January 2012, p. 10, <http://www.bls.gov/opub/mlr/2012/01/art1full.pdf#page=8>.

25. See Dowell Myers, *Immigrants and Boomers: Forging a New Social Contract for the Future of America* (New York, NY: Russell Sage Foundation, 2007), <https://www.russellsage.org/publications/immigrants-and-boomers-0>; John Pitkin and Dowell Myers, *Projections of the U.S. Population, 2010–2040, by Immigrant Generation and Foreign-Born Duration in the U.S.* (Los Angeles, CA: Population Dynamics Research Group, School of Policy, Planning, and Development, University of Southern California, 2011), <http://www.usc.edu/schools/price/futures/pdf/2011_Pitkin-Myers_Projections-Immigrant-Generations-and-Foreign-Born.pdf>.

26. Mitra Toossi, "Labor Force Projections to 2020: A More Slowly Growing Workforce," *Monthly Labor Review*, January 2012, p. 47, <http://www.bls.gov/opub/mlr/2012/01/art3full.pdf#page=5>.

27. C. Brett Lockard and Michael Wolf, "Occupational Employment Projections to 2020," *Monthly Labor Review*, January 2012, p. 102, <http://www.bls.gov/opub/mlr/2012/01/art5full.pdf#page=19>.

28. Mitra Toossi, "Labor Force Projections to 2020: A More Slowly Growing Workforce," *Monthly Labor Review*, January 2012, p. 56, <http://www.bls.gov/opub/mlr/2012/01/art3full.pdf#page=14>.

29. Mitra Toossi, "Labor Force Projections to 2020: A More Slowly Growing Workforce," *Monthly Labor Review*, January 2012, p. 63, <http://www.bls.gov/opub/mlr/2012/01/art3full.pdf#page=21>.

30. C. Brett Lockard and Michael Wolf, "Occupational Employment Projections to 2020," *Monthly Labor Review*, January 2012, p. 85, 90,<http://www.bls.gov/opub/mlr/2012/01/art5full.pdf#page=2>.

31. C. Brett Lockard and Michael Wolf, "Occupational Employment Projections to 2020," *Monthly Labor Review*, January 2012, p. 89, <http://www.bls.gov/opub/mlr/2012/01/art5full.pdf#page=6>.

32. Darrell M. West, *The Paradox of Worker Shortages at a Time of High National Unemployment* (Washington, DC: The Brookings Institution, April 2013), p. 2, <http://www.brookings.edu/~/media/research/files/papers/2013/04/10%20worker%20shortage%20immigration%20west/west_paradox%20of%20worker%20shortages.pdf#page=2>.

33. Census/Bureau of Labor Statistics, *Current Population Survey* (Washington, DC: Department of Labor, pooled January through December 2011 data).

34. Alexander Nowrasteh, *How to Make Guestworker Visas Work* (Washington, DC: Cato Institute, 2013), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa719_1.pdf>.

35. Demand for the H-1B and H-2B programs are not driven by the cap, instead demand for these programs are based on employer new hiring and the inability of employers to find American workers in sufficient numbers. For example, in 2001 through 2003, the H-1B cap of 195,000 visas was never reached. Jill H. Wilson, *Immigration Facts: Temporary Foreign Workers* (Washington, DC: The Brookings Institution, June 18, 2013), <http://www.brookings.edu/research/reports/2013/06/18-temporary-workers-wilson>.

36. See U.S. Citizenship and Immigration Services, "H-1B Fiscal Year (FY) 2014 Cap Season," April 15, 2013, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4b-7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

37. Madeline Zavodny and Tamar Jacoby, *Filling the Gap: Less-Skilled Immigration in a Changing Economy* (Washington, DC: American Enterprise Institute and ImmigrationWorks USA, June 2013), pp. 1–3, <http://www.aei.org/files/2013/06/10/-zavodny-filling-the-gap-immigration-report_140631709214.pdf >.

38. C. Brett Lockard and Michael Wolf, "Occupational Employment Projections to 2020," *Monthly Labor Review*, January 2012, p. 106, <http://www.bls.gov/opub/mlr/2012/01/art5full.pdf#page=23>.

39. Madeline Zavodny and Tamar Jacoby, *Filling the Gap: Less-Skilled Immigration in a Changing Economy* (Washington, DC: American Enterprise Institute and ImmigrationWorks USA, 2013), <http://www.aei.org/files/2013/06/10/-zavodny-filling-the-gap-immigration-report_140631709214.pdf>; Demetrios G. Papademetriou and Madeleine Sumption, *The Role of Immigration in Fostering Competitiveness in the United States* (Washington, DC: Migration Policy Institute, 2011), <http://www.migrationpolicy.org/pubs/competitiveness-us.pdf>.

40. Stuart Anderson, *H-1B Visas Essential to Attracting and Retaining Talent in America* (Arlington, VA: National Foundation for American Policy, 2013), <http://www.nfap.com/pdf/NFAP%20Policy%20Brief%20H-1B%20Visas%20May%202013.pdf>.

41. Jonathan T. Rothwell and Neil G. Ruiz, *H-1B Visas and the STEM Shortage: A Research Brief* (Washington, DC: The Brookings Institution, 2013), pp. 1–3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262872>; see also Giovanni Peri, Kevin Shih, and Chad Sparber, "STEM Workers, H-1B Visas and Productivity in U.S. Cities," *Norface Migration Discussion Paper No. 2013-09* (London: Norface Research Programme on Migration, 2013), <http://www.norface-migration.org/publ_uploads/NDP_09_13.pdf>.

42. Madeline Zavodny, *Immigration and American Jobs* (Washington, DC: American Enterprise Institute for Public Policy Research and the Partnership for a New American Economy, 2011), p.11. <http://www.aei.org/files/2011/12/14/-immigration-and-american-jobs_144002688962.pdf>.

43. Frederick R. Treyz, Corey Stottlemyer, and Rod Motamedi, *Key Components of Immigration Reform: An Analysis of the Economic Effects of Creating a Pathway to Legal Status, Expanding High-Skilled Visas, and Reforming Lesser-Skilled Visas* (Amherst, MA: Regional Economic Models, Inc., 2013), <http://www.remi.com/immigration-report>.

44. McKinsey Global Institute, *An Economy that Works: Job Creation and America's Future*, (June 2011), http://www.mckinsey.com/Insights/MGI/Research/Labor_Markets/An_economy_that_works_for_US_job_creation

45. *American Community Survey*, data from 2008. <www.census.gove/acs>.

46. *Bureau of Labor Statistics Employment Projections 2010-2020* (Washington, DC: Department of Labor, February 1, 2012), table 9.

47. *U.S. Census Educational Attainment for the Population 25 Years and Over* (Washington, DC: Department of Commerce, December 10, 2012), Table 1.

48. *Help Wanted* (Washington, DC: the Information Technology Industry Council, the Partnership for a New American Economy, the U.S. Chamber of Commerce, November 2012), <http://www.immigrationresearch-info.org/report/us-chamber-commerce/help-wanted-role-foreign-workers-innovation-economy>.

49. *American Community Survey*, data from 2009-2011. <www.census.gov/acs>. See also Gordon Hanson (UC San Diego) and Matthew Slaughter (Dartmouth), *Talent, Immigration, and U.S. Economic Competitiveness* (Washington, DC: National Bureau of Economic Research, May 2013), <http://irps.ucsd.edu/assets/001/504703.pdf>.

50. Bureau of Labor Statistics, *Occupational Employment Statistics* (Washington, DC: Department of Labor), <http://www.bls.gov/oes/current/oes_nat.htm>.

51. Id.

52. See, Gordon Hanson (UC San Diego) and Matthew Slaughter (Dartmouth), *Talent, Immigration, and U.S. Economic Competitiveness* ((Washington, DC: National Bureau of Economic Research, May 2013), at p. 31-32 and See section 3 footnotes for methodology, <http://irps.ucsd.edu/assets/001/504703.pdf>.

53. Jacob L. Vigdor, *Immigration and the Revival of American Cities: From Preserving Manufacturing Jobs to Strengthening the Housing Market* (Washington, DC: Americas Society/Council of the Americas and Partnership for a New American Economy, 2013), <http://www.as-coa.org/sites/default/files/ImmigrationUSRevivalReport.pdf>; see also Tamar Jacoby, *U.S. Economic Competitiveness at Risk: A Midwest Call to Action on Immigration Reform* (Chicago, IL: The Chicago Council on Global Affairs, 2013), <http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2013_ImmigrationTaskForce_Final.pdf>.

54. Mark Muro, *Multiplier Effects: Connecting the Innovation and Opportunity Agendas* (Washington, DC: The Brookings Institution, August 23, 2012), <http://www.brookings.edu/blogs/the-avenue/posts/2012/08/23-multiplier-effects-muro>.

55. Enrico Moretti, *The New Geography of Jobs* (New York, NY: Houghton Mifflin, 2012), <http://tinyurl.com/mplov9k>.

56. Id.

57. Jonathan Rothwell, *Regional Inequality and 'The New Geography of Jobs'* (Washington, DC: The Brookings Institution, August 7, 2012), <http://www.brookings.edu/blogs/the-avenue/posts/2012/08/07-regional-inequality-rothwell>.

58. The Chicago Council, *U.S. Economic Competitiveness at Risk: A Midwest Call to Action on Immigration Reform* (Chicago, IL: The Chicago Council on Global Affairs, February 2013), <http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2013_ImmigrationTaskForce_Final.pdf>.

59. Welcoming Michigan, <http://www.welcomingmichigan.org/content/learn-more>.

60. *Global Detroit, Global Detroit: Final Report* (Detroit, MI: 2010), <http://www.globaldetroit.com/wp-content/files_mf/1327697728Global_Detroit_Study.full_report.pdf >.

61. Welcome Dayton, <http://www.welcomedayton.org/>.

62. Welcoming America: Building a Nation of Neighbors, <http://www.welcomingamerica.org/about-us/accomplishments/>.

63. Bill Blazar, Senior Vice President of Public Affairs and Business Development, Minnesota Chamber of Commerce, quoted in The Chicago Council, *U.S. Economic Competitiveness at Risk: A Midwest Call to Action on Immigration Reform* (Chicago, IL: The Chicago Council on Global Affairs, February 2013), <http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2013_ImmigrationTaskForce_Final.pdf>.

64. The White House, *Economic Report of the President*, February 2005, p. 107, <http://www.gpoaccess.gov/eop/2005/2005_erp.pdf>.

65. Stephen Goss, et al., "Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds," *Actuarial Note* no. 151 (Baltimore, MD: Office of the Chief Actuary, Social Security Administration, April 2013), p. 3, <http://www.socialsecurity.gov/OACT/NOTES/pdf_notes/note151.pdf#page=3>.

66. Institute on Taxation and Economic Policy, *Undocumented Immigrants' State and Local Tax Contribution* (Washington, DC: July 2013), <http://www.itep.org/immigration/>.

67. Carole Keeton Strayhorn, Texas Comptroller, *Special Report: Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy* (Austin, TX: December 2006), p. 1, <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf#page=3>.

68. Sarah Beth Coffey, *Undocumented Immigrants in Georgia: Tax Contribution and Fiscal Concerns* (Atlanta, GA: Georgia Budget and Policy Institute, January 2006), p. 1, <http://www.gbpi.org/pubs/garevenue/20060119.pdf>.

69. Robin Baker and Rich Jones, *State and Local Taxes Paid in Colorado by Undocumented Immigrants* (Denver, CO: The Bell Policy Center, June 30, 2006), p. 1, <http://www.thebell.org/PUBS/IssBrf/2006/06ImmigTaxes.pdf#page=2>.

70. Oregon Center for Public Policy, *Undocumented Workers Are Taxpayers, Too* (Silverton, OR: April 10, 2007), p. 4 <http://www.ocpp.org/cgi-bin/display.cgi?page=issue070410immig>.

71. Beth Pearson and Michael F. Sheehan, *Undocumented Immigrants in Iowa: Estimated Tax Contributions and Fiscal Impact* (Mount Vernon, IA: Iowa Policy Project, October 2007), pp. 30–31, <http://www.iowafiscal.org/2007docs/071025-undoc.pdf#page=30>.

72. Institute on Taxation and Economic Policy, *Undocumented Immigrants' State and Local Tax Contribution* (Washington, DC: July 2013), <http://www.itep.org/immigration/>.

73. National Immigration Law Center, *Overview of Immigrant Eligibility for Federal Programs* (Washington, DC: October 2010), <http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw-fed-pgms-rev-2010-10-07.pdf>.

74. National Immigration Law Center, *Facts about Immigrants' Low Use of Health Services and Public Benefits* (Washington, DC: September 2006), p. 2 <http://www.nilc.org/immspbs/research/imms&publicservices_2006-9-12.pdf#page=2>.

75. Judith Gans, *Immigrants in Arizona: Fiscal and Economic Impacts* (Tucson, AZ: Udall Center for Studies in Public Policy, University of Arizona, 2007), p. 3, <http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf#page=10>.

76. Emily Eisenhauer, et al., *Immigrants in Florida: Characteristics and Contributions* (Miami, FL: Research Institute for Social and Economic Policy, Florida International University, May 2007), pp. 7, 34, <http://www.risep-fiu.org/wp-content/uploads/2009/03/immigrants_spring_2007_reduced.pdf>.

77. Michael Greenstone and Adam Looney, *Ten Economic Facts about Immigration* (Washington, DC: The Hamilton Project, Brookings Institution, September 2010), p. 6, <http://www.brookings.edu/~/media/Files/rc/reports/2010/09_immigration_greenstone_looney/09_immigration.pdf#page=8>.

78. Tomás R. Jiménez, *Immigrants in the United States: How Well Are They Integrating into Society?* (Washington, DC: Migration Policy Institute, May 2011), <http://www.migrationpolicy.org/pubs/integration-jimenez.pdf >.

79. Dowell Myers and John Pitkin, *Assimilation Today: New Evidence Shows the Latest Immigrants to America Are Following in Our History's Footsteps* (Washington, DC: Center for American Progress, September 1, 2010), p. 16, <http://www.americanprogress.org/issues/2010/09/pdf/immigrant_assimilation.pdf#page=19>.

80. James Lee, *U.S. Naturalizations: 2012* (Washington, DC: Department of Homeland Security, Office of Immigration Statistics, March 2013), p. 2, <http://www.dhs.gov/sites/default/files/publications/ois_natz_fr_2012.pdf#page=2>.

81. Tomás R. Jiménez, *Immigrants in the United States: How Well Are They Integrating into Society?* (Washington, DC: Migration Policy Institute, May 2011), p. 12, <http://www.migrationpolicy.org/pubs/integration-jimenez.pdf >.

82. Bryan C. Baker, *Trends in Naturalization Rates: 2008 Update* (Washington, DC: U.S. Department of Homeland Security, Office of Immigration Statistics, June 2009), p. 2, <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_natztrends_fs_2008.pdf>.

83. Dowell Myers and John Pitkin, *Assimilation Tomorrow: How America's Immigrants Will Integrate by 2030* (Washington, DC: Center for American Progress, November 2011), p. 2, <http://www.americanprogress.org/wp-content/uploads/issues/2011/11/pdf/dowell_assimilation_report.pdf#page=5>.

84. Pew Research Center, *Second-Generation Americans: A Portrait of the Adult Children of Immigrants* (Washington, DC: February 7, 2013), p. 9, <http://www.pewsocialtrends.org/files/2013/02/FINAL_immigrant_generations_report_2-7-13.pdf#page=9>.

85. James P. Smith, "Assimilation across the Latino Generations," *American Economic Review* 93, no. 2 (Washington, DC, May 2003), pp.315–319, <http://econpapers.repec.org/article/aeaaecrev/v_3a93_3ay_3a2003_3ai_3a2_3ap_3a315-319.htm>.

86. Elizabeth M. Grieco, et al., *The Size, Place of Birth, and Geographic Distribution of the Foreign-Born Population in the United States: 1960 to 2010* (Washington, DC: U.S. Census Bureau, October 2012), p. 19, <http://www.census.gov/population/foreign/files/WorkingPaper96.pdf#page=19>.

87. Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (Washington, DC: Pew Hispanic Center, February 1, 2011), p. 23, <http://www.pewhispanic.org/files/reports/133.pdf#page=24>.

88. FBI, Uniform Crime Reports, prepared by the National Archive of Criminal Justice Data, Date of download: July 16, 2013, <http://www.ucrdatatool.gov/>.

89. Richard Nadler, *Immigration and the Wealth of States* (Overland Park, KS: Americas Majority Foundation: January 2008), p. 9, <http://immigrationworksusa.org/uploaded/file/ImmigrationandWealth.pdf#page=11>.

90. Rubén G. Rumbaut and Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men* (Washington: DC: Immigration Policy Center, American Immigration Law Foundation, Spring 2007), pp. 6–10, <http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf#page=8>.

91. *Immigrants and Crime* (San Francisco, CA: Public Policy Institute of California, June 2008), <http://www.ppic.org/content/pubs/jtf/JTF_ImmigrantsCrimeJTF.pdf>.

92. Kristin F. Butcher and Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation*, Working Paper 2005-19 (Chicago, IL: Federal Reserve Bank of Chicago, November 2005), p. 2, <http://www.chicagofed.org/digital_assets/publications/working_papers/2005/wp2005_19.pdf#page=5>.

93. During the last period of large-scale immigration at the beginning of the twentieth century, three federal commissions reached this conclusion along with the U.S. Commission on Immigration Reform in a 1994 report. And so have academic researchers using data from the 1980, 1990, and 2000 Census; the National Longitudinal Study of Adolescent Health; and community studies in Chicago, San Diego, El Paso, and Miami. See Rubén G. Rumbaut and Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men* (Washington: DC: Immigration Policy Center, American Immigration Law Foundation, Spring 2007), pp. 13–14, <http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf#page=15>.

94. Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, January 2013), p. 3, <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf#page=9>.

95. Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (Washington, DC: Pew Hispanic Center, February 1, 2011), p. 23, <http://pewhispanic.org/files/reports/133.pdf#page=24>.

96. Terry Goddard, *How to Fix a Broken Border: A Three Part Series* (Washington, DC: Immigration Policy Center, American Immigration Council, September 2011, February 2012, and May 2012), <http://www.immigrationpolicy.org/perspectives/how-fix-broken-border-three-part-series>.

U.S. CHAMBER OF COMMERCE
Labor, Immigration & Employee Benefits

1615 H Street, NW | Washington, DC 20062

Why They Come: The Real Reason for the Surge of Unaccompanied Children in the United States

HUFFINGTON POST
By Andrew Tucker Avorn
Posted: 10/30/2014 3:43 pm EDT

Americans have been wondering why the recent surge of unaccompanied children streaming into the United States is happening, and why it's happening right now. Debate rages over why children flee their homes in Central America, but a little-known U.S. counter narcotics policy may explain how this exodus started.

The surge of migrants actually began in the fall of 2011, and the number of children crossing the Southern border has increased every year since then. U.S. Customs and Border Patrol apprehended 68,541 children in 2014, and the number is expected to reach 145,000 in 2015. Some commentators claim that children migrate because *coyotes* promise them immigration reform, or that they migrate to pursue economic opportunities in the United States. According to Sen. Ted Cruz (R.-Texas), "It's been widely reported that the administration is contemplating yet another amnesty...Granting another amnesty will result in those numbers being even higher.

Explanations based on the possibility that our logjammed Congress will pass comprehensive immigration reform--or explanations that credit the public relations acumen of human traffickers--do not merit serious consideration. The real reason that children flee is that conditions in the Northern Triangle (Honduras, El Salvador, and Guatemala) have deteriorated sharply in the past four years. I have asked children why they left their home countries, and they overwhelmingly cite violence as the number one reason. But the question remains: why has life in those three countries recently become so unlivable for children?

The real explanation for the surge has to do with the "balloon theory" of counter narcotics strategy: squeeze the balloon by cutting off supply routes in one place, and drug traffickers pop up somewhere else. Right now, the path of least resistance cuts through the heart of Central America. As Sonia Nazario (author of *Enrique's Journey*and a board member of Kids in Need of Defense, an organization for which I do pro bono work) testified to Congress, "The U.S. has spent billions to disrupt the flow of drugs from Colombia up the Caribbean corridor. The narco cartels, mostly Mexican, have simply re-routed inland, and four in five flights of cocaine bound for the U.S. now land in Honduras."

Since 2010, for example, Congress has spent over $263 million on a program called the Caribbean Basin Security Initiative ("CBSI") to stem the flow of illegal drugs through Caribbean transit points. The share of cocaine destined for the United States fell from 75% in the mid-1980s, to a low of 4% in 2011, thanks in part to U.S. drug interdiction. Although Caribbean drug traffic is back on the rise, many traffickers fled to Central America when they encountered resistance, and they never left. It's no surprise that the beginning of the surge of migrants directly coincided with effective U.S. drug enforcement efforts in the Caribbean Corridor.

Mexico's recent drug policies have also played a role. Since Mexican President Felipe Calderon declared war on drug traffickers in 2006, transporting narcotics through Mexico has become more dangerous and expensive for cartels. Since the crackdown began, as many as 80,000 people have been killed in Mexico's narco wars. This is bad for business for the Zetas and Pacific (Sinaloa) cartels. According to a recent reportfrom the United Nations Office on Drugs and Crime, "downward pressure from the Mexican security strategy...has virtually suspended direct shipments to Mexico and forced as much as 90% of the cocaine flow into the bottleneck of Guatemala."

Even Honduras's current president blames counter narcotics policies for the surge in migrants. This summer, he told a Mexican newspaper, "The root cause [of the migration] is that the United States and Colombia carried out big operations in the fight against drugs. Then Mexico did it," which, he said, pushed traffickers into Honduras, Guatemala, and El Salvador. "This is creating a serious problem for us that sparked this migration."

The influx of drug traffickers into the Northern Triangle, and resulting turf battles between rival gangs vying for lucrative transit points for northbound drugs, have made the Northern Triangle the planet's most dangerous region for people who live there. Honduras has the highest murder rate in the world, with more than 90 murders per 100,000 inhabitants. El Salvador has the dubious distinction of the highest child murder rate in the world. For context, Honduras is more than four times as murderous as Mexico, a country that became too dangerous even for its own drug cartels. Compare Honduras's murder rate of 90.4 with the rates in active war zones like Iraq's 8.0, or Afghanistan's paltry 6.5, and the true terror of living in one of these countries as one of its most vulnerable citizens comes into focus.

The surge of traffickers and drug money in the Northern Triangle in the past few years did not create the problems faced by Central American children, but it has exacerbated poor conditions until they reached a tipping point in late 2011. These countries have notoriously poor governance, with large swaths of territory ruled by gangs, virtually untouched by government or police. In 2009, Honduras's military overthrew its democratically elected government in a coup, which decimated that country's already

weak institutions. After the coup, the United States worked through diplomatic channels to ensure that Honduras's left-leaning president did not return to power.

To make matters worse, the United States deported thousands of Central American gang members into the Northern Triangle after those countries' civil wars in the late 1990s, effectively importing Los Angeles-style gang culture into societies that were already teetering on the edge of collapse. Street gangs like MS-13 have filled the power vacuums in these near-failed states, falsely promising a sense of security to the children they recruit. (Compare the case of Nicaragua, which is just as poor as its Central American neighbors, but did not receive an influx of deported gang members. Nicaragua is relatively safe and does not produce significant numbers of refugees).

Of course the United States represents better prospects for children migrants, just as it always has been for the millions of people who have immigrated here over the centuries. But claiming that the main motivation of the children who flee the Northern Triangle is anything other than violence and danger is worse than false, because such claims try to absolve Americans of the responsibility for solving the crisis. If we believe that the recent arrivals are just immigrants moving here to find jobs (the fact that they are children who should be in school notwithstanding) or because we think they want a free pass to citizenship, then there is no urgent need to help them. But understanding what's really going on in the Northern Triangle, and why, imposes a moral responsibility on Americans to treat these children as what they are: refugees fleeing a serious humanitarian crisis.

Andrew T. Avorn is a litigation attorney at K&L Gates LLP. He has been temporarily posted to Kids In Need of Defense (KIND), where he represents unaccompanied children in asylum proceedings. The views expressed are solely those of the author and do not necessarily represent the views of KIND and/or K&L Gates.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies for the Apprehension, Detention and Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,* March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens,* June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases,* November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,* December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations,* December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;[1] 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, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal[2] on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

---

[1] In evaluating whether the offense is a significant misdemeanor involving ..domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. *See generally,* John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* June 17, 2011.

[2] For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

OFFICE OF INSPECTOR GENERAL

U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations

Homeland Security

December 24, 2014

OIG-15-17

HIGHLIGHTS

U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations

December 24, 2014

Why We Did This

We conducted this audit to determine the effectiveness and cost of the Unmanned Aircraft System program, in which U.S. Customs and Border Protection (CBP) has invested significant funds.

What We Recommend

We made four recommendations to conduct an independent study before acquiring more unmanned aircraft, lift the limitations on radar sensor operations, establish attainable goals and performance measures, and gather and report all program costs.

For Further Information:
Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

Although CBP's Unmanned Aircraft System program contributes to border security, after 8 years, CBP cannot prove that the program is effective because it has not developed performance measures. The program has also not achieved the expected results. Specifically, the unmanned aircraft are not meeting flight hour goals, and we found little or no evidence CBP has met its program expectations. We estimate it costs $12,255 per flight hour to operate the program; CBP's calculation of $2,468 per flight hour does not include all operating costs. By not recognizing all operating costs, CBP cannot accurately assess the program's cost effectiveness or make informed decisions about program expansion. In addition, Congress and the public may be unaware of all the resources committed to the program. As a result, CBP has invested significant funds in a program that has not achieved the expected results, and it cannot demonstrate how much the program has improved border security. The $443 million CBP plans to spend on program expansion could be put to better use by investing in alternatives.

CBP Response

CBP concurred with one recommendation and concurred in principle with the remaining three recommendations.

Table of Contents

Executive Summary 1

Background 2

Results of Audit 4

Effectiveness of the UAS Program 4
UAS Program Cost 7
Future UAS Program Costs 9

Recommendations 11

Management Comments and OIG Analysis 12

Appendixes

Appendix A: Objectives, Scope, and Methodology 20
Appendix B: Management Comments to the Draft Report 22
Appendix C: Excerpt from JFC Vader Concept of Operations 30
Appendix D: Data Used in OAM's Cost Per Flight Hour 31
Appendix E: Major Contributors to This Report 32
Appendix F: Report Distribution 33

Abbreviations

CBP	U.S. Customs and Border Protection
CONOPS	Concept of Operations
DHS	Department of Homeland Security
FY	fiscal year
GSA	General Services Administration
JFC	Joint Field Command
OAM	Office of Air and Marine
OCRSO	Office of the Chief Readiness Support Officer
OIG	Office of Inspector General
OIIL	Office of Intelligence and Investigative Liaison
OMB	Office of Management and Budget
UAS	Unmanned Aircraft System
USBP	U.S. Border Patrol
VADER	Vehicle and Dismount Exploitation Radar

Executive Summary

U.S. Customs and Border Protection (CBP) guards nearly 7,000 miles of U.S. land border and 2,000 miles of coastal waters surrounding Florida, Texas, and southern California. CBP's Office of Air and Marine uses air assets, including unmanned aircraft to patrol the borders, conduct surveillance, and assess disaster damage. The objective of our audit was to determine the effectiveness and cost of CBP's Unmanned Aircraft System program.

Although CBP's Unmanned Aircraft System program contributes to border security, after 8 years, CBP cannot prove that the program is effective because it has not developed performance measures. The program has also not achieved the expected results. Specifically, the unmanned aircraft are not meeting flight hour goals. Although CBP anticipated increased apprehensions of illegal border crossers, a reduction in border surveillance costs, and improvement in the U.S. Border Patrol's efficiency, we found little or no evidence that CBP met those program expectations. CBP also planned to use unmanned aircraft to operate a radar sensor over the southwest border to increase awareness and analyze surveillance gaps, but sensor operations have been limited. In addition, the unmanned aircraft do not operate along the entire southwest border as has been reported.

We estimate that, in fiscal year 2013, it cost at least $62.5 million to operate the program, or about $12,255 per hour. The Office of Air and Marine's calculation of $2,468 per flight hour does not include operating costs, such as the costs of pilots, equipment, and overhead. By not including all operating costs, CBP also cannot accurately assess the program's cost effectiveness or make informed decisions about program expansion. In addition, unless CBP fully discloses all operating costs, Congress and the public are unaware of all the resources committed to the Unmanned Aircraft System program. As a result, CBP has invested significant funds in a program that has not achieved the expected results, and it cannot demonstrate how much the program has improved border security.

Given the cost of the Unmanned Aircraft System program and its unproven effectiveness, CBP should reconsider its plan to expand the program. The $443 million that CBP plans to spend on program expansion could be put to better use by investing in alternatives, such as manned aircraft and ground surveillance assets.

We made four recommendations to put limited funds to better use, improve border security, demonstrate program effectiveness, and improve program transparency.

Background

CBP guards nearly 7,000 miles of U.S. land border and 2,000 miles of coastal waters surrounding Florida, Texas, and southern California. To accomplish its mission, CBP's Office of Air and Marine (OAM) uses a variety of air assets to patrol the borders, conduct surveillance, and assess disaster damage. The air assets include helicopters, fixed-wing aircraft, and Predator B unmanned aircraft. The Unmanned Aircraft System (UAS) program includes Predator B aircraft, as well as ground control stations, pilots, sensor operators, video cameras, land and maritime radar, and communication equipment.

CBP began UAS operations in fiscal year (FY) 2004 with a pilot study to determine the feasibility of using UAS along the southwest border of the United States. The study concluded that the unmanned aircraft could carry sensors and equipment and remain airborne for longer periods than CBP's manned aircraft. CBP reported that, from FYs 2005 to 2013, it obligated about $360 million for the purchase of unmanned aircraft and related equipment, and for personnel, maintenance, and support. At the time of our audit, CBP had a fleet of 10 unmanned aircraft.[1] Five were configured for land missions, two for maritime missions, and three could operate over both land and water.

Figure 1: Predator B Unmanned Aircraft
Source: CBP Photo

Predator B Capabilities

- *20 hours of possible flight time*
- *Speed of 276 miles per hour*
- *Altitude of 50,000 feet*
- *Carry 1.9 tons of equipment*

CBP's long-term plan, which is approved by CBP's Chief Procurement Officer, include adding 14 more unmanned aircraft to its fleet to be able to respond to a major event anywhere in the United States within 3 hours and provide first responders with real-time information and imagery. In October 2012, OAM proposed adding about $443 million to the existing support and maintenance contract for its unmanned aircraft to acquire, support, and maintain the additional 14 aircraft. The proposed acquisition of 14 more aircraft would bring

[1] In total, CBP has purchased 11 unmanned aircraft for the UAS program, but 1 crashed in April 2006 and another crashed in January 2014.

CBP's investment in the UAS program (aircraft, equipment, maintenance, and support) to more than $802 million.

Since program inception, OAM has expanded UAS operations beyond the southwest border of the United States to the northern border, the Caribbean, the Gulf of Mexico, and the southern California coast. At the time of our audit, OAM launched its Predator B aircraft from bases in Corpus Christi, Texas; Cocoa Beach, Florida; Grand Forks, North Dakota; and Sierra Vista, Arizona.

The UAS program contributes to border security by providing information to U.S. Border Patrol (USBP) agents and other agencies. For example, UAS operations in Arizona provide border patrol stations with real-time information on the location of suspected illegal border crossings by people on foot or in vehicles. Other UAS missions collect information on intelligence targets.

Each unmanned aircraft carries a video camera that can provide images of people, vehicles, and buildings. Video images can be taken day and night and are transmitted in real time to personnel on the ground. Additionally, two unmanned aircraft in Arizona can carry a Vehicle and Dismount Exploitation Radar (VADER) to detect people and vehicles. When VADER detects a suspected target, a sensor operator uses the video camera to confirm and observe the activity. The sensor operator can then give the location of activity to border patrol agents. In addition, according to CBP, it employs personnel to analyze data obtained by VADER.

Some unmanned aircraft carry a Synthetic Aperture Radar that captures still images. According to CBP, it can use the images to confirm USBP's conclusions about activity in an area. For example, images from the Synthetic Aperture Radar may show tire tracks or footprints in areas where previous images from the sensor showed no activity. The maritime aircraft carry radar that can detect vessels on the ocean.

CBP has conducted some UAS operations for other Department of Homeland Security (DHS) components, as well as Federal, state, and local law enforcement agencies, such as the Federal Emergency Management Agency, U.S. Immigration and Customs Enforcement's Homeland Security Investigations Directorate, Federal Bureau of Investigation, Minnesota Department of Natural Resources, and the Texas Department of Public Safety.

According to OAM, it has achieved other milestones identified in its 2010 UAS Concept of Operations (CONOPS). These milestones, some which have been achieved ahead of the forecasted timeframe, include supporting a full range of mission sets; operating over land borders and over coastal waters and international waters; working with the Federal Aviation Administration to

expand access to the National Airspace System; performing capabilities, including operation of interchangeable sensor payloads and long endurance missions; serving as a test platform for other agency technology projects; and modernizing the OAM UAS through block upgrades.

Results of Audit

Although CBP's UAS program contributes to border security, after 8 years, CBP cannot prove its effectiveness because it has not established verifiable performance measures. In addition, the program has not achieved its expected level of operation. Specifically:

- The unmanned aircraft are not meeting OAM's goal of being airborne 16 hours a day, every day of the year; in FY 2013, the aircraft were airborne 22 percent of the anticipated number of hours.
- The extent of increased apprehensions of illegal border crossers is uncertain, but compared to CBP's total number of apprehensions, OAM attributed relatively few to unmanned aircraft operations.
- OAM cannot demonstrate that the unmanned aircraft have reduced the cost of border surveillance.
- OAM expected the unmanned aircraft would be able to respond to motion sensor alerts and thus reduce the need for USBP response, but we found few instances of this having occurred.
- VADER's restricted operation over only a section of the Arizona border, rather than its anticipated operation over New Mexico, Texas, and a larger section of the Arizona border, has limited CBP's ability to use the sensor to analyze surveillance gaps.

In addition, the unmanned aircraft are not operating along the entire southwest border of the United States, as DHS has reported.

We estimate that, in FY 2013, it cost at least $62.5 million to operate the program, or about $12,255 per hour. Although it may be useful for internal purposes, OAM's calculation of $2,468 per flight hour does not include operating costs such as the costs of pilots, equipment, and overhead. As a result, CBP has invested significant funds in a program that has not achieved the expected results, and it cannot demonstrate how much the program has improved border security.

Effectiveness of the UAS Program

Although CBP's UAS program contributes to border security, its effectiveness cannot be fully evaluated because CBP has not established verifiable performance measures. According to program-related

documents, such as the UAS CONOPS and the UAS Mission Need Statement, expectations included 16-hour flights 7 days a week, increased apprehensions, reduced surveillance costs, improved USBP efficiency, and the ability to analyze surveillance gaps in Arizona, New Mexico, and Texas. A comparison of these documented program expectations with current operations shows that the UAS program is not meeting these objectives. In addition, DHS reported that UAS operations covered the entire southwestern U.S. land border. However, operations focus on relatively small sections of the border.

UAS Flight Hours

According to OAM's UAS CONOPS, by FY 2013, OAM anticipated four 16-hour unmanned aircraft patrols every day of the year, or 23,296 total flight hours.[2] However, the unmanned aircraft logged a combined total of 5,102 flight hours, or about 80 percent less than what OAM anticipated. According to OAM, the aircraft did not fly more primarily because of budget constraints, which prevented OAM from obtaining the personnel, spare parts and other infrastructure for operations, and maintenance necessary for more flight hours. Other contributing factors included flight restrictions and weather-related cancellations. OAM does not operate the unmanned aircraft in certain weather conditions, such as thunderstorms, high winds, or when there is cloud cover. Because of these weather-related limitations alone, OAM's long-term goal of unmanned aircraft operations 24 hours a day, 7 days a week is unrealistic and not attainable.

OAM's inability to achieve the anticipated number of flight hours for its unmanned aircraft is a persistent concern. We reached similar conclusions in our May 2012 audit report on the UAS program.[3]

Apprehensions

It is not possible to determine to what extent using unmanned aircraft increased apprehensions of illegal border crossers. When compared to USBP's total number of reported apprehensions, however, OAM attributed relatively few to use of unmanned aircraft. Table 1 shows the number of apprehensions in FY 2013 that OAM attributed to the UAS program in Arizona and Texas compared to overall numbers reported by USBP for the same areas.

[2] Four patrols multiplied by 16 hours a day multiplied by 7 days a week multiplied by 52 weeks a year equals 23,296 hours.
[3] *CBP's Use of Unmanned Aircraft Systems in the Nation's Border Security*, OIG-12-85, May 2012.

Table 1. OAM-reported Apprehensions Attributed to UAS and USBP-reported Total Number of Apprehensions, FY 2013

Sector	Total Apprehensions Reported By USBP	Apprehensions OAM Attributed to UAS	Percent
Arizona – Tucson	120,939	2,161	1.8%
Texas – Rio Grande Valley	154,453	111	.07%

Source: USBP- and OAM-reported apprehension figures

According to border patrol agents and intelligence personnel in Arizona, USBP probably would have detected the people using ground-based assets, without the assistance of unmanned aircraft. These ground-based assets include Agent-Portable Surveillance Systems and Mobile Surveillance Systems, Unattended Ground Sensors, radar and camera towers, and border patrol agents.

Border Surveillance Costs

According to the UAS Mission Need Statement, OAM expected unmanned aircraft to reduce border surveillance costs by 25 to 50 percent per mile. However, because OAM does not track this metric, it cannot demonstrate that the unmanned aircraft have reduced the cost of border surveillance.

Sensor Alerts

OAM expected that unmanned aircraft would be able to respond to alerts from Unattended Ground Sensors, which USBP uses to detect movement. Sometimes, things like animals or weather, which do not require USBP action, set off the sensors. According to OAM, unmanned aircraft would fly to the location of the alert and determine whether action was necessary, thus reducing the need for border patrol agents to respond and improving USBP's efficiency. We identified only six instances in FY 2013 of unmanned aircraft responding to ground sensor alerts.

Arizona VADER Operations

In Arizona, restricted operation of the VADER sensor limited CBP's ability to analyze data to determine common entry points, times of entry, commonly used trails, and areas where people may have broken through the border fence. Initially, CBP planned to use VADER, which is mounted on unmanned aircraft, over sections of the southwest border. By doing so, CBP expected VADER to "dramatically" affect border operations in Arizona, New Mexico, and Texas.

According to CBP, in 2011, the Department of Defense loaned VADER to CBP for surveillance to identify people and vehicles illegally crossing the southwest border. According to CBP's June 2012 VADER CONOPS, CBP would use the sensor primarily over sections of the border in Arizona, New Mexico, and Texas. VADER would increase awareness of border activity, identify gaps in CBP's surveillance capabilities, and support decision making.

In March 2013, CBP's Joint Field Command (JFC) restricted VADER operations to Arizona and prepared its own CONOPS for the sensor. The JFC limited the length of border covered by the sensor primarily to an area around a single border patrol station. The JFC restricted operations to "increase the certainty of a positive law enforcement resolution," such as apprehension, to VADER detections.

Because of JFC's diminished focus area of operation with VADER, border areas outside the focus area did not benefit from use of the sensor. In addition, CBP's Office of Intelligence and Investigative Liaison (OIIL) could not analyze the sensor data as described in CBP's June 2012 VADER CONOPS to determine entry points, trails, and fence breakthroughs along other areas of the border.

Border Coverage

According to DHS' *Annual Performance Report, Fiscal Years 2012–2014*, the UAS program "expanded unmanned aircraft system coverage to the entire Southwest Border." Although the Federal Aviation Administration permits OAM to fly over the southwest border from California to the Texas gulf coast, the unmanned aircraft focus on relatively small portions of the border.

For example, according to CBP, in FY 2013 UAS operations along the 1,993-mile southwest border focused on about 100 miles of Arizona border and operations in Texas concentrated on about 70 miles of that state's border.

UAS Program Cost

OAM has not accumulated or reported all the costs of the UAS program. For FY 2013, we estimated it cost about $62.5 million to support 5,102 unmanned aircraft flight hours, or $12,255 per hour.[4] In that same fiscal year, OAM calculated a cost per flight hour of $2,468, which included the

[4] Our estimate includes about $7.6 million for depreciation of 10 unmanned aircraft and equipment.

costs of the aircraft maintenance and support contract (parts, labor, and repairs), fuel, and satellites. OAM's calculation does not include all costs, such as the costs of personnel, contract support, and equipment, which represent about 80 percent of our estimated cost to operate and support the program. According to OAM, its calculation for determining aircraft cost per flight hour is a standard practice similar to that used by the Department of Defense.

Table 2 compares the costs the Office of Inspector General (OIG) included in our estimate of UAS program cost to the costs included in OAM's calculation. We estimated the total cost per flight hour, both with and without personnel costs.

Table 2. OIG-estimated Total Cost per Flight Hour and OAM Calculation of Cost per Flight Hour for UAS Program, FY 2013

Cost Type	OIG Estimate	OAM Calculation
Contract Support, Equipment, and Overhead		
Maintenance and Support (parts, labor, repairs)	$24,543,564	$9,458,567
Satellite	$2,986,077	$1,952,000
Fuel	$643,651	$632,941
Depreciation	$7,650,000	$0
VADER	$1,700,000	$0
Operational Support	$5,541,227	$0
Engineering Services	$188,450	$0
Base Overhead	$2,146,569	$0
Total	**$45,399,538**	**$12,043,508**
Flight Hours	÷ 5,102	÷ 4,880*
Cost per flight hour (without personnel)	**$8,898**	**$2,468**
Personnel		
OAM Personnel (full-time)	$8,215,000	$0
OAM Personnel (part-time)**	$2,867,500	$0
United States Coast Guard Support	$1,775,853	$0
USBP Sensor Operators	$1,395,000	$0
OIIL Personnel	$2,726,780	$0
Premium Pay & Overtime	$145,413	$0
Grand Total	**$62,525,084**	**$12,043,508**
Flight Hours	÷ 5,102	÷ 4,880
Full cost per flight hour (with personnel)	**$12,255**	**$2,468**

Source: OIG analysis of UAS program-related costs and OAM data on its cost per flight hour

* According to OAM, it used flight hours from its maintenance system rather than hours from the Tasking, Operation, and Management Information System (the system we used).

** According to OAM, it has also cross-trained some pilots to fly the unmanned aircraft when they are not flying their normally assigned aircraft.

OAM said it does not include all the costs we included in our estimate because some are funded by other sources. For example, OAM does not include:

- the salaries of pilots because separate appropriations for air and marine operations funds them; and
- the cost of the VADER or analysis of VADER data because OIIL funds these.

The Office of Management and Budget's (OMB) Circular A-126 Revised, *Improving the Management and Use of Government Aircraft,* requires all Federal agencies with aircraft programs to accumulate all costs associated with the programs, including the cost of crew, maintenance, fuel and other fluids, leasing, landing fees, operations and administrative overhead, accident repairs, and acquisition costs. Agencies need to understand the full cost of a program to accurately determine cost effectiveness and to conduct cost comparisons when choosing aircraft.

Federal agencies must also report all their aviation activities, including costs, in the General Services Administration's (GSA) Federal Aviation Interactive Reporting System. Agencies are to report costs for crew, fuel, maintenance, and overhead. According to data provided by GSA, OAM has not reported crew or overhead costs for the UAS, or any other aircraft, since 2005.

We included costs in our estimate based on the cost elements defined by OMB. These include the costs necessary for UAS program support and operation, including pilots; support personnel, such as sensor operators; equipment; depreciation; and overhead. According to OAM, including the cost of personnel in a calculation of cost per flight hour is not standard practice. However, we believe OAM should report the full cost of the program so the Department can conduct a more accurate cost comparison to help choose the proper surveillance aircraft or decide to use nonflight-related surveillance methods.

Future UAS Program Costs

OAM's long-term plans include acquiring 14 more unmanned aircraft for its fleet, which will cause the cost of the UAS program to continue to rise. On April 4, 2012, in response to a draft of our audit report on the UAS program, OAM asserted that it did not plan to add more unmanned

aircraft to the UAS fleet unless directed by a higher authority.[5] Yet, in February 2012, OAM had already drafted a plan for acquiring 14 more aircraft. On April 6, 2012, 2 days after OAM's assertion to us, the contracting officer reviewed and concurred with the plan, which the DHS Chief Procurement Officer approved in October 2012. In November 2012, in a Justification for Other than Full and Open Competition, OAM proposed adding about $443 million to the existing support and maintenance contract to acquire, support, and maintain the additional 14 aircraft. This amount does not include funding CBP may need for more personnel to operate the aircraft, which could also increase the cost.

According to OAM UAS program officials, they may have to expand the UAS program because, in a July 2008 memorandum, DHS approved the acquisition of unmanned aircraft. In its 2008 memorandum, however, DHS approved OAM's plan to acquire up to 24 unmanned aircraft; it did not require OAM to acquire all 24 aircraft.

OAM also continues to invest in new technology for the UAS program, which will further increase program costs. For example, in FY 2013, OAM acquired two VADERs for $16.8 million. Contracted support for these new sensors will cost OAM an additional $1.7 million for 1 year. In the long term, OAM plans to purchase more VADERs to increase its total number of sensors to six.

Conclusion

CBP's UAS program contributes to border security, but the program's effectiveness is unproven and program expectations have not been met. Specifically, CBP has not established performance measures and the unmanned aircraft are not meeting flight hour goals. Although CBP expected that the UAS program would result in increased apprehensions of illegal border crossers, reduce the cost of border surveillance, and improve the USBP's efficiency, we found little or no evidence that CBP met those expectations. In addition, VADER operations have been limited, and the unmanned aircraft do not operate along the entire southwest border as has been reported.

CBP does not calculate the total operating cost of the program. By not including all operating costs, CBP also cannot accurately assess the program's cost effectiveness or make informed decisions about program

[5] *CBP's Use of Unmanned Aircraft Systems in the Nation's Border Security*, OIG-12-85, May 2012

expansion. As a result, CBP has invested significant funds in a program that has not achieved the expected results, and it cannot demonstrate how much the program has improved border security. In addition, unless CBP fully discloses all operating costs, Congress and the public are unaware of all the resources committed to the UAS program.

Given that, after 8 years of operations, the UAS program cannot demonstrate its effectiveness, as well the cost of current operations, OAM should reconsider its planned expansion of the program. CBP could put the $443 million it plans to spend to expand the program to better use by investing in alternatives, such as manned aircraft and ground surveillance assets.

Recommendations

We recommend that the Commissioner, U.S. Customs and Border Protection:

Recommendation #1:

Coordinate with the DHS Office of the Chief Readiness Support Officer (OCRSO) to conduct an independent study, before acquiring more unmanned aircraft, to determine whether:

- additional unmanned aircraft are needed and justified; and
- future funding should be used to invest in the current program or invested in other alternatives, such as manned aircraft and ground assets, to enhance surveillance needs.

Recommendation #2:

Require the JFC to lift the limitations on VADER and allow the analysis expected in the original plan for the sensor's operation.

Recommendation #3:

Require OAM to revise its UAS CONOPS to include attainable goals for the program, along with verifiable performance measures.

Recommendation #4

In coordination with the DHS OCRSO, require OAM to develop policies and procedures to ensure that it accumulates and reports all costs associated with the UAS program and other OAM flight programs.

Management Comments and OIG Analysis

CBP concurred with one of our recommendations, concurred in principle with the remaining three recommendations, and provided comments to the draft report. A summary of CBP's responses and our analysis follows. We have included a copy of the management comments in their entirety in appendix B. CBP also provided technical comments to our report. We made changes to incorporate these comments, as appropriate.

Response to Recommendation #1: CBP concurred in principle. However, CBP said that the recommendation is based on a misunderstanding of OAM's procurement plans. According to CBP, at this time, it has no plans to acquire additional unmanned aircraft other than a replacement for the aircraft that crashed in January 2014, nor does OAM have a contract or funding in place to expand the program. OAM's existing UAS program funding is being used to expand the program's infrastructure and achieve a greater level of utilization of its existing fleet. Until OAM is able to elevate the staffing, operations, and maintenance of its existing fleet, it does not support expanding the number of unmanned aircraft. CBP requested that we close this recommendation.

OIG Analysis: CBP's comments do not address the recommendation. We believe that OAM's long-term plan is to expand its fleet of unmanned aircraft. OAM's intent to expand the program is clearly stated in its Acquisition Plan and Justification for Other Than Full and Open Competition. According to the justification, this "requirement" supports the CBP Commissioner's 2008 Acquisition Decision Memorandum and CBP's 2010 Strategic Air and Marine Plan "both of which document OAM's plans for a fleet of 24 unmanned aircraft and supporting systems."

CBP said OAM does not have funding in place to expand its fleet of unmanned aircraft; however, according to OAM's Acquisition Plan, "the plan is based on the assumption that the UAS program will receive new initiative or supplemental funding to reach end state goals. Prior funding has been provided in a similar manner."

In addition, CBP's response indicates that if OAM elevates staffing, operations, and maintenance, it would support expanding the program.

After issuing our draft report, we reached out to OCRSO to help CBP implement this recommendation. OCRSO has a key role in the DHS Joint Requirements Council and the Joint Requirements Council Aviation

Commonality Portfolio Team, which assesses current operational needs and determines ways to fulfill those needs.

The recommendation will remain unresolved and open until CBP conducts an independent study to determine whether expanding the program is the best use of funds for border security.

Response to Recommendation #2: CBP concurred in principle. However, according to CBP, the recommendation is based on a misunderstanding that the JFC has limited VADER operations and analysis of the sensor's products. Previous limitations, based on external factors over which the JFC had no control, have already been resolved. CBP has operated VADER outside the JFC area of operations and will continue to deploy the asset to the highest priority location for DHS and CBP. CBP requested that we close this recommendation.

OIG Analysis: CBP's comments do not address the recommendation. In its response, CBP said that our assertion that the JFC decided on its own to set geographic limitations on the use of VADER is inaccurate. Yet, as shown in the portion of the JFC's VADER CONOPS in appendix C, JFC set these limitations and identified a specific section of the border as the "primary focus" of the FY 2013 VADER campaign. CBP also said there were earlier geographic limitations placed on locations for VADER operations, due to factors external to the JFC, such as airspace and other restrictions. We recognize that there were airspace limitations in a portion of Arizona and other restrictions in Texas. However, we are unaware of any restrictions in New Mexico and the stated restrictions do not explain reducing VADER operations to a single station's area of responsibility in Arizona.

CBP also said it developed its June 2012 VADER CONOPS prior to VADER operations. According to the VADER CONOPS, however, CBP fully integrated VADER on its unmanned aircraft in December 2011. OAM flew 58 VADER missions between January 1, 2012, and June 26, 2012 (the date CBP's VADER CONOPS was approved). According to CBP, the JFC and OAM essentially outperformed the requirements in the initial (June 2012) VADER CONOPS.

Table 3 shows the results of VADER operations in FY 2013 before and after the JFC limitation (set in March 2013).

Table 3. FY 2013 VADER Missions Before and After the JFC's March 2013 Limitation

JFC Limitation, March 13, 2013	Average Length of VADER Operations (Kilometers)	Total Number of Detections	Number of flights
Before	164	12,968	83
After	71	5,456	93

Source: OIG analysis of FY 2013 daily VADER flight logs

CBP also said the JFC has shared all VADER- and UAS-related data with OIIL. The OIIL Processing Exploitation Dissemination cell at the Air and Marine Operations Center receives all video feeds, intelligence collections, and VADER feeds directly. We recognize that OIIL received the data and produced daily VADER reports, but these reports are mission summaries that show where VADER detected people. The reports from the cell do not identify common entry points, times of entry, commonly used trails, and areas where people may have broken through the border fence. These daily reports are not the strategic analysis that OIIL and CBP envisioned in the initial plans.

CBP provided information showing trend analysis of VADER data obtained between April 2012 and July 2013 in November 2014.

We believe it would be more effective in the long term to use VADER as originally planned and capture more data to analyze and detect more people. The recommendation will remain unresolved and open until CBP requires the JFC to lift its limitation on VADER operations.

Response to Recommendation #3: CBP concurred. CBP said that OAM has already begun the process of revising its UAS CONOPS, which will include performance measures. The estimated completion date is March 31, 2015.

OIG Analysis: CBP's comments appear to be responsive to this recommendation, which will remain open and resolved until OAM provides the revised UAS CONOPS that includes verifiable performance measures showing the impact unmanned aircraft have on border security. The performance measures should go beyond the capabilities of the aircraft and sensors to demonstrate return on investment and impact on border security.

Response to Recommendation #4: CBP concurred in principle. CBP agreed that establishing and following policies and procedures ensures transparency of all costs associated with all flight programs and is a required and necessary part of flight programs. According to its response,

CBP currently reports all required costs directly associated with the operations of unmanned aircraft; however, there is no one formulaic tool that encompasses all parts of the program to derive totals for program cost. CBP said there are numerous methodologies and approaches that satisfy the requirement to report all costs associated with a program. CBP will continue to exercise its current methodology in computing program costs, including its previously developed cost per flight hour model. CBP's use of the cost per flight hour provides management with one tool to assess program performance. Alone, cost per flight hour does not capture the total program cost because it does not include all elements of the program, but it does identify internal trends. CBP said it has met the intent of the recommendation because OAM's approach meets current OMB standards. CBP requested that we close this recommendation.

OIG Analysis: CBP's comments do not address this recommendation. In its response, CBP acknowledged that establishing and following policies and procedures ensures transparency of all costs associated with all flight programs and is required and necessary for the programs. Although CBP recognized that its cost per flight hour does not capture the total program cost, it will continue to use its current methodology to compute program costs. CBP's current methodology includes about 20 percent of the full cost to own and operate unmanned aircraft.

OAM said it did not agree with the figures we used for its calculation of cost per flight hour and they should not form the basis for cost per flight hour calculations. Appendix D contains the figures OAM informed us it used in its calculation.

OAM disagreed with our estimate, specifically the cost for maintenance and support, satellite, and fuel. OAM said these figures are inaccurate because they are not the actual amounts billed to the contracts. OAM also acknowledged that Government contracts typically take months or years to fully close out depending on contract value, complexity, and number of subcontractors. We used the amounts in the contracts because contractors may continue to submit invoices for costs incurred in FY 2013.

OAM said that amounts paid on the contract were significantly less than the amounts we used. In an attempt to reconcile differences in our costs and what OAM believed to be more accurate, we requested additional information from OAM. Based on OAM's comments, we removed $427,278 from the amount for the engineering services contract. This amount includes services for both manned and unmanned aircraft, but

we could not separate them. According to information OAM provided, as of November 10, 2014, most of the maintenance and support, satellite, and operational support contracts have been paid. Table 4 shows the contract amounts and the updated information that OAM provided.

Table 4. Contract Amounts Compared to Updated Information from OAM

Contracts	Contract Amount	Amount Paid	Percent
Maintenance/Support	$24,543,564	$23,079,992	94
Satellite	2,986,077	2,338,768	78
Operational Support	5,541,227	5,076,266	92
Total	$33,070,868	$30,495,026	92

Source: Updated information from OAM on contract amounts

OAM disagreed with our inclusion of depreciation in our estimate. According to GSA's *U.S. Government Aircraft Cost Accounting Guide*, depreciation represents the cost or value of ownership and is the method used to spread the acquisition cost, less residual value, over an asset's useful life. Although these costs are not direct outlays as is the case with most other costs, it is important to recognize them for analysis.

OAM also disagreed with us including UAS Headquarters Program Office support, base overhead, personnel, and VADER in the total cost of the program. OAM does not recognize the cost associated with VADER even though it uses VADER detections as a measure for UAS performance. All of these costs are all directly related to the UAS program.

According to CBP, the language in OMB Circular A-126 and its governing authorities does not specifically apply to the operation of unmanned aircraft and "there is still a great deal of ambiguity in how the circular applies." Nevertheless, CBP said that OAM has been "prudent" in applying "the general intent" of the circular and is operating in a manner consistent with its "spirit." In its response CBP noted OIG's reference to the circular's requirement that "Federal agencies with aircraft programs to accumulate all costs associated with the programs, including the cost of crew, maintenance, fuel and other fluids, leasing, landing fees, operations and administrative overhead, accident repairs, and acquisition costs." According to CBP, this is an important consideration for cost planning, which OAM applies to all of its aviation assets. However, as shown in our report and CBP's response, OAM does not recognize all costs of the UAS program and intends to continue using its current methodology to compute program costs.

In addition, Title 41 of the Code of Federal Regulations § 102-33 – *Management of Government Aircraft*, requires Federal agencies to account for the operations and ownership cost of their aircraft as described in the *Government Accounting Guide*, which follows OMB Circular A-126. With some exceptions, such as the armed forces and intelligence agencies, the requirements "apply to all federally funded aviation activities of executive agencies of the U.S. Government." GSA is revising this section of the Code of Federal Regulations to include unmanned aircraft and estimates the revision will be published in the Federal Register by December 31, 2014.

Subsequent to our draft report, we included DHS' OCRSO to assist CBP in implementing this recommendation. OCRSO has a lead role on the Aviation Governance Board, which is DHS' governing authority over aviation-related mission support activities, including policy.

The recommendation will remain open and unresolved until OAM recognizes and reports all costs associated with the UAS program and other OAM flight programs.

Expected Results

In its response, CBP said we cited a limited sample of expected results from historical documents, some going back to 2007. Because OAM does not have performance measures for the unmanned aircraft, we used all the expected results from OAM's documents. The expected results we identified appear reasonable. For example, we expected to see an increase in apprehensions or an increase in USBP efficiency by having the unmanned aircraft respond to ground sensor alerts. In addition, we expected to see aircraft capable of being airborne for up to 20 hours to be in the air more than they are. Instead, we found little or no evidence that OAM achieved its expected results.

Apprehensions

CBP said that apprehensions are not an appropriate measure of unmanned aircraft performance. According to CBP, the role of the unmanned aircraft, specifically VADER, is to report detections. The unmanned aircraft detect targets of interest and provide this information to personnel on the ground who apprehend the suspects. Aircraft are only credited with contributing to the apprehension if they remain on the scene until the apprehension is verified. CBP said a better measure of performance is detections.

According to JFC's VADER CONOPS, VADER's primary role is to provide detection, classification, and tactical cueing in a geographically focused area, resulting in an increased certainty of interdiction. According to OAM, in FY 2013 VADER operations detected, identified, and classified 18,239 suspected undocumented aliens and smugglers. However, OAM could only attribute 2,172 apprehensions to unmanned aircraft. In addition, OAM's FY 2013 detection statistic is for VADER in Arizona, which only comprised about 28 percent of the total flight hours for the program in that fiscal year.

CBP also said we did not recognize other UAS program achievements. Specifically, our draft report did not include seizure statistics along the southwest border and during transit zone operations. We did not include these statistics in the draft report because OAM's documents did not identify expected results for seizures. However, Table 5 shows the amount of marijuana seized along the southwest border that OAM attributed to the UAS program compared to the overall numbers reported by USBP for the same areas. CBP also said that unmanned aircraft operations in Central America and Hispaniola interdicted 7,439 pounds of cocaine and 2,000 pounds of marijuana.

Table 5. OAM-reported Marijuana Seizures Attributed to the UAS Program and USBP-reported Total Seizure Amounts, FY 2013

Sector	Total Pounds of Seized Marijuana Reported By USBP	Pounds of Seized Marijuana OAM Attributed to the UAS program	Percent
Arizona – Tucson	1,193,083	16,345	1.37%
Texas – Rio Grande Valley	797,249	33,103	4.15%

Source: USBP- and OAM-reported marijuana seizure figures

Border Surveillance Costs

In its response to our draft report, CBP said it did not adopt reduction of border surveillance costs as a performance measure.

Sensor Alerts

CBP said that, initially, responding to sensor alerts with unmanned aircraft was appropriate for its technological capabilities. CBP used unmanned aircraft for this function before implementing VADER and continues to perform this function on a limited basis. According to CBP, however, technological advances to the system have made this a less

efficient use of the unmanned aircraft's current capabilities, negating its significance as a performance measure. At the time of our audit, CBP operated one VADER in Arizona, which only comprised about 28 percent of the total flight hours for the program in FY 2013.

Border Coverage

According to CBP, our statements that unmanned aircraft are not operating along the entire southwest border are inaccurate. CBP said OAM has authorization to fly, and has flown, the unmanned aircraft along every stretch of the southwest border, from California to the Texas gulf coast.

OAM provided additional flight hour information that showed 44.6 hours flown over California and 3.8 hours flown over New Mexico. The California hours involved an unmanned aircraft flying over that state to conduct missions over water off the state's southern coast. We do not know what the 3.8 hours over New Mexico flight hours involved. OAM did not provide information that showed surveillance missions in either of these states.

We believe it is misleading for CBP to report that its unmanned aircraft operate over every stretch of the southwest border when these flights appear to be simply on the way to another mission.

Appendix A
Objectives, Scope, and Methodology

DHS OIG was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

The objective of our audit was to determine the effectiveness and cost of CBP's UAS program. To answer our objective, we:

- Interviewed officials at OAM in Washington, DC, to gain an understanding of the UAS program and obtain program statistics and cost information;
- Obtained and reviewed relevant criteria, policies, and other guidance related to the UAS program, such as the UAS CONOPS, Mission Need Statement, and the UAS Acquisition Plan, which we used to identify the expected results of the program;
- Obtained and reviewed DHS's *Annual Performance Report, Fiscal Years 2012 – 2014*;
- Obtained and analyzed unmanned aircraft flight data to learn when, where, how often, and for how long the unmanned aircraft were flown, as well as the types of missions performed;
- Conducted sites visits to airbases in Sierra Vista, Arizona; Corpus Christi, Texas; Grand Forks, North Dakota; and CBP's Air and Marine Operations Center in Riverside, California, to better understand those operations;
- Analyzed apprehension data for the two border patrol stations in Arizona where CBP concentrated its southwest border UAS program surveillance operations;
- Interviewed border patrol agents at border stations in Arizona and Texas, as well as border patrol agents and OAM personnel at the JFC in Arizona, to determine the impact of the UAS program on their operations;
- Interviewed OIIL personnel in Washington, DC; at the Air and Marine Operations Center in Riverside, CA; at the UAS airbases we visited; and at the JFC in Arizona, to better understand their operations;
- Performed data reliability testing on flight hour and detection information and determined that it was sufficiently reliable for the purposes of our audit;
- Obtained data CBP reported for overall apprehension figures. We interviewed officials at CBP to determine how CBP collects apprehension data and obtained an independent verification and validation report of

reported statistics. We determined that the overall apprehension figures were sufficiently reliable for the purposes of our audit; and
- Could not verify the apprehension figures that OAM attributed to the UAS program. Given this limitation with OAM's UAS-assisted apprehensions, which prevented an adequate assessment, we determined that OAM's reported apprehension figures are of undetermined reliability.

We used OMB's guidance, as a basis, to identify aircraft program costs and estimated how much it cost CBP to own and operate its unmanned aircraft in FY 2013. Specifically, we:

- Used the contract amounts for maintenance and support, operational support, VADER, satellite, and engineering services;
- Estimated personnel costs for OAM and USBP personnel based on CBP's personnel rate of $155,000 per employee; and
- Obtained cost estimates from the United States Coast Guard and OIIL for UAS costs they incurred in FY 2013 and on the cost of base overhead and pilot overtime from OAM in FY 2013. These estimated costs were not significant compared to the total estimated cost, and we did not test the reliability of the estimates provided.

Our cost estimate includes about $7.6 million for depreciation of the 10 unmanned aircraft and equipment. We calculated straight-line depreciation, using the average cost of an unmanned aircraft system, less 10 percent residual value, over the useful life. The average cost of the unmanned aircraft and equipment was $17 million; therefore, the residual value is $1.7 million. The useful life of the Predator B is 20 years.

$17,000,000 – $1,700,000 = $15,300,000 ÷ 20 years = $765,000 multiplied by 10 aircraft.

We conducted this performance audit between May 2013 and September 2014 pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.

Appendix B
Management Comments to the Draft Report

1300 Pennsylvania Avenue NW
Washington, DC 20229

OCT 24 2014

U.S. Customs and Border Protection

MEMORANDUM FOR: The Honorable John Roth
Inspector General

FROM: Eugene H. Schied
Assistant Commissioner
Office of Administration

SUBJECT: OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations" (Project Number 13-135-AUD-DHS)

U.S. Customs and Border Protection (CBP) thanks the Department of Homeland Security (DHS) Office of the Inspector General (OIG) for the opportunity to review and comment on this draft Report.

CBP disagrees with the draft OIG Report's portrayal of the program's effectiveness; the Report's analysis of cost and cost per flight hour (CPFH)—which is based on OIG's misapplication of Office of Management and Budget (OMB) Circular A-126, "Improving the Management and Use of Government Aircraft" (OMB A-126); and the Report's misinterpretation that Office of Air and Marine (OAM) plans to expand the Unmanned Aircraft System (UAS) fleet to 24 aircraft. While the title and content of the Report state the CBP UAS program has not achieved the intended results, CBP has achieved or exceeded all relevant performance expectations.

CBP also disagrees with the methodology used to calculate CPFH to reach the Report's conclusions, and with the Report's interpretation of OMB A-126—as it includes fixed costs for aircraft owned and operated by the government, when the circular specifically states variable costs should be used. In addition, the OIG Report inaccurately states that OAM plans to procure 14 more unmanned aircraft, when in fact, CBP's plan is to enhance the UAS program's infrastructure and achieve a greater utilization of its existing fleet.

To offer a more accurate and comprehensive picture of the CBP UAS program's effectiveness, costs, and acquisition plans, CBP takes this opportunity to provide additional context and details that pertain to the draft OIG Report's findings and conclusions that appear to have been overlooked by OIG in assessing the information provided by CBP during this audit.

Unmanned Aircraft Systems (UAS) Program Effectiveness

CBP believes the OIG Report should include quantitative and qualitative information which better represents the current performance of the CBP UAS program. This information was

provided to OIG during the review. There have been countless successful CBP missions over the years in which UAS capabilities and resulting products have contributed significantly to the successful investigation, dismantling, and disrupting of criminal enterprises and organizations. The CBP UAS has also collected on numerous intelligence targets, and supported other Federal, State, and local agencies in various capacities, all of which are successful utilizations of the UAS.

Contrary to the implications in the Report, CBP's OAM has achieved the majority of the performance expectations identified in the 2010 Concept of Operations (CONOPS). These milestones, some which have been achieved ahead of the forecasted timeframe, include objectives for supporting a full range of mission sets; operating over land borders, over littoral waters, and in international waters; providing data to intra and interagency information networks; working with the Federal Aviation Administration to expand access to the National Airspace System; performance capabilities, including operation of interchangeable sensor payloads, and performance of long endurance missions; serving as a test platform for other agency technology projects; and modernizing the OAM UAS through block upgrades. In addition, CBP is currently in the process of updating the UAS CONOPS, which will include performance measures that represent the system's effectiveness.

Other CBP UAS program achievements that the draft OIG Report does not recognize include seizure statistics along the Southwest Border and during Transit Zone operations. During Fiscal Year (FY) 2013, CBP's UAS program directly contributed to the seizure of 49,447 pounds (with a value of $122 million) of marijuana on the Southwest Border, averaging approximately 15.7 pounds of marijuana seized at the Southwest Border per flight hour. Pertaining to Transit Zone operations, the UAS Guardian has deployed to Central America and Hispaniola four times since FY 2012, interdicting a total of 7,439.2 pounds of cocaine (with a value of $562 million), at an average of over 14 pounds interdicted per flight hour. These deployments also interdicted 2,000 pounds of marijuana. In the most recent deployment, OAM operated from a public international airport, flying published terminal arrival and departure procedures mixed with commercial airline traffic, an accomplishment previously considered not possible.

The OIG draft Report does not cite these achievements. Instead, the Report cites a limited sample of expected results from historical documents, some going back to 2007. The expectations the OIG focused on were based on the program receiving resources that were not obtained, performance measures that were never employed by CBP, or technological capabilities that have been surpassed. This context is critical for presenting an accurate assessment of the CBP UAS program's current performance and achievements.

The flight hour metric cited in the OIG Report was included in the *Concept of Operations for CBP's Predator B Unmanned Aircraft System: Fiscal Year 2010 Report to Congress*, dated June 29, 2010. This operations "tempo" objective was based on receiving commensurate investments in UAS resources, such as personnel, aircraft, spares, and other necessary infrastructure. Because of funding decreases across the Department, CBP has been unable to meet the objectives. CBP is achieving the maximum number of flight hours possible given its current funding levels.

OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations"
Page 3

In addition to concerns about incomplete use of information provided, CBP is concerned about OIG's selection of measures and metrics. Specifically, the apprehension metric reported on by OIG is not an appropriate measure of an aircraft's performance. The role of the UAS, specifically in the case of the Vehicle and Dismount Exploitation Radar (VADER), is to report detections. It is nearly 100 percent effective in the execution of that capability, and this information is then used to aid in CBP's ground response. Aircraft detections are provided to law enforcement on the ground who apprehend suspects. OAM has no way to attach a disposition to a detection that is not immediately resolved with any degree of certainty. Aircraft are only credited with contributing to the apprehension if the aircraft stays on scene until the apprehension is verified, which is not always an effective use of the asset. For these reasons, a better measure of UAS performance is detections. CBP provided OIG with FY 2013 data on detections. While the number of apprehensions attributed to UAS was only around 2,172, during the same timeframe, the VADER pod detected, identified, and classified 18,239 suspected undocumented aliens and smugglers. The detections illustrate that VADER is providing situational awareness, a critical capability for border security.

Further, the draft OIG Report cites speculation that the Border Patrol could have detected the suspects using other means. CBP deploys multiple layers of personnel, technology, and infrastructure, and all CBP assets are instrumental in achieving the Agency's mission. In the view of the local Border Patrol field leadership, the asset is a critical contributor to border security.

In reporting on the objective to reduce the cost of border surveillance, the draft OIG Report refers to a statement in the March 20, 2007, Mission Need Statement (MNS). At the time the MNS was written, CBP was considering a range of performance measures, potentially including the cost of border surveillance. CBP did not adopt this as a performance measure, so the necessary data is not available. Including this as a measure that has not been met would not be accurate.

The draft OIG Report also identifies responding to motion sensor alerts as an unmet expectation. Initially, this use of the unmanned aircraft was appropriate for its technological capabilities. CBP did utilize the UAS for this function prior to the implementation of VADER, and continues to perform this function on a limited basis; however, technological advances to the system have made this a less efficient use of the current capabilities of the UAS, and so its significance as a performance measure has been negated.

It is also important to clarify where CBP operates the UAS along the Southwest Border. The DHS FY 2012-2014 Annual Performance Report includes a text box on Southwest Border Security on page 21, which states "expanded unmanned aircraft system coverage to the entire Southwest Border." This milestone refers to the expansion of UAS access to the National Airspace System across the entire Southwest. While CBP UAS flights are focused on the highest priority sections of the border, OAM has authorization to fly, and has flown, the UAS along every stretch of the Southwest Border, from California to the Texas gulf coast. Therefore, statements in the draft OIG Report that, "unmanned aircraft are not operating along the entire southwest border," are inaccurate.

OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations"
Page 4

VADER

The originally anticipated VADER operations, which were documented in the *Concept of Operations for Vehicle and Dismount Exploitation Radar (VADER) Deployment*, issued in 2012, were developed prior to the operations of the asset. As is appropriate, the tactics and techniques for utilizing the system were refined as CBP gained experience using the system, culminating in a new concept of operations written by CBP's Joint Field Command (JFC). The new concept of operations recognized that VADER provided not only strategic information, but tactical information as well. Based on this improved understanding, as well as the fact that the JFC area of responsibility was the highest priority location for DHS and CBP, the JFC Commander utilized the assets under his purview, including VADER, to accomplish CBP's mission. As such, and contrary to the OIG Report, the JFC and OAM essentially outperformed the requirements in the initial CONOPS for the VADER.

The statement that the JFC decided on its own accord to set geographic limitations on the use of VADER is inaccurate. There were earlier geographic limitations placed on the locations of operations of VADER, due to factors external to the JFC, such as airspace and other restrictions. Additionally, these earlier geographic limitations have since been lifted.

Contrary to the assertions in the draft Report that CBP has been prevented from analyzing VADER's sensor data, the JFC has shared all VADER and UAS related data with CBP's Office of Intelligence and Investigative Liaison (OIIL). The OIIL Processing Exploitation Dissemination (PED) cell at the Air and Marine Operations Center (AMOC) in Riverside, California, receives all video feeds, intelligence collections, and VADER feeds directly, as well as copies of all follow-up JFC field reports associated with VADER detections. OIIL reports that from August 29, 2012 through September 1, 2014, the PED cell produced 292 daily VADER products. In addition to the OIIL PED cell, the JFC established a Joint Intelligence Operations Center (JIOC). The significance of both the PED cell and JIOC is that VADER data is streamed simultaneously to both; to the PED cell for strategic analysis, and to the JIOC for actionable intelligence.

UAS Program Cost

CBP disagrees with the cost and CPFH calculations in the OIG Report. Aircraft CPFH figures are not meant to be an indicator of a program's actual cost, but a management tool to assess program performance. OAM complies with OMB A-126, and derives a reasonable CPFH using both fixed and variable costs. As reported by the Congressional Budget Office (CBO), the Defense services use similar cost methodologies to derive their respective CPFH figures, but tailor their CPFH programs to identify internal trends to support their budgetary and management processes. The OIG draft Report erroneously states that OAM is not properly reporting UAS program costs in the GSA Federal Aviation Interactive Reporting System (FAIRS), as OAM recorded FY 2013 costs in FAIRS in accordance with GSA requirements.

OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations"
Page 5

UAS Program Cost and OIG Estimates

The Report cost figures do not accurately reflect OAM UAS Program cost, include figures not properly attributed to the UAS Program, and inflate the actual program cost. OAM does not agree with the figures in Table 2 identified as "OAM Calculation," and these numbers should not form the basis for CPFH calculations. OAM specifically disagrees with the Maintenance and Support cost figure; Satellite cost figure; Fuel cost figure; Depreciation cost figure, as well as its inclusion as a program cost; inclusion of VADER systems; inclusion of OAM UAS Headquarters Program Office support; Engineering Services cost figure; and inclusion of Base Overhead and Government Personnel costs. These figures are inaccurate, and in some cases, should not be included in the Program Cost, or associated with a CPFH model.

Cost Per Flight Hour Discussion and Formulation

CBP disagrees with the methodology used by OIG to derive UAS CPFH. In accordance with OMB A-126, OAM developed a CPFH model to "improve the management and use of" OAM aviation resources. OMB A-126 Attachment A, Accounting for Aircraft, states:

> The actual cost of using a government aircraft is either: (a) the amount that the agency will be charged by the organization that provides the aircraft, (b), if the agency operates its own aircraft, the variable cost of using the aircraft; or (c), if the agency is not charged for the use of an aircraft owned by another agency, the variable cost of using the aircraft as reported to it by the owning agency.
>
> Agencies should develop a variable cost rate for each aircraft or aircraft type (i.e., make and model) in their inventories before the beginning of each fiscal year.

Based on the guidance above, and because OAM operates its own aircraft, OAM uses variable costs to calculate its CPFH. Variable and fixed costs are defined in Attachment B, Standard Aircraft Program Cost Element Definitions, which divides crew costs into variable costs and fixed costs. As defined, variable costs for crew are limited to travel, such as per diem; overtime charges; and wages of crew hired on an hourly or part-time basis. The crew costs that do not vary according to aircraft usage, including OAM's salaried personnel, are fixed costs. Therefore, OAM includes its variable costs as appropriate, but does not include the salaries, benefits, or training costs for its personnel. OIG's inclusion of fixed costs appear to conflict with the OMB A-126 guidance.

OAM recognizes there are differing approaches to calculating CPFH, although the OAM approach does not significantly differ from alternative cost model approaches. Under the Conklin and de Decker commercial method, the four main data sets for each aircraft type are: (1) the cost of depot level repair parts, (2) the cost of maintenance consumables, (3) the cost of fuel, and (4) the cost of maintenance contracts, expressed in terms of a CPFH, then added all together for a total CPFH. The CBO even notes differences in the Defense services CPFH models in its publication "Models Used by the Military Services to Develop Budgets for Activities Associated with Operational Readiness" (February 2012), highlighting "[b]udget models for flying hours calculate the quantities of fuel, spare parts, and other resources required per hour of flight, and

then apply historical cost factors to each of those resources to estimate the total cost per flying hour."

The specific components of the OAM approach to calculating CPFH include both direct costs (fuel, avionics, engine, airframe, equipment, support, and services) and indirect costs (aircraft specific travel, training, tools, equipment, parts, and communications support). By determining CPFH in this manner, OAM is "identifying opportunities to reduce aircraft operational cost" as highlighted in Attachment A of OMB A-126.

OMB A-126 Does Not Cover Unmanned Aircraft in its Present Form

The language in OMB A-126 and its governing authorities, specifically 31 U.S.C. 1344, titled, Passenger Carrier Use, addresses transporting government personnel on government aircraft versus commercial carriers and does not specifically apply to the operation of unmanned aircraft. However, OAM has been prudent in its approach to applying the general intent of the circular. OIG notes "OMB's Circular No. A-126 Revised, *Improving the Management and Use of Government Aircraft*, requires Federal agencies with aircraft programs to accumulate all costs associated with the programs, including the cost of crew, maintenance, fuel and other fluids, leasing, landing fees, operations and administrative overhead, accident repairs, and acquisition costs. Agencies need to understand the full cost of a program to accurately determine cost effectiveness and to conduct cost comparisons when choosing aircraft." This is an important consideration for cost planning, which OAM applies to all of its aviation assets. As it relates to the operation of unmanned aircraft, there is still a great deal of ambiguity in how the circular applies; however, OAM is operating in a manner consistent with the spirit of the circular. The next revision of the circular, currently in progress, could provide more guidance specific to unmanned aircraft, which CBP anticipates might help resolve the current ambiguity.

Future UAS Program Costs

The draft Report inaccurately conveys OAM's UAS procurement plans. The draft Report states, "CBP's long-term plans include adding 14 more unmanned aircraft to its fleet [of 10 aircraft]… In October 2012, OAM proposed adding about $443 million to the existing support and maintenance contract for its unmanned aircraft to acquire, support, and maintain the additional 14 aircraft."

OIG referenced a July 17, 2008, Acquisition Decision Memorandum from the DHS Under Secretary for Management and a 2012 Acquisition Plan Annex for the CBP Strategic Air and Marine Plan to support its conclusion that OAM plans to procure an additional 14 UAS. While these documents outline potential UAS procurements, they authorize – not mandate – the purchase. These documents clearly state two key caveats: 1) procurement is based upon OAM's mission needs and determination, and 2) procurement is dependent on available funds. Contrary to statements in the draft Report, OAM has always been in agreement that the 2008 Acquisition Decision Memorandum did not mandate expansion, but authorized OAM to expand the program, contingent upon funding.

OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations"
Page 7

Currently, OAM has a fleet of nine UAS, and intends to purchase one additional aircraft to replace the one that was ditched off the coast of California in January 2014. There is no intent at this time to acquire additional UAS beyond the one replacement aircraft, nor does OAM have a contract or funding in place to expand the UAS program. This is directly supported in CBP's response to OIG's 2012 Report (OIG-12-85), wherein CBP responded it did not plan to "expand the UAS fleet beyond the 10 systems already in operation or on order unless directed to do so by higher authority." OAM's existing UAS program funding allocation is being used to expand the program's infrastructure and achieve a greater level of utilization of its existing fleet. Until OAM is able to elevate the staffing, operations, and maintenance of its existing UAS fleet, it does not support the expansion of the program.

CBP has previously discussed this issue with OIG, providing information and background on these and subsequent developments. These actions illustrate responsible program management to develop contingency plans that would enable the program to execute congressional and administration direction.

The draft report contained four recommendations. CBP's response to the recommendations is below:

Recommendation 1: Conduct an independent study of the UAS program, before acquiring more unmanned aircraft, to determine whether:

- Additional unmanned aircraft are needed and justified; and
- Future funding should be used to invest in the current program or invested in other alternatives, such as manned aircraft and ground assets, to enhance surveillance needs.

Response: Concur in principle. However, CBP would like to clarify that the recommendation is based on a misunderstanding of OAM's procurement plans. At this time, CBP has no plans to acquire additional UAS beyond the one replacement aircraft, nor does OAM have a contract or funding in place to expand the UAS program. OAM's existing UAS program funding is being used to expand the program's infrastructure and achieve a greater level of utilization of its existing fleet. Until OAM is able to elevate the staffing, operations, and maintenance of its existing UAS fleet, it does not support the expansion of its number of aircraft. CBP respectfully requests closure of this recommendation.

Recommendation 2: Require the JFC to lift the limitations on VADER and allow the analysis expected in the original plan for the sensor's operation.

Response: Concur in principle. However, CBP would like to clarify that the recommendation is based on a misunderstanding that the JFC has limited VADER operations and the analysis of the sensor's products. Previous limitations, which were based on external factors over which the JFC had no control, have already been resolved. CBP has operated VADER outside the JFC area of operations, and will continue to deploy the asset to the highest priority location for DHS and CBP. CBP respectfully requests closure of this recommendation.

Recommendation 3: Require OAM to revise its UAS Concept of Operations to include attainable goals for the program, along with verifiable performance measures.

OIG Draft Report: "U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations"
Page 8

Response: Concur. CBP's OAM has already begun the process to revise its UAS Concept of Operations, which will include performance measures. Estimated Completion Date: March 31, 2015.

Recommendation 4: Require OAM to develop policies and procedures to ensure that it accumulates and reports all costs associated with the UAS program and other OAM flight programs, as required by OMB.

Response: Concur in principle. CBP agrees that the establishment and following of policies and procedures ensuring transparency of all costs associated with all flight programs is required and is a necessary part of such flights programs. CBP currently reports all required costs directly associated with the operations of unmanned aircraft; however, there is no one formulaic tool that can encompass all programs' parts to derive program cost totals. While CBP concurs in principle with the OIG recommendation, there are numerous methodologies and approaches that satisfy the requirement to report all costs associated with a program. CBP will continue to exercise its current methodology in computing program costs, including its previously developed CPFH model. CBP's use of the CPFH provides management with one tool to assess program performance, and while it alone does not capture the total program costs as it does not include all elements of the program, it does enable CBO to identify internal trends. While CBP's approach to accumulating and reporting all costs associated with the UAS program and other OAM flight programs differs from the approaches utilized by OIG, we believe the intent of the recommendation is met in that OAM's approach meets current OMB standards. CBP respectfully requests closure of this recommendation.

Again, thank you for the opportunity to review and comment on this draft Report. Technical comments were provided under separate cover. If you have any questions or would like additional information, please contact me at (202) 344-2300, or a member of your staff may contact Ms. Jennifer Topps, Component Audit Liaison, Management Inspection Division, at (202) 325-7713.

Appendix C
Excerpt from JFC VADER Concept of Operations

U.S. Department of Homeland Security
Bureau of Customs and Border Protection
Concept of Operations Report for:

VaDER FY 13

Con Op Number: [redacted]
Report Date: 03/13/2013

SITUATION

The overarching goal and intent of the Joint Field Commander is to increase the certainty of a positive law enforcement resolution to VaDER detections in a priority focus area. The success of VaDER is dependent on the [redacted] that work together to insure a law enforcement resolution of VaDER detections.

As a result of the ongoing testing of the VaDER sensor package, the JFC Commander and component field leadership have determined that adjustments to current TTPs are warranted by refining VaDER tracks and adjusting the operational ground force laydown and intelligence capabilities to a manageable area of operations, primarily focused within a single station AOR.

The Joint Field Command has identified [redacted] as the priority focus for the fiscal year 2013 campaign. The TCO's freedom of movement is augmented by the [redacted] border zones. In order to maximize efficiency and effectiveness of the forces and technology deployed to these areas, the Joint Field Command will deploy the CBP-UAS/VaDER in a dual role as follows:

1. **Tactical Support – Primary Role**

The primary role is to provide detection, classification and tactical cueing in a geographically focused area. This will enable designated air and ground forces to directly support the JFC Air Integration Strategy, resulting in an increased certainty of interdiction.

2. **Strategic Support – Situational Awareness**

The secondary role will be to serve as a strategic wide area surveillance and intelligence gathering platform. This role utilizes the CBP-UAS/VaDER while flying large portions of the Arizona-Sonora border to provide situational awareness by detecting locations and numbers of persons crossing the border. Due to the wide area of this search it will be impractical for the CBP-UAS VaDER to provide direct tactical support to agents on the ground and still provide a complete situational awareness picture.

Appendix D
Data Used in OAM's Cost Per Flight Hour Calculation

From: [redacted]
To:
Cc:

Subject: RE: OIG Unmanned Aircraft Audit Budget request
Date: Friday, February 28, 2014 7:36:13 AM
Attachments: [redacted]

[redacted]

I've got some of the information and materials that were requested, and I'm providing what I have to this point.

For number 2, the breakout of the five categories is:

FY13 W/DEPOT COST- 10/01/2012 - 09/30/2013

Category	Values	Per Hour	
Hours	4880		
Parts	7220316.68	1479.57	
Labor	790686	162.03	
Outside Repairs	1447564.98	296.63	
Fuel	632941	129.70	@3.85
Satellite	1952000	400.00	
		CPFH:	2467.93

Appendix E
Major Contributors to This Report

Donald Bumgardner, Director
Sean Pettersen, Audit Manager
Shawn Cosman, Auditor-In-Charge
Douglas Bozeman, Program Analyst
Patricia Benson, Program Analyst
Marisa Coccaro, Program Analyst
Peter Christopher, Program Analyst
Vashti Gordon, Program Analyst
Kelly Herberger, Communications Analyst
Gloria Medina-Ortiz, Independent Referencer

Appendix F
Report Distribution

Department of Homeland Security

Secretary
Deputy Secretary
Chief of Staff
Deputy Chief of Staff
General Counsel
Executive Secretary
Director, GAO/OIG Liaison Office
Assistant Secretary for Office of Policy
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
Chief Privacy Officer

Office of Management and Budget

Chief, Homeland Security Branch
DHS OIG Budget Examiner

Congress

Congressional Oversight and Appropriations Committees, as appropriate

ADDITIONAL INFORMATION AND COPIES

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov. Follow us on Twitter at: @dhsoig.

OIG HOTLINE

To report fraud, waste, or abuse, visit our website at www.oig.dhs.gov and click on the red "Hotline" tab. If you cannot access our website, call our hotline at (800) 323-8603, fax our hotline at (202) 254-4297, or write to us at:

Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Hotline
245 Murray Drive, SW
Washington, DC 20528-0305

Policing Immigration

Adam B. Cox† & Thomas J. Miles††

INTRODUCTION

Today, local police are being integrated into federal immigration enforcement on a scale never seen before in American history. This transformation of immigration law is not the result of the high-profile efforts by Arizona and a few other states to regulate migrants. Instead, it is the product of a largely overlooked federal program known as "Secure Communities." Launched three years ago, the program's goal is simple: to check the immigration status of *every single person* arrested by local police anywhere in the country.

Secure Communities represents the future of immigration enforcement. It dramatically lowers the information cost of identifying immigration violators, accelerates the ongoing convergence of the immigration and criminal bureaucracies in the United States, and reshapes the structure of immigration federalism. Despite its significance, however, little is known about the program.

This Article, part of a larger project providing the first large-scale empirical evaluation of Secure Communities, uses the program's rollout to explore a pervasive feature of criminal and administrative law that rarely lends itself to empirical examination—the role of discretion in policing. The breadth of discretion

---

† Professor of Law, New York University School of Law.

†† Professor of Law and Walter Mander Research Scholar, The University of Chicago Law School.

Thanks to Ahilan Arulanantham, Ingrid Eagly, Stephen Lee, Courtney Oliva, Margo Schlanger, F. Daniel Siciliano, David Sklansky, participants in The University of Chicago Immigration Law and Institutional Design Symposium, held at The University of Chicago Law School on June 15 and 16, 2012, and participants in workshops at the Law and Society Association, Northwestern University School of Law, and the 2012 Conference on Empirical Legal Studies. Many thanks also to Elizabeth Alcocer-Gonzalez, Yotam Barkai, Cynthia Benin, Christopher Heasley, Emily Heasley, Ronnie Hutchinson, Charity Lee, Zachary Mayo, Taylor Meehan, Emily Underwood, and Allison Wilkinson for outstanding research assistance. Adam Cox thanks The Filomen D'Agostino and Max E. Greenberg Research Fund for generous support. Thomas Miles thanks the SNR Denton Fund for generous support.

wielded by police and prosecutors is probably the single most important feature of modern law enforcement. Controlling that discretion—through judicial intervention, administrative design, and so on—has consequently become the central preoccupation of criminal and administrative law scholarship. For all that attention, however, we often have little sense of how law enforcement officials actually wield the discretion they possess. Anecdotal accounts abound, but systemic empirical evidence is rarely available. This is even truer with respect to immigration enforcement, which represents one of the largest and least studied law enforcement bureaucracies in the United States.

Secure Communities' rollout provides a unique opportunity to study the role of discretion in immigration enforcement. While the program is designed to check the immigration status of anyone arrested by local police anywhere in the country, resource limitations forced the federal government to stagger the program's activation across the country. Rather than activating the program simultaneously nationwide, Immigration and Customs Enforcement (ICE) rolled out the program on a county-by-county basis. As one would expect, senior administrators faced with limited resources made the explicit decision to target high-priority counties for early activation. The pattern of activation therefore provides a revealing look into the enforcement agency's priorities, showing us *where around the country* the government chose to concentrate its limited immigration resources.

Public debate about Secure Communities points to three potential sets of priorities that might have driven the geography of rollout. ICE has said repeatedly that Secure Communities is a tool for preventing crime and removing serious "criminal aliens" from the country. That justification suggests that counties with the most serious crime problems and the largest number of noncitizens engaged in crime would be targeted for early activation. While crime is the putative focus, however, Secure Communities also makes enforcement cheaper by lowering the information cost of identifying immigration violators. Critics of the program have argued that this is the program's real aim—to identify cheaply more people in violation of immigration law whom the agency can then deport. If true, this priority should lead the agency to target the program at areas with high levels of immigration violators, rather than high levels of criminal offenders. Finally, many have suggested that bureaucrats worry as much about the political costs of their choices as they do the

policy consequences. If this were true for those in charge of Secure Communities, we would expect that they would target activation in local communities that support the program while delaying activation in counties where the program might produce political backlash.

We test these three hypotheses about the use of discretion using the program's rollout data and extensive data regarding local crime rates, demography, and partisan politics. The analysis leads to three principal conclusions. First, the data undermine the government's claim that Secure Communities is principally about making communities more secure from crime. High-crime areas were, surprisingly, not a priority in the rollout. It is very difficult to square the lack of any meaningful correlation between early activation and local crime rates with the government's putative desire to target immigration enforcement resources in a manner designed to reduce the incidence of serious crime by noncitizens.

Second, the data provide little support for the claim that the agency's use of discretion was driven more by local politics than federal policy. Many critics of local police involvement in immigration enforcement have argued that incorporating local police will result in the tail wagging the dog, with local governments determining immigration priorities. Whatever the force of this concern in contexts like *Arizona v United States*,[1] where Arizona wanted to involve itself in immigration enforcement *without federal authorization*, it does not appear to have much purchase here. There is little evidence that the pattern of rollout reflected local attitudes about immigration enforcement rather than federal priorities. This does not mean that politics were irrelevant: as we will see, proximity to the border was a powerful predictor of early activation, and some readers will likely see this prioritization as a reflection of politics rather than strictly policy. Nonetheless, there is little support for our first or third hypotheses.

Third, and perhaps most important, the data reveal that early activation in the program correlates strongly with whether a county has a large Hispanic population. This finding can be seen as support for the hypothesis that the rollout prioritized locations thought to have high levels of immigration violators, given both the demographics and politics of unauthorized migration. It is crucial to note, however, that the pattern of correlation

---

[1] 132 S Ct 2492 (2012).

between rollout and a community's Hispanic population persists even when we control for myriad other factors that might also be thought to be proxies for suspected immigration violators, such as a county's proximity to the border or its noncitizen or foreign-born population. Moreover, other demographic proxies for immigration violators, such as the local noncitizen or foreign-born population, predict the rollout sequence much less well than Hispanic population. These findings raise important questions about racial profiling in immigration enforcement. While the data should not be interpreted as evidence that the government intentionally singled out predominantly Hispanic communities for increased immigration enforcement, ICE's discretionary allocation of resources had the effect of concentrating enforcement in these communities.

As the exercise of discretion in immigration enforcement becomes more centralized within the immigration bureaucracy, patterns like the ones we find raise questions identical to those at the heart of debates in criminal justice today. In the arena of criminal justice, risk-based models of crime prevention have led to strategies like the NYPD's stop-and-frisk program—a program that has renewed the focus in criminal law scholarship on questions about which communities bear the brunt of the costs of crime prevention strategies. The pattern of Secure Communities' rollout suggests the need to start a parallel conversation about immigration enforcement. More generally, it highlights the oft-overlooked similarities between the structure of modern criminal and immigration enforcement—similarities that should lead, but have not yet led, to the integration of scholarship on the two subjects.

The Article proceeds in three parts. Part I provides background on Secure Communities and the broader ongoing integration of criminal and immigration enforcement. Part II lays out and tests our hypotheses. Part III explores the implications of our findings.

I. INTEGRATING THE CRIMINAL AND IMMIGRATION ENFORCEMENT SYSTEMS

Immigration and crime have been intimately linked in American law and politics for over a century. In 1875, the first restrictive immigration law passed by the federal government prohibited

the entry of certain criminals and suspected prostitutes.[2] When Congress began adopting deportation laws in the early twentieth century, "criminal aliens" were again among the first targeted by the government.[3] And over the last twenty-five years the focus on deporting those who commit crimes has expanded dramatically. Today a broad swath of criminal convictions can make a noncitizen deportable—convictions ranging from serious offenses such as murder to minor drug crimes and other misdemeanors.[4]

While the connection between criminal convictions and immigration consequences is nearly as old as federal immigration law itself, over the last few decades a new sort of connection has developed between immigration law and criminal law. This new linkage concerns the *enforcement bureaucracies* of criminal and immigration law, rather than the *primary rules of conduct* that regulate noncitizens.

There is a growing convergence between the enforcement systems for immigration law and criminal law. This convergence is at odds with an old, conventional view about these regulatory domains. According to this old view, criminal law is the province of the states while immigration law is exclusively within the control of the federal government. The old view was really never quite right.[5] Nonetheless, it was prominent in both regulatory practice and academic commentary for many decades. Recently, however, a host of factors—including a rise in unauthorized immigration and new thinking about cooperative federalism—have

---

[2] Page Act of 1875 § 1, ch 141, 18 Stat 477. The statute prohibited certain felons and prostitutes from immigrating to the United States and criminalized the importation of prostitutes and "cooly" labor. Page Act §§ 3–5, 18 Stat at 477–48.

[3] See, for example, Immigration Act of 1917 § 19, Pub L No 64-301, ch 29, 39 Stat 874, 889–90:

> [Making deportable] any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry.

See also Immigration Act of 1907 § 3, Pub L No 59-96, ch 1134, 34 Stat 898, 899–900 (making deportable women who engaged in prostitution within three years after entering the United States).

[4] See Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan L Rev 809, 836–39 (2007).

[5] For a discussion of the old view and the argument that it was not correct, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum L Rev 1833, 1839–40 (1993).

led to two prominent developments that challenge this neat division of labor.

The first development is the rise of state and local efforts to combat unlawful migration. Examples include Texas's attempt in the 1970s to deny free public school education to undocumented children,[6] California's bid in the 1990s to deny a variety of government benefits to all out-of-status noncitizens,[7] and the recent efforts by Arizona and a handful of other states to arrest, prosecute, and otherwise single out potentially deportable immigrants for disfavorable treatment.[8] These efforts have been largely unsuccessful. Many efforts were blocked in their entirety: the Supreme Court struck down Texas's statute in *Plyler v Doe*[9] as a violation of the Equal Protection Clause,[10] and lower courts initially blocked California's Proposition 187 before the state abandoned its defense of the law.[11] More recently, the Supreme Court rebuffed Arizona's high-profile effort to get involved in enforcing immigration law. In the summer of 2012, the Court struck down all but one of the central provisions of Arizona's SB 1070,[12] handing a big victory to the federal government and reaffirming a strong view of federal supremacy over immigration policy.[13]

While these state and local initiatives have garnered most of the public and scholarly attention, they are in some ways a sideshow to a second development: the federal government's incorporation of the state criminal enforcement bureaucracy into the federal immigration enforcement system. This incorporation, which has roots that date back many decades, began picking up speed in the 1990s, when Congress passed a statute authorizing the attorney general to deputize state and local law enforcement

---

6 See 1975 Tex Sess Law Serv 896, codified at Tex Educ Code Ann § 21.031 (Vernon 1975), invalidated by *Plyler v Doe*, 457 US 202 (1982).

7 See 1994 Cal Legis Serv Prop 187 (West).

8 See, for example, Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), 2010 Ariz Sess Laws 113, as amended by HB 2162, 2010 Ariz Sess Laws 211.

9 457 US 202 (1982).

10 Id at 230.

11 See *League of United Latin American Citizens v Wilson*, 997 F Supp 1244, 1261 (CD Cal 1997); Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, LA Times A1 (July 29, 1999).

12 2010 Ariz Sess Laws 113.

13 *Arizona*, 132 S Ct at 2510.

officials to enforce immigration law.[14] Under this statutory provision, § 287(g) of the Immigration and Nationality Act (INA), the attorney general has authorized local police in nearly seventy-five jurisdictions around the country to screen prisoners for immigration violations and, in some cases, to assist in street-level immigration enforcement.[15] These cooperative arrangements have been complemented by the Criminal Alien Program (CAP), under which federal immigration agents (rather than local police) interview arrestees in federal, state, and local jails and prisons to identify potentially deportable noncitizens.[16] As of early 2009, all foreign-born prisoners in roughly 14 percent of local jails and prisons were screened by ICE agents.[17]

Secure Communities, a new program launched in the fall of 2008, builds on these preliminary efforts at cooperative federalism. Its basic aim is in some ways quite similar to the earlier programs: like CAP and most 287(g) agreements, the goal is to provide immigration screening for people arrested by local law enforcement. But the scale of the program is dramatically different. While 287(g) agreements were in effect in fewer than seventy-five jurisdictions, and CAP was limited to screening prisoners in a tiny fraction of local jails (and then only if the prisoners had already been identified as foreign-born), Secure Communities is vastly more ambitious: under the program, *every single person* arrested by a local law enforcement official *anywhere in the country* will soon be screened by the federal government for immigration violations. In short, Secure Communities is the largest expansion of local involvement in immigration enforcement in the nation's history.[18]

---

14 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 133, Pub L No 104-208, 110 Stat 3009, 3009-563 to -564, amending INA § 287(g), codified as amended at 8 USC § 1357(g).

15 See Randy Capps, et al, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* 9 (Migration Policy Institute Jan 2011), online at http://www.migrationpolicy.org/pubs/287g-divergence.pdf (visited Mar 4, 2013).

16 See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J Reg 47, 73 (2010).

17 See ICE, *Secure Communities: Quarterly Report; Fiscal Year 2009 Report to Congress—First Quarter* 3 (Department of Homeland Security (DHS) Feb 17, 2009), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy091stquarter.pdf (visited Mar 4, 2013).

18 The program appears set to supplant some of the earlier, more limited efforts at cooperation. For example, as this Article went to press the Obama administration announced that it would not renew *any* of its existing 287(g) agreements that operate on the task-force model, as opposed to the jail-screening model, instead letting them expire at the end of 2012. See ICE, News Release, *FY 2012: ICE Announces Year-End Removal*

To provide screening in local jails and prisons, Secure Communities relies on a fundamentally different—and much less labor-intensive—approach than 287(g) agreements or CAP. Those programs required individual police officers or ICE agents to interview each prisoner personally in order to collect information and assess the person's status.[19] In contrast, the backbone of Secure Communities is an information-sharing arrangement that permits ICE to use biometric identification to flag suspected immigration violators.

Traditionally, whenever a person is arrested and booked by a state or local law enforcement agency, his fingerprints are taken and forwarded electronically to the FBI. The FBI compares those prints against various national criminal information databases that return a "hit" if the person has a criminal history or outstanding warrants.[20] Under Secure Communities, the federal government forwards to the Department of Homeland Security (DHS) the fingerprints already being routed to the FBI. DHS then compares the person's fingerprints against prints in the Automated Biometric Identification System (known within the agency as IDENT)—a large immigration database compiled by DHS over the last few decades and into which, in theory, the agency inputs the fingerprints of every noncitizen fingerprinted as part of any of the agency's mission-related activities.[21] If the

Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (DHS Dec 21, 2012), online at http://www.ice.gov/news/releases/1212/121221washingtondc2.htm#statement (visited Mar 4, 2013). See also Ted Hesson, *As One Immigration Enforcement Program Fades Away, Another Rises*, ABC News (Dec 27, 2012), online at http://abcnews.go.com/ABC_Univision/News/immigration-enforcement-program-287g-scaled-back/story?id=18077757 (visited Mar 4, 2013). Explaining this decision, DHS emphasized that "ICE has concluded that other enforcement programs, including Secure Communities, are a more efficient use of resources for focusing on priority cases." ICE, News Release, *ICE Announces Year-End Removal Numbers* (cited in note 18).

19 For many years CAP therefore required ICE agents to travel to each local jail for interviews. In recent years in-person interviews have been replaced in some instances by remote interviews via telephone or videoconferencing equipment. But this streamlining still requires an available staff of ICE agents to conduct the interviews remotely—a need that led to the creation of the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago—and, for videoconferencing, requires the installation of equipment in each local jail. See Sweeney, 27 Yale J Reg at 73 (cited in note 16).

20 See David J. Venturella, *Secure Communities: Identifying and Removing Criminal Aliens*, The Police Chief 40, 43 (Sept 2010).

21 As this description should make clear, IDENT is importantly different than the criminal history databases relied on by the FBI. The National Crime Information Center (NCIC)—the FBI's database—includes, in theory, only information about suspected and convicted criminals. See FBI, *National Crime Information Center*, online at http://www.fbi.gov/about-us/cjis/ncic (visited Mar 4, 2013). IDENT is much broader because by design

database returns a hit, indicating that the arrestee's fingerprints are in the database, ICE's Law Enforcement Support Center (LESC) assesses the person's status using all available information in order to determine whether the arrestee is in violation of immigration law, perhaps because he has overstayed his visa or because he has been previously deported and has not been legally readmitted to the country. The ICE district office then decides whether to place a detainer on the person.[22] The detainer requests that the local agency hold the person for forty-eight hours in order to permit ICE to transfer the person to federal custody for the initiation of deportation proceedings.[23]

Secure Communities thus uses information sharing and biometric identity matching to dramatically reduce the labor required to screen arrestees. Nonetheless, while the technology made it conceivable that ICE could screen every arrestee in the country, it did not entirely automate the process of identifying and charging those believed to be in violation of immigration law. Database matches must still be evaluated by ICE agents trained to determine whether a noncitizen flagged by the database can be charged with being removable—a process that requires technicians at ICE's LESC to compile and analyze information from multiple databases, and may even require an

---

it includes records for *all* noncitizens fingerprinted by DHS. This includes known and suspected immigration violators, such as those who have been arrested by ICE, placed in removal proceedings, or previously removed to another country. But it also includes lawful immigrants, such as those who have been fingerprinted at a point of entry to the United States or when they applied for immigration benefits while residing in the United States. See US Visitor and Immigrant Status Indicator Technology Program (US-VISIT), *Biometric Standards Requirements for US-VISIT: Version 1.0* 1 (DHS Mar 15, 2010), online at http://www.dhs.gov/xlibrary/assets/usvisit/usvisit_biometric_standards.pdf (visited Mar 4, 2013); *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* 2 (DHS July 31, 2006), online at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf (visited Mar 4, 2013). Because the database includes lawful immigrants, and even some immigrants who have since naturalized, a match in the database is not itself conclusive evidence that the arrestee is potentially deportable. Moreover, because some unlawful migrants have never had contact with ICE—most importantly, those who snuck into the country and have never been captured—a no-match in the database is not conclusive evidence that the person is a citizen or lawfully present.

[22] See ICE, *Secure Communities: Quarterly Report; First Quarter FY 2009* at 3–4 (cited in note 17); ICE, *1st Quarterly Status Report (April–June 2008) for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* 7 (DHS Aug 2008), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy081stquarter.pdf (visited Mar 4, 2013).

[23] See 8 CFR § 287.7.

interview of the suspect.[24] Even if the suspect is deemed removable, local ICE offices must still determine whether charging the suspect is consistent with the agency's use of prosecutorial discretion. These determinations must be made quickly enough for ICE to take action to apprehend the suspect while he remains in local police custody. For suspects who will be detained during removal proceedings, ICE must locate transportation resources and bed space necessary to take the person into custody.[25] These resource bottlenecks—combined with certain other technological challenges and the sheer scope of the task of communicating with the roughly thirty-one thousand booking locations around the country—all but guaranteed that simultaneous nationwide activation of Secure Communities was not an option.[26]

Instead, ICE rolled out the program, county by county, over the course of the last four years. The first handful of counties was activated on October 27, 2008.[27] Each month new counties

---

[24] See ICE, *1st Quarterly Status Report (April–June 2008)* at 7 (cited in note 22). For this reason, Secure Communities' relationship to the CAP program is quite complicated. It can be seen as a successor program to CAP, as a program operating in tandem with CAP, or as a biometric component of CAP itself, and agency documents sometimes describe the relationship between the programs in each of these three ways. See *Is Secure Communities Keeping Our Communities Secure? Hearing before the Subcommittee on Immigration Policy and Enforcement of the House Committee on the Judiciary*, 112th Cong, 1st Sess 8, 11–13 (2011) (statement of Gary Mead, Executive Associate Director for Enforcement and Removal Operations, ICE) ("Secure Communities Oversight Hearing"); ICE, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens; Strategic Plan* 2–3 (DHS July 21, 2009), online at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf (visited Mar 4, 2013); ICE, *1st Quarterly Status Report (April–June 2008)* at 2 (cited in note 22).

[25] See ICE, *Second Congressional Status Report Covering the Fourth Quarter Fiscal Year 2008 for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* 20–23 (DHS Nov 7, 2008), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy084thquarter.pdf (visited Mar 4, 2013); ICE, *1st Quarterly Status Report (April–June 2008)* at 7 (cited in note 22).

[26] See ICE, *Second Congressional Status Report: Fourth Quarter FY 2008* at 9–10 (cited in note 25); ICE, *1st Quarterly Status Report (April–June 2008)* at 7 (cited in note 22). The technological hurdles included the fact that many local jurisdictions did not have live scan fingerprint devices when the rollout commenced in 2008. See ICE, *Second Congressional Status Report: Fourth Quarter FY 2008* at 10–11 (cited in note 25).

[27] See ICE, *Secure Communities: IDENT/IAFIS Interoperability; Monthly Statistics through September 30, 2011* 1 (DHS Oct 14, 2011), online at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf (visited Mar 4, 2013); ICE, *Secure Communities: Quarterly Report; First Quarter FY 2009* at 4–5 (cited in note 17). Prior to that date, ICE operated a pilot program in a handful of counties in order to prepare for broader deployment. ICE, *Secure Communities: Quarterly Report; First Quarter FY 2009* at 4 (cited in note 17) (listing Boston, MA; Dallas County, TX; Harris County, TX; Wake County, NC; Henderson County, NC; Buncombe County, NC; and Gaston County, NC as early participants).

have been added, and as of August 2012, 3,074 counties—almost 97 percent of all of the counties in the United States—had been incorporated into Secure Communities.[28] Only 107 counties remained to be activated at the close of August, and ICE stated in May that it planned to activate all remaining stragglers in short order—well ahead of the rollout's initial timetable.[29]

While Secure Communities' activation has been staggered rather than simultaneous, the decision about which counties to activate first has been entirely the federal government's. This is also quite a departure from the earlier efforts at cooperative immigration enforcement, such as the 287(g) program. Under that program, individual states and local governments themselves decided whether they wanted to opt into the program. Unless both the local government and the Department of Justice agreed on the terms of cooperation, no arrangement under § 287(g) was possible.[30] In contrast, under Secure Communities counties are selected for activation by DHS regardless of whether they wish to participate.[31] Moreover, once activated, a local law enforcement agency has no real means of shirking or otherwise declining to participate in the program. As we explained above, the fingerprints that form the basis of the biometric identity check in Secure Communities are the very same fingerprint records that are provided by the local law enforcement agency to the FBI for purposes of criminal background checks. There is no way for a local government to forward these fingerprints for criminal purposes but prevent the FBI from sharing them with DHS. As a result, the only way for a local law enforcement agency to prevent the immigration check from taking place would be to stop fingerprinting altogether suspects who are arrested and booked into custody. It goes without saying that this is not an option for local law enforcement.[32]

---

[28] See ICE, *Activated Jurisdictions* (DHS Aug 22, 2012), online at https://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf (visited Mar 4, 2013).

[29] See Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, NY Times A10 (May 12, 2012).

[30] INA § 287(g), 8 USC § 1357(g).

[31] See Julia Preston, *Resistance Widens to Obama Initiative on Criminal Immigrants*, NY Times A11 (Aug 13, 2011).

[32] To be clear, we do not mean to suggest that there is nothing that local governments can do to resist the program. As one of us has written about elsewhere, and as we are exploring in other aspects of this project, local law enforcement agencies could resist participation by changing their arrest or bail practices. See Adam B. Cox and Eric A. Posner, *Delegation in Immigration Law*, 79 U Chi L Rev 1285, 1344–49 (2012).

The mandatory nature of Secure Communities was not initially made public.[33] When it was, swift criticism followed by some public officials and civil rights organizations.[34] Nonetheless, this feature of the program is advantageous from a research perspective. Because state and local governments cannot decline activation as a legal matter or avoid participation as a practical matter, activation provides more complete information about the federal government's priorities.

To provide an initial sense of the deliberate nature of DHS's selection of communities for activation, Figure 1 shows the sequence of county activations each month from October 2008 through July 2012. The left scale reports the number of new activations in each month; the right reports the cumulative number of activated counties. The program spread slowly in its first eighteen months. During that period, twenty or fewer counties were activated in each month. After a sharp spike in activations in June 2010, the program spread more rapidly. During the second eighteen months of the program, nearly one hundred counties were activated in each month. By the summer of 2011, roughly half of counties nationwide had been activated. Beginning in October 2011 and continuing to May 2012, the pace of activations accelerated once again. During this period, more than one hundred counties were activated in each month. By the summer of 2012, the number of monthly activations fell precipitously, with no activations occurring in some months, because very few counties that had not already been activated remained.

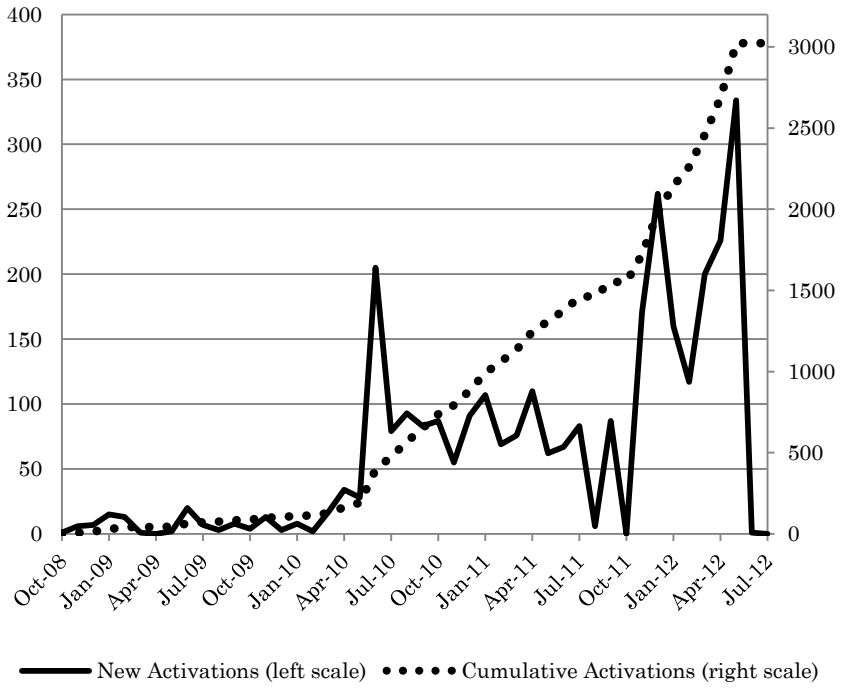
---

[33] See Office of Inspector General, *Communication Regarding Participation in Secure Communities* 4 (DHS Mar 2012), online at http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-66_Mar12.pdf (visited Mar 4, 2013) (detailing the failure of DHS to provide clear guidance to the public and state and local governments regarding the mandatory nature of the program).

[34] See, for example, *Insecure Communities: Press Packet; Uncovering the Truth and Understanding the Deceptive Deportation Program* *4–11 (National Day Laborer Organizing Network (NDLON) 2011), online at http://ndlon.org/pdf/scommbrief.pdf (visited Mar 4, 2013); *Uncover the Truth: ICE and Police Collaborations* (Center for Constitutional Rights, NDLON, and Cardozo Law School 2012), online at http://uncoverthetruth.org (visited Mar 4, 2013). Part of what generated confusion about the mandatory nature was that DHS initially adopted a practice of entering into Memoranda of Understanding with state governments (though not with local governments or law enforcement agencies) prior to activation. As soon as some states began to resist signing these agreements, however, the government made clear that the agreements were not required because the program required no actions by state or local officials; all that was required was a rerouting of the fingerprint data stream among the federal agencies. See Preston, *Resistance Widens*, NY Times at A11 (cited in note 31); *Insecure Communities* at *4–11 (cited in note 34).

By July 2012, the end of our study period, 97 percent of counties were active participants in Secure Communities.

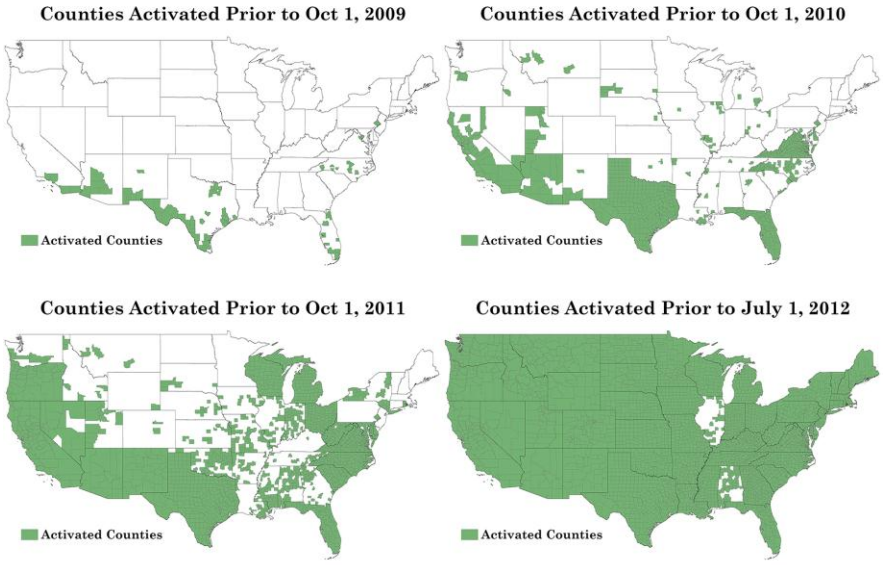
FIGURE 1. NUMBER OF COUNTIES ACTIVATED UNDER SECURE COMMUNITIES: OCTOBER 28, 2008–JULY 31, 2012



While Figure 1 shows how the pace of activation has accelerated over time, what it cannot show is the dramatic way in which early and late activations differed. Figure 2 highlights these changes by mapping the cumulative activations in each twelve-month period following the beginning of the rollout. As the maps make clear, over time activations became much lumpier, with multiple counties within the same state frequently activated on the same date. During the program's first year the number of monthly activations was quite small. With such small numbers, it was rare for multiple counties within the same state to activate at the same time. Instead, scattered counties around the country were singled out for activation. As the rollout of the program progressed, however, it became increasingly common for several counties within one state to be activated simultaneously. And over time, more and more of these mass activations

had the effect of bringing all the remaining inactive counties within a state into Secure Communities. In other words, early in the program's rollout activations can truly be characterized as county by county, while at the tail end of the rollout some activations were nearly statewide events.

FIGURE 2. PATTERN OF SECURE COMMUNITIES ACTIVATION



To get a better numerical sense for this pattern of mass activations, Table 1 reports the frequency of simultaneous activation events according to the proportion of counties within a state activated simultaneously and how far into Secure Communities' rollout the activation event occurred. The pattern is unmistakable. Mass activation events have become increasingly frequent as Secure Communities has neared its goal of nationwide coverage. For example, consider instances in which at least half of the counties in a state activated on the same day and, in so doing, brought the entire state into active status. No such events occurred during the first year of the program, but they have become increasingly frequent during later years. During the second year of the program, such mass-activation events occurred in two states and involved forty-six counties, which constituted 8 percent of counties activated during that year. During the third year of the program, such mass-activation events occurred in 5 states, and they included 208 counties, or 23 percent of all coun-

ties activated during that period. In the last 10 months included in this study, such mass activations occurred in 26 states, encompassing 1,328 counties—over 90 percent of counties activated during that period. And as Table 1 shows, the pattern remains unchanged regardless of the threshold chosen to define mass-activation events; raising it to 75 percent of a state's counties or lowering it to 25 percent does not alter the conclusion that early activations show a distinctly different pattern than later activations.

Figures 1 and 2, as well as Table 1, thus reveal a distinct evolution in the pattern of activation. In the first eighteen months or so of the program, the pace of activations was slow, and early activations tended to pick off one or two counties within a state. The government did not seek to activate an entire state before moving on to another state. Instead, it carefully selected just one or two counties in each state for activation. Later on, as the pace of activations sped up, the process of selecting counties for activation clearly changed. The government did not simply accelerate the activation of scattered counties. Instead, the government shifted to mass activations in which all inactive counties remaining in a state were activated on the same date. This manner of activation implied a much quicker rate of adoption; in the last twelve months of our observation period, more counties were activated than during the first thirty months of the program. It also suggests that early activations were more deliberate and targeted.

TABLE 1. FREQUENCY OF MASS ACTIVATIONS BRINGING ENTIRE STATE INTO ACTIVE STATUS

Percent of Counties in the State Activating on Same Date	Months since Launch of Secure Communities in October 2008			
	12 or fewer months (1)	13–24 months (2)	25–36 months (3)	37–46 months (4)
25%				
Number of Counties in Mass Activation	0	92	213	1,438
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	16.2%	23.7%	97.6%
Number of States Brought into Complete Activation through These Mass Activations	0	3	7	30
50%				
Number of Counties in Mass Activation	0	46	208	1,328
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	8.1%	23.1%	90.3%
Number of States Brought into Complete Activation through These Mass Activations	0	2	5	26
75%				
Number of Counties in Mass Activation	0	3	159	1,051
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	0.5%	17.7%	71.4%
Number of States Brought into Complete Activation through These Mass Activations	0	1	4	22
Total Number of Counties Activated Nationwide during This Period	83	569	900	1,471

II. THE POLICY AND POLITICS OF TARGETED ENFORCEMENT

The pattern of Secure Communities' activation provides unique insight into the way a large, nationwide law enforcement agency wields discretion in order to satisfy its programmatic and political objectives. Constrained by limited resources, where did ICE initially concentrate its enforcement efforts? As a result of those decisions, what types of immigrants were most likely to be targeted by the program?

To develop hypotheses about Secure Communities' rollout strategy, it makes sense to begin with the public justifications for the program. As one might suspect from the name "Secure Communities," agency officials have argued publicly that the program is designed to target enforcement resources at "criminal aliens" and to reduce crime.[35] When the program was unveiled in March 2008, it was described as "a multi-year initiative to more effectively identify, detain and return removable criminal aliens."[36] This goal has been repeated time and again in press releases, in quarterly reports, and by agency officials from the head of Secure Communities up to Janet Napolitano, the Secretary of DHS.

Prioritizing the removal of criminal offenders can be understood in two different ways. First, it may simply reflect the reality of resource constraints. As John Morton, the Director of ICE, has noted repeatedly, the government lacks the resources to remove every noncitizen who is in violation of immigration law.[37] The government must therefore decide which noncitizens in this large pool should be targets for deportation. Perhaps unsurprisingly, noncitizens who have committed serious crimes regularly top the list.

Second, Secure Communities' focus on criminal offenders may reflect the administration's determination that not all

---

[35] *Secure Communities Oversight Hearing*, 112th Cong, 1st Sess at 11–12 (cited in note 24) (statement of Gary Mead); DHS, Press Release, *Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement* (Oct 5, 2011), online at http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm (visited Mar 4, 2013).

[36] ICE, News Release, *ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide* (DHS Mar 28, 2008), online at http://www.ice.gov/news/releases/0804/080414washington.htm (visited Mar 4, 2013).

[37] See, for example, John Morton, Director, ICE, Memorandum for all Field Office Directors, Special Agents in Charge, Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 2 (June 17, 2011), online at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (visited Mar 4, 2013).

noncitizens who are in violation of immigration law should be deported. Recently the government has made explicit what has long been clear: that there is a distinction between those immigrants who are formally deportable and those whom the government actually wants to expend resources trying to deport.[38] Huge numbers of noncitizens are technically deportable, in part because the grounds of deportability have expanded dramatically over the years. But not all technically deportable noncitizens are considered undesirable by the government.[39] In fact, Director Morton recently formalized this fact. Last June, he promulgated a memorandum on prosecutorial discretion directing line agents to decline to initiate removal proceedings against some noncitizens who are technically deportable and describing in detail the factors that should be weighed in making the charging decision.[40] Around the same time, ICE also initiated a review of over 300 thousand pending deportation proceedings to decide which should be terminated.[41] And most recently, President Barack Obama announced that the administration would not seek to deport hundreds of thousands of unauthorized migrants who came to the United States as children and have led successful lives.[42]

If Secure Communities is designed to target serious criminals in order to make communities more secure, as the government argues, then one would expect the rollout to reflect that fact.

---

[38] See Julia Preston and John H. Cushman Jr, *Obama to Permit Young Migrants to Remain in U.S.*, NY Times A1 (June 16, 2012). For one explanation of why the government might affirmatively prefer for some resident noncitizens to lack legal status, see Cox and Posner, 59 Stan L Rev at 851 (cited in note 4) (explaining that granting noncitizens legal status would decrease flexibility for the government in terms of immigration screening processes).

[39] In some ways this parallels the argument frequently made about American criminal law—that a large gap exists between legal and moral culpability. See, for example, William J. Stuntz, *The Collapse of American Criminal Justice* 1–8 (Belknap 2011); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum L Rev 1655, 1658–61 (2010).

[40] Morton, Memorandum, *Exercising Prosecutorial Discretion* at 2–5 (cited in note 37).

[41] See Christopher Goffard, Paloma Esquivel, and Teresa Watanabe, *U.S. Will Review Cases of Illegal Migrants: Low-Risk Individuals, Including Students, the Elderly, and Crime Victims, Might Be Able to Avoid Deportation*, LA Times A1 (Aug 19, 2011).

[42] See Preston and Cushman, *Obama to Permit Young Migrants*, NY Times at A1 (cited in note 38); Janet Napolitano, Secretary of Homeland Security, Memorandum for David V. Aguilar, Acting Commissioner, US Customs and Border Protection, Alejandro Mayorkas, Director, US Citizenship and Immigration Services, John Morton, Director, ICE, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012), online at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (visited Mar 4, 2013).

Without the ability to activate everywhere simultaneously, the government was forced to choose which communities to activate first. One prediction is that the government would bring the program online first in counties with the biggest crime problems—that is, places with the highest crime rates, or perhaps the highest rates of violent crime. Indeed, the executive director of Secure Communities has stated that the rollout would "initially focus[] on jurisdictions that have the highest estimated volumes of criminal aliens or *criminal activity* while remaining flexible."[43] Of course, as the statement notes, the focus might not be only on counties that have high crime rates if the goal is to reduce crime using a program that incapacitates and deters only noncitizens. Instead, the agency might target communities that have *both* a high crime rate and a large number of noncitizens. Or the agency might employ more elaborate strategies to predict which communities have the highest numbers of noncitizens engaged in criminal activity. The strategic planning documents undergirding Secure Communities purport to do just this: they speak about the development of a "risk-based" rollout strategy that prioritizes activation in part based on a model designed to predict the number of noncitizens who will be arrested by local law enforcement.[44] While details about this model have not been

---

[43] Venturella, The Police Chief at 44 (cited in note 20) (emphasis added). This statement suggests a focus on crime rates—though it also suggests that rollout was sufficiently "flexible" to incorporate non-crime-related factors. It also highlights that, in addition to focusing on areas with high levels of "criminal activity," the agency might target areas with the highest rates of crime *by noncitizens*, or with large numbers of "criminal aliens." Id. While in practice the rate of immigrant offending is unknown, the government might pursue this strategy by targeting areas with both (a) high crime rates and (b) a high fraction of noncitizen population. We discuss this possibility below. In future work, we will show that the serial nature of the Secure Communities rollout makes it possible to draw inferences about the rate of immigrant offending.

[44] *Department of Homeland Security Appropriations for 2010, Hearing on Priorities Enforcing Immigration Law before the Subcommittee on Homeland Security of the House Committee on Appropriations*, 111th Cong, 1st Sess 915, 943, 953 (2009) (statement of David Venturella, Executive Director of Secure Communities, ICE) ("Priorities Enforcing Immigration Law Hearing") (indicating that increased deployment of biometric identification technology would result in more data, which would allow ICE to target priority areas with more precision, enabling them to "predict and forecast the locations where we may encounter the greatest numbers of current and future criminal alien populations"); ICE, *Secure Communities: Strategic Plan* at 2–3 (cited in note 24) (indicating that the agency was "initiating risk-based deployment to cover increasing percentages of the estimated criminal alien population"); ICE, *1st Quarterly Status Report (April–June 2008)* at 7–8 (cited in note 22).

made publicly available, crime-rate data appear to be a central component.[45]

Despite its moniker, of course, crime reduction and public safety is not the only plausible goal Secure Communities might be designed to pursue. While this has been the agency's standard justification for the program, many critics of Secure Communities have argued that the government is instead using Secure Communities to target "illegal immigration," or simply to make deportations cheaper.[46] Reducing the cost of immigration enforcement is clearly one advantage of tacking mandatory immigration screening onto every local arrest. If efficiency were the goal, one would predict that the government would initially direct the program's limited resources to areas with large numbers of noncitizens who are in violation of immigration law, regardless of whether they had engaged in criminal activity. Relatedly, the government might target areas with large numbers of unauthorized migrants, or some other subset of all immigration

---

[45] See ICE, *Criminal Alien Population Projection Analysis (CAPPA) Projected Arrests and Releases—County Level* (DHS Nov 2010), online at http://www.ice.gov/doclib/foia/reports/cappa-projected-arrests-releases-county-level.xls (visited Mar 4, 2013). According to agency documents, the CAPPA analysis included: FBI violent crime statistics for 2007; 2000 US Census percentages of foreign-born, noncitizen populations; apprehensions and charging documents issued by ICE's own Detention and Removal Operations (DRO); and "CAP Limited Coverage, High-Risk Assessment for Tier 2 facilities," presumably some internal analysis drawn from Tier 2 (second highest-risk) federal, state, and local prisons and jails. ICE, *Secure Communities: Quarterly Report; First Quarter FY 2009* at 30 (cited in note 17). Later congressional reports note refinements to the model. See, for example, ICE, *Secure Communities: Quarterly Report; Fiscal Year 2009 Report to Congress—Third Quarter* 26 (DHS Aug 27, 2009), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy093rdquarter.pdf (visited Mar 4, 2013); ICE, *Secure Communities: Quarterly Report; Fiscal Year 2009 Report to Congress—Second Quarter* 26 (DHS June 1, 2009), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy092ndquarter.pdf (visited Mar 4, 2013).

[46] See, for example, Pat Quinn, Governor of Illinois, Letter to Marc Rapp, Acting Assistant Director of Secure Communities, *Secure Communities Program* 1 (May 4, 2011), online at http://epic.org/privacy/secure_communities/sc_ill.pdf (visited Mar 4, 2013) (pointing out that while the agency had implied that only those aliens convicted for serious offenses would be targeted by Secure Communities, "more than 30% of those deported from the United States, under the program, have never been convicted of *any* crime, much less a serious one"); Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, NY Times A18 (May 6, 2011); *ACLU Statement on Secure Communities*, ACLU Blog of Rights (ACLU Nov 10, 2010), online at http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities (visited Mar 4, 2013); Dan Frosch, *In Colorado, Debate over Program to Check Immigration History of the Arrested*, NY Times A16 (July 30, 2010) (quoting Cheryl Little, Executive Director for the Florida Immigrant Advocacy Center in Miami: "ICE claims, as it has done for years, that it is targeting dangerous criminals. Yet the program screens the fingerprints of anyone arrested by local police, not just those convicted of crimes").

violators. In fact, ICE itself has repeatedly identified one set of immigration violators as a target of Secure Communities: "[R]epeat violators who game the immigration system, those who fail to appear at immigration hearings, and fugitives who have already been ordered removed by an immigration judge."[47]

It would be difficult, if not impossible, for the government to target directly communities with large numbers of immigrant violators or unauthorized immigrants. There are no reliable local measures of immigrant violators generally, or even of unauthorized population specifically. The national estimates of unauthorized population produced by the Pew Center and other organizations are subject to considerable uncertainty, and that uncertainty multiplies if one attempts to decompose the numbers into smaller units of geography.[48] For this reason, states are the smallest units for which the Pew Center produces estimates of unauthorized population.

Nonetheless, were the government interested in targeting the unauthorized it could rely on other variables that are correlated with the unauthorized population. Proximity to the southern border is one potential correlate, given that a large fraction of unauthorized migrants enter across the southern border and live in border regions.[49] A second is a community's noncitizen or

---

[47] ICE, *Secure Communities: The Basics* (DHS Aug 31, 2012), online at http://www.ice.gov/secure_communities/#top (visited Mar 4, 2013). See also ICE, *Secure Communities: Quarterly Report; Fiscal Year 2011 Report to Congress—First Quarter* 7 (DHS Mar 1, 2011), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy111stquarter.pdf (visited Mar 4, 2013); ICE, *Secure Communities: Quarterly Report; Fiscal Year 2010 Report to Congress—First Quarter* 6 (DHS Mar 1, 2010), online at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy101stquarter.pdf (visited Mar 4, 2013); ICE, *Secure Communities: Quarterly Report; Second Quarter FY 2009* at 30 (cited in note 45); ICE, *Secure Communities: Quarterly Report; First Quarter FY 2009* at 26 (cited at note 17).

[48] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* 3 (Pew Hispanic Center Feb 1, 2011), online at http://www.pewhispanic.org/files/reports/133.pdf (visited Mar 4, 2013). See also Michael Hoefer, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* 1 (DHS Mar 2012), online at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (visited Mar 4, 2013).

[49] See Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* 21 (Pew Hispanic Center Apr 14, 2009), online at http://www.pewhispanic.org/files/reports/107.pdf (visited Mar 4, 2013). Secretary Napolitano officially made border areas a priority for activation in March 2009, when she announced the Southwest Border Security Initiative. But her stated reason for this prioritization was to "crack down on Mexican drug cartels . . . to prevent the violence in Mexico from spilling over across the border." DHS, Press Release, *Secretary Napolitano Announces Major Southwest Border Security Initiative* (Mar 24, 2009), online at http://www.dhs.gov/ynews/releases/pr_1237909530921.shtm (visited Mar 4, 2013); *Priorities Enforcing*

foreign-born population—though the latter measure includes naturalized citizens and both proxies includes lawful migrants as well as those who are in violation of immigration law. A third potential proxy is the size of a community's Hispanic population. Nearly half of all immigrants living in the United States today are of Hispanic origin, and more than three-quarters of all unauthorized immigrants are from Central or South America.[50]

Of course, all of these proxies are both over- and underinclusive. For example, while most unauthorized migrants are Hispanic, the vast majority of Hispanic residents in the United States are not unauthorized. Nonetheless, there is some evidence that the government is using imperfect proxies to evaluate progress under the rollout. In DHS's 2011 appropriations report for Congress, for example, the agency emphasized as a key Secure Communities accomplishment from 2009 the deployment of biometric technology to "approximately 31 percent of the estimated nationwide number of the foreign born non citizen population."[51] The goals for 2010 included "covering approximately 96 percent of the estimated nationwide number of the foreign born non citizen population."[52] Notably, the agency's own chosen metric here is not the population of immigration violators, nor is it the population of noncitizens engaged in criminal activity or

Immigration Law Hearing, 111th Cong, 1st Sess at 931–32 (cited in note 44) (statement of Mary M. Forman, Director of Office of Investigations, ICE); DHS, Press Release, *Secretary Napolitano Announces Secure Communities Deployment to All Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens* (Aug 10, 2010), online at http://www.dhs.gov/ynews/releases/pr_1281457837494.shtm (visited Mar 4, 2013); ICE, *Secure Communities: Quarterly Report; Second Quarter FY 2009* at 8–9 (cited in note 45). See also *Secure Communities Oversight Hearing*, 112th Cong, 1st Sess at 13 (cited in note 24) (statement of Gary Mead) ("Since 2008, ICE has expanded . . . Secure Communities from 14 jurisdictions to more than 1,729 today, *including every jurisdiction along the Southwest border*.") (emphasis added).

[50] See Eileen Patten, *Statistical Portrait of the Foreign-Born Population in the United States, 2010*, table 6 (Pew Hispanic Center Feb 21, 2012), online at http://www.pewhispanic.org/2012/02/21/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2010/#6 (visited Mar 4, 2013) (showing that 18,817,105 of 39,916,875 immigrants reported their ethnicity as Hispanic); Passel and Cohn, *Portrait of Unauthorized Immigrants* at 21 (cited in note 49) (noting that 59 percent of unauthorized migrants are from Mexico, 11 percent are from other Central American countries, and 7 percent are from South America).

[51] ICE, *Salaries and Expenses: Fiscal Year 2011; Overview—Congressional Justification* 67–68 (DHS), online at http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf (visited Mar 4, 2013).

[52] Id at 68–69.

convicted of crimes. Instead, the agency touts coverage of areas with large numbers of noncitizens.[53]

We should note, of course, that the twin objectives of immigration and crime control are not mutually exclusive. One could imagine the program pursuing both goals to a certain extent—perhaps a realistic assumption in a world where agency officials regularly single out both violent criminal offenders and repeat immigration offenders as the highest priority enforcement targets. Moreover, as we noted above, even if the government's ultimate focus were purely crime control, such a focus might not lead the government to rely exclusively on crime rates to determine rollout strategy. Nonetheless, these slightly different hypotheses about the government's means and ends all point to the same broad conclusions about what we should expect of the rollout strategy: the crime reduction strategy leads to targeting communities with high crime rates, and the immigration enforcement strategy leads to targeting communities with high levels of some proxy for immigration violators.

In addition to potential programmatic objectives, such as targeting serious criminals or reducing the cost of immigration enforcement, political objectives or pressures may also have shaped the use of discretion in Secure Communities' rollout. Some communities have applauded the idea of checking immigration status as part of the criminal process.[54] A number of states have even required such checks in the absence of any federal agreement or program.[55] In contrast, other communities have objected to Secure Communities. They have argued that the program undermines community policing by making local citizens wary of the police and imposes significant detention costs on local governments asked to hold prisoners in local jails until ICE agents take custody.[56] These complaints have garnered national media attention, with prominent governors such as Deval Patrick and Pat Quinn arguing that Secure Communities should not be implemented in their states.[57]

---

53 Id at 67–68.

54 See generally ICE, *What Others Are Saying . . . about Secure Communities* (DHS June 2011), online at http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf (visited Mar 4, 2013) (collecting sources supportive of Secure Communities from across the country).

55 See, for example, SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051(B) (2010).

56 See, for example, Quinn, Letter, *Secure Communities Program* at 1 (cited in note 46).

57 See Deval L. Patrick, *Hillel Moral Voices Lecture* (Apr 30, 2012), online at http://www.mass.gov/governor/pressoffice/speeches/20120430-tufts-moral-voices-immigration.html

If agency officials are sensitive to the possibility of political support or backlash against their program, as the literature on cooperative federalism suggests will often be the case,[58] then we would predict that the program would be activated first in communities that supported increased immigration enforcement, with activation delayed for communities that opposed the enforcement measure. Here too, the hypothesis finds support in the agency's public statements: agency documents state that early activation may be prioritized for those communities that have expressed an interest in partnering with ICE.[59]

As a starting point, therefore, we approach the activation data with three quite different hypotheses about the role discretion may have played in the program's implementation. Two of the hypotheses focus on the possibility that officials pursued implementation in places where the social need was considered greatest from a policy perspective—though the policy need can be understood in at least two different ways, depending on whether the focus is on serious criminals or not. The other hypothesis focuses on the possibility that officials pursued implementation in places where the political benefits were biggest and the risk of backlash, smallest.

III. TESTING THE HYPOTHESES

To test these hypotheses, as well as other questions that we will explore in future work, we collected a large set of data related to both immigration and criminal enforcement. For purposes of this Article we assembled the data into a cross section of US counties. For each county, the data include four large sets of information:

> (1) *Secure Communities operational data.* Through a FOIA request, we secured comprehensive statistics for Secure Communities that ICE collected as part of its implementation of the program. When combined with publicly available data, these statistics cover the period from October 2008

(visited Mar 4, 2013); Elise Foley, *Massachusetts Rejects Secure Communities Immigration Enforcement Program*, Huffington Post (June 6, 2011), online at http://www.huffingtonpost.com/2011/06/06/massachusetts-rejects-immgration-enforcement-program_n_871970.html (visited Mar 4, 2013); Quinn, Letter, *Secure Communities Program* at 1 (cited in note 46).

58 See, for example, Roderick M. Hills Jr, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813, 816 (1998).

59 ICE, *1st Quarterly Status Report (April–June 2008)* at 7–8 (cited in note 22).

through July 2012. For this Article, the most relevant data provide the date on which Secure Communities was activated in each county around the country. But the data are far richer than this. They also include a tremendous amount of operational data concerning the program. On a county-by-month basis, the data include a wealth of information about the investigative, charging, and dispositional stages of enforcement, including: number of submissions; number of hits in the IDENT immigration database;[60] number of persons against whom ICE initiated removal proceedings; and number of removals. Moreover, this county-by-month data is further broken down by offense category, making it possible to separate serious offenders, minor offenders, and persons with no criminal convictions.

(2) *Demographic data.* From the USA Counties file,[61] we assembled a variety of county-level demographic data. These data include each county's racial composition, foreign-born population, crime rate, level of wealth and poverty, population density, police force size, and level of support for the Republican presidential candidate in 2004.

(3) *Immigration lawmaking and enforcement data.* Using publicly available data, we collected information on cooperative enforcement agreements entered into by local governments pursuant to § 287(g) of the INA. Using data generously provided by Huyen Pham and Pham Hoang Van, we assembled information on recent state and local legislation relating to immigration enforcement.[62]

---

[60] The IDENT database includes persons who have lawfully immigrated to the United States in recent years, as well as persons who have had an enforcement encounter with ICE. Thus, even over the time period it covers, the IDENT database is both over- and underinclusive as a source of information about immigration violators. Many lawful immigrants and citizens are in the database, and unauthorized migrants who have never been deported are unlikely to be in it. See note 21.

[61] See *USA Counties* (Census Bureau), online at http://censtats.census.gov/usa/usa.shtml (visited Mar 4, 2013).

[62] This data was collected by Pham and Pham as part of their project studying the adoption of local immigration laws and the local political climate for migrants. For parts of their research, see generally Huyen Pham and Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 Cardozo L Rev 485 (2010); Huyen Pham and Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in Gabriel Jack Chin and Carissa Hessick, eds, *Illegals in the Backyard: State and Local Regulation of Immigration Policy* (NYU forthcoming 2013).

(4) *Criminal enforcement data.* From the Uniform Crime Reports, we assembled data on both offending and arrest rates. These data are reported each month by every law enforcement agency in the country. Both the offense and arrest data are broken down by offense type and provide information on the race of persons arrested (though the demographic information does not include coding on Hispanic origin). We aggregated individual law enforcement agency data up to the county level for the year 2007, the year before Secure Communities was implemented.[63]

A. The Basic Patterns

To test our hypotheses about Secure Communities, we begin with some summary statistics about the differences between early and later activating counties. The government has said repeatedly that it targeted high-priority areas for early activation. As a result, the counties in which Secure Communities was first activated provide revealing information about the government's highest priorities for the program. Moreover, as we explained earlier, ICE activated only a very small number of scattered counties in the first twelve months of the program—slightly more than 3 percent of all counties. The slow rollout of the program highlights the deliberateness of the choices made in launching the program and permits us to use county-level data about crime and demographics to see whether the rollout patterns are consistent with the various goals the government might have pursued.

In these summary statistics we focus on our first two hypotheses: targeting crime and criminal violators on the one hand, and targeting immigration violators on the other. (We add our third hypothesis—targeting pockets of local political support—in the later sections.) Our prediction above was that the first goal would lead the government to target high-crime communities for early activation, while the second goal would lead the government to target proxies for immigration violators,

---

[63] The FBI releases the Master Arrest and Offense files on a lagged basis, so 2011 data did not become available until early 2013. See FBI, *Uniform Crime Reports: UCR Publication Schedule (Tentative)*, online at http://www.fbi.gov/about-us/cjis/ucr/publication-schedule (visited Mar 4, 2013); FBI, *Preliminary Semiannual Uniform Crime Report, January–June 2012*, online at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/preliminary-semiannual-uniform-crime-report-january-june-2012 (visited Mar 4, 2013).

such as border proximity, noncitizen population, or perhaps Hispanic population.

TABLE 2. COMPARING THE CHARACTERISTICS OF EARLY AND LATER ACTIVATING COUNTIES

Characteristic	Counties Activated within First 12 Months of Program (1)	Counties Activated Later (2)	Difference of (1) − (2)
County Is on Southern Border with Mexico	0.265 (0.078)	0.0023 (0.0014)	0.263** (0.078)
County Is on the Gulf of Mexico	0.133 (0.044)	0.015 (0.080)	0.118** (0.038)
Fraction of Population Noncitizen	0.095 (0.007)	0.025 (0.003)	0.070** (0.007)
Fraction of Population Hispanic	0.379 (0.091)	0.068 (0.016)	0.312** (0.080)
Log Violent Crime Rate	5.832 (0.114)	4.717 (0.207)	1.115** (0.240)
Log Property Crime Rate	7.930 (0.072)	6.917 (0.255)	1.013** (0.265)
N	83	2,994	3,077

**$p < 0.05$

Note: The table reports means, with standard errors in parentheses.

Table 2 tests these simple predictions by comparing crime rates, fractions of the noncitizen and Hispanic population, and border proximity by date of activation. The first row shows that counties activated within the first twelve months of Secure Communities were concentrated along the southern border. Counties along the southern border with Mexico represent only 1 percent of all US counties, but they accounted for nearly 27 percent of the counties activated during the first year of Secure Communities. After the first year, these border counties accounted for only about one-quarter of one percentage point of counties activated. The concentration of activations is unmistakable and highlights the fact that the overwhelming majority of counties along the southern border with Mexico were activated during Secure Communities' first year. Counties adjacent to the Gulf of Mexico were also more likely to activate during the first year of the program.

The third and fourth rows show that locations activated in the first year also had higher proportions of noncitizens and Hispanics in their populations. The magnitudes of these differences were substantial. Noncitizens accounted for 9.5 percent of persons in counties activated during the first year of Secure Communities, compared to only 2.5 percent in counties activated later. In other words, the proportion of the noncitizens in communities activated earliest was more than three times that of communities activated later.

The differences with respect to the proportion of Hispanics in the population were still larger. Hispanics constituted 37.9 percent of the population in early-activating counties and only 6.8 percent in counties activating later. That is, the fraction of Hispanics in counties activated during the first year of Secure Communities was more than five times that of counties activated later. A remarkable feature of this difference is that it cannot be fully explained by the concentration of early activations in border counties. Border counties comprise about 27 percent of early activations, and a higher fraction of their population is Hispanic than the average among other counties. Yet, even if border counties were populated entirely by Hispanics, the average fraction of Hispanic population in early-activating counties would not exceed 27 percent. Instead, the nearly 38 percent share of Hispanics in early-activating counties can only be explained by the fact that the government targeted counties that were *not* on the southern border but that did have proportionately large Hispanic populations. These demographic differences suggest that Secure Communities may have been directed in part at counties where more immigration violators were expected to be found.

The final two rows of Table 2 contemplate the other possible policy objective of Secure Communities: crime control. They compare the rates of violent and property crimes in early- and later-activating counties. Consistent with conventional practice in the academic literature, the crime rates are expressed as natural logarithms of the crime rate scaled up by 100 thousand. Crime rates vary widely across jurisdictions, and this convention places less weight on outlying locations with extremely high or low crime rates.[64] Early-activating counties had higher rates of

[64] For an explanation of the use of natural logarithms of the crime rate rather than the crime rate itself, see Lance Hannon, Peter Knapp, and Robert DeFina, *Racial Similarity*

both violent and property crime, and the differences are statistically meaningful. The difference suggests that Secure Communities may have been directed in part at counties with more severe crime problems.

As mentioned above, the hypotheses about the goals of Secure Communities are not mutually exclusive, and Table 2 provides some support for both hypotheses about enforcement priorities. But the table also shows that the speed of activation correlates more strongly with certain county characteristics than with others, suggesting that one objective of the program had higher priority. The differences in crime rates were more modest than those in the measures of immigration enforcement. For example, the difference of just over one log point for the violent crime rate appears small. When expressed in levels, the violent crime rate in the first counties to activate is double that of later-activating counties. Still, this difference is much smaller than the 300 percent difference in the proportion who are noncitizens or the 500 percent difference in the proportion who are Hispanic. The upshot is that the different county characteristics of early activators suggest that both general immigration enforcement and crime control priorities shaped Secure Communities' rollout. But the selection of counties appears more consistent with the desire to target immigration violators generally—rather than just those engaged in serious criminal activity—because early activations targeted counties close to the border and counties with a high proportion of noncitizen and Hispanic persons in the population.

B. Hazard Analysis

Summary statistics offer some clues about the enforcement priorities of Secure Communities, but they do not control for numerous other factors that are potentially relevant. To better assess whether the patterns in Table 2 are robust to other influences, we proceed to multivariate analysis.

In this Section, we present estimates from survival or hazard models, which are particularly well-suited to the analysis of the rollout of Secure Communities. Hazard models have two important advantages for present purposes. First, they allow us to focus directly on *how much time passes* before a county is

in the Relationship between Poverty and Homicide Rates: Comparing Retransformed Coefficients, 34 Soc Sci Rsrch 893, 898–901 (2005).

activated under Secure Communities. Waiting time provides the best information about the government's prioritization because the length of time until activation measures the temporal sequencing of the program's rollout. Alternative approaches, such as binary measures of whether the program has been activated in a county, are not appropriate because the program will eventually operate nationwide. We measure waiting times as commencing in October 2008, the first month of Secure Communities' rollout, and ending when the individual county activates.

The second advantage of hazard analysis is that it produces robust results even when the event of interest—here, activation—has not yet occurred for some members of the sample. At the time of our study, 3 percent of counties in the United States had not yet activated the program. Even though these counties are (right) censored—in that the event of interest has not yet occurred for them—hazard analysis permits the outcomes for these counties to be related to a set of explanatory variables.[65]

In the analysis that follows, the hazard function for a county is the risk of the event (activation) occurring at time t, conditional on having survived (not activated) until that time.[66] The specific hazard models presented here are Cox proportional hazard models, which are widely used because they avoid bias by not making an arbitrary assumption about the baseline hazard.[67] The relationship of an explanatory variable to the hazard (or risk) of the event is more easily interpreted with hazard ratios—that is, the ratio of a risk of a particular event relative to the baseline risk—and for that reason, Table 3 reports hazard ratios. Hazard ratios of greater than 1.00 imply that the variable is associated with an increased hazard or shorter waiting time, and a hazard ratio of less than 1.00 suggests the variable is associated with a lower hazard or longer waiting time.

To test our three hypotheses, the hazard models in Table 3 include explanatory variables tracking county demography, proximity to the border, crime, and potential political support

---

65 See S.W. Lagakos, *General Right Censoring and Its Impact on the Analysis of Survival*, 35 Persp in Biometry 139, 139 (1979).

66 Slightly more formally, the hazard is specified as $h_i(t, X_i) = h_o(t)\exp(X_i\beta)$, where X_i are county i's observed characteristics and β is a vector of coefficients. The term $\exp(X_i\beta)$ shifts the baseline hazard function, with a positive coefficient indicating that the explanatory variable increases the hazard.

67 See generally D.R. Cox, *Regression Models and Life Tables*, 34 J Royal Stat Socy Series B (Methodological) 187 (1972).

for Secure Communities.[68] The models also include fixed effects for each state, though these are not reported in the tables in order to conserve space.[69]

[68] As described above, we follow the convention of expressing crime rates in natural logarithms. For counties with zero values for crime rates, we also followed the convention of replacing the missing values for these log crime rates with zeroes and including an indicator variable taking a value of 1.00 when such substitutions were made. We do not report in the tables below the estimates for these indicator variables.

[69] The inclusion of fixed effects for states ensures that our results are driven by county-level characteristics rather than state-level characteristics. The inclusion of fixed effects is particularly important in light of a fact we documented earlier—that later activations were more likely to be lumpy, state-wide affairs.

TABLE 3. ESTIMATING THE TIME UNTIL ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)	(6)
County Is on Southern Border with Mexico	4.187** (1.006)	—	4.859** (1.480)	4.191** (1.037)	4.190** (1.021)	4.103** (0.908)
County Is on the Gulf of Mexico	1.581 (0.575)	—	1.619 (0.623)	1.584 (0.586)	1.582 (0.574)	1.587 (0.581)
Fraction of Population Hispanic	2.166** (0.565)	3.282** (1.124)	—	2.132** (0.556)	2.152** (0.556)	2.205** (0.582)
Fraction of Population Noncitizen	0.937 (1.205)	0.607 (0.797)	3.848 (4.066)	—	—	1.257 (1.497)
Fraction of Population Foreign-Born	—	—	—	—	0.970 (1.130)	—
Change in Fraction of Population Hispanic 2000–2010	—	—	—	—	—	0.432 (0.758)
Fraction of Population Black	0.570 (0.268)	0.508 (0.250)	0.529 (0.256)	0.570 (0.268)	0.570 (0.268)	0.584 (0.277)
Log Violent Crime Rate	1.025 (0.024)	1.201 (0.023)	1.028 (0.024)	1.025 (0.024)	1.025 (0.024)	1.026 (0.024)
Log Property Crime Rate	1.013 (0.020)	1.021 (0.021)	1.013 (0.020)	1.013 (0.021)	1.013 (0.020)	1.013 (0.020)
Log Population Density	1.231** (0.043)	1.246** (0.043)	1.231** (0.043)	1.231** (0.045)	1.231** (0.041)	1.231** (0.042)
Log Income per Capita	0.945 (0.117)	0.936 (0.130)	0.904 (0.111)	0.943 (0.129)	0.945 (0.118)	0.951 (0.115)
Fraction in Poverty	0.474 (0.348)	0.603 (0.381)	0.521 (0.348)	0.472 (0.359)	0.473 (0.350)	0.458 (0.354)
Fraction of Vote in 2004 for Republican President	0.750 (0.403)	0.746 (0.461)	0.723 (0.401)	0.749 (0.407)	0.749 (0.406)	0.775 (0.378)
Count of Local Anti-Immigrant Legislation	0.997 (0.082)	0.987 (0.084)	0.997 (0.082)	0.997 (0.082)	0.997 (0.082)	0.999 (0.084)
Local 287(g) Agreement	4.164** (1.493)	4.441** (1.681)	4.109** (1.458)	4.159** (1.487)	4.162** (1.498)	4.151** (1.498)

*$p < 0.10$, **$p < 0.05$

Note: The table reports hazard ratios, with standard errors in parentheses. $N = 3{,}077$. Estimates for state fixed effects are not reported in order to conserve space.

1. Immigration enforcement.

The first set of explanatory variables in Table 3 explores the striking pattern in the summary statistics—that county demographics and border proximity, much more than crime rates, appear to be highly correlated with activation. These patterns hinted that the rollout might not have been targeted exclusively at crime reduction. As we will see below, the hazard models in Table 3 confirm some of these patterns but undermine others in surprising and potentially troubling ways.

The strongest correlates of activation remain location on the southern border and the fraction of the population that is Hispanic. The hazard models show that a county's location on the border with Mexico is strongly correlated with a high risk of activation. The estimates imply that counties on the southern border have a hazard rate of activation roughly four times higher than that of other counties.

The fraction of Hispanics in the county population also strongly predicts activation. For example, the estimate in column (1) implies that a 10 percentage-point increase in the share of Hispanics in a county's population corresponds to an 8.0 percent jump in the hazard for Secure Communities activation.[70] This result confirms that the pattern seen in the summary statistics of Table 2 for the Hispanic share of the population does not diminish when we control for other factors that might influence activation. Moreover, to alleviate the concern that this correlation is an artifact of some unobserved characteristic that correlates with minority population more generally, we provide for a sort of placebo test by including in the model a measure of the black population. Because this measure of race lacks the salience in contemporary debates about immigration enforcement that Hispanic ethnicity carries, one would not expect it to correlate with activation. Consistent with this intuition, the estimate for black population is less than 1.00, implying that counties with proportionately more black residents were activated later on average rather than being prioritized for early activation. In addition, each estimate for a county's black population is statistically insignificant, indicating that it, unlike Hispanic ethnicity, does not have a statistically significant correlation with the timing of activation.

---

[70] To see this, note that ln(2.166) = 0.7729, and exp(0.7729*0.1) = 1.0804.

The correlations for border proximity and Hispanic population are also robust. In every specification in Table 3 that includes these variables, the estimates are statistically significant and relatively stable in magnitude. Of course, these variables correlate strongly with each other; counties along the border have proportionately much larger Hispanic populations than the national average. To gauge how sensitive the estimate for each of these variables is to the presence of the other, column (2) reports an equation in which both indicators for the southern border were dropped, and column (3) reports an estimate in which the variable for Hispanic population was dropped. The exclusions add to the magnitude of the remaining variable's estimate but not enormously so: dropping the border variables raises the hazard ratio for the Hispanic share of the population from 2.166 to 3.282, while dropping the Hispanic variable raises the hazard ratio for the southern border from 4.187 to 4.859. Moreover, if we reestimate the equation excluding border counties from the sample entirely, the estimates are relatively unchanged. The estimated hazard ratio for the Hispanic share in particular remains statistically significant and largely unchanged at 2.135 (standard error = 0.665). These estimates show that although these two county characteristics are correlated, each plausibly captures a different influence on the risk of activation.

In the summary statistics above, a county's noncitizen population was also correlated with activation—though more weakly than Hispanic population or border proximity. In the hazard models, however, the relationship between noncitizen population and activation is flipped on its head. The hazard ratio for noncitizens is in some models less than 1.00. This means that, rather than increasing the likelihood of activation, a larger share of noncitizens in a county *modestly reduces* the likelihood of activation. For example, the hazard ratio of 0.937 in column (1) implies that a 10 percentage-point increase in the share of noncitizens in a county's population *lowers* the hazard by about 1 percentage point.[71]

The direction of this estimate is surprising, even counterintuitive. The central function of Secure Communities is to check the status of noncitizens through fingerprints, and on one theory this technology would promise the greatest benefit where there

[71] To see this, note that ln(0.937) = −0.651, and exp(−0.651*0.1) = 0.994. This indicates that a county with a share of noncitizens that is 10 percentage points greater than the baseline has a hazard that is 85 percent that of the baseline.

are the most noncitizens. Yet noncitizen population does not predict activation. Moreover, the results for noncitizens contrast sharply with the estimates for Hispanic population. If taken at face value, they indicate that early activation targeted counties with large Hispanic populations but did not target counties with large noncitizen populations.

Of course, a crucial caveat to these estimates is that they reflect the effect of noncitizens' population share *after* controlling for the Hispanic share and other county characteristics. As mentioned above, Hispanic ethnicity and noncitizen status are highly correlated in these data, and thus any correlation between noncitizens and activation may be captured to a large extent by the presence of the Hispanic share variable. The results provide some reason to believe this is the case. When the Hispanic share variable is excluded from the set of explanatory variables in column (3), the estimate for noncitizens' share changes direction, implying that a 10 percentage-point increase in the proportion of noncitizens in the county raises the risk of activation by 14 percent.[72] For this reason, it would be inappropriate to advance a strong claim that Hispanic ethnicity accelerated activation while noncitizen status slowed it.

That said, it is important to note that Hispanics' share of a county's population appears to be a more powerful predictor of activation than noncitizens' share of the population. Just as any correlation between noncitizens and activation may be captured to a large extent by the presence of the Hispanic share variable, the opposite could be said about the noncitizens variable. But while the presence of the Hispanic variable eliminates the correlation between noncitizen population and activation (and in fact suggests an inverse correlation), the opposite is not true: the presence of the noncitizens variable does not impair the correlation between ethnicity and the activation hazard. Column (4) shows that when the measure of noncitizens is excluded from the equation, the estimated hazard ratio for Hispanics' share falls only modestly from 2.166 to 2.132. Thus, Hispanic population does appear to exert a greater influence on the estimate for noncitizens than vice versa.

Perhaps even more important, none of the estimates for noncitizens' share attain statistical significance—not even in column (3) when the Hispanic variable is excluded from the

---

[72] To see this, note that ln(3.848) = 1.348, and exp(1.348*0.1) = 1.144.

equation and the noncitizen estimate connotes a positive relationship with the activation hazard. In contrast, the estimates for Hispanics' population share are positive and statistically significant in every single model. These patterns suggest that the time-until-activation correlates more closely with the proportion of Hispanics in a county than with the proportion of noncitizens.[73]

2. Crime control.

The second set of variables tests our second hypothesis about the objectives of Secure Communities: its relationship to crime control. If crime control was a key objective of the program, we would predict that locations with higher crime rates should have activated sooner.[74] The summary statistics in Table 2 provided some evidence for this hypothesis. But the hazard analysis undermines this support. Once we control for other influences on activation, local crime rates are not consistently correlated with the decision to activate Secure Communities.

As in the summary statistics, Table 3 includes two principal measures of crime rate: the (log) rate of violent crime and the (log) rate of property crime. Given Secure Communities' putative focus on violent crime, we would predict that the violent crime rate, but perhaps not the property crime rate, would be associated with early activation. In fact, however, neither measure of crime predicts early activation. The hazard ratios for both violent and property crime hover around the baseline risk of 1.00, and none of these estimates attains statistical significance.

These estimates imply that, contrary to our prediction, crime rates are not closely related to the activation hazard—a surprising result. In order to explore the apparent irrelevance of crime rates in more depth, Table 4 presents a series of additional models that examine more closely why crime rates have such a weak relationship to the speed of activation.

---

[73] Replacing noncitizen population with foreign-born population produces the same results. The model in column (5) replaces the measure of noncitizens with the fraction of foreign-born persons in the population. Perhaps unsurprisingly, the foreign-born and noncitizen variables are highly correlated, and the estimates from using one measure are essentially identical to those from using the other. These results suggest that the activation hazard correlates with the fraction of Hispanics in a county rather than either the fraction noncitizen or the fraction foreign-born.

[74] See text accompanying notes 35–45.

TABLE 4. THE RELATIONSHIP BETWEEN CRIME AND TIME-UNTIL-ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)
County Is on Southern Border with Mexico	4.187** (1.006)	4.214** (1.010)	4.126** (0.939)	3.813** (0.949)	5.341** (1.663)
County Is on the Gulf of Mexico	1.581 (0.575)	1.582 (0.574)	1.558 (0.551)	1.511 (0.494)	1.550 (0.541)
Fraction of Population Hispanic	2.166** (0.565)	2.163** (0.569)	2.084** (0.574)	2.148** (0.538)	2.194** (0.553)
Fraction of Population Noncitizen	0.937 (1.205)	0.928 (1.202)	0.869 (1.139)	1.079 (1.520)	2.190 (2.887)
Log Violent Crime Rate	1.025 (0.024)	1.033 (0.025)	—	1.027 (0.024)	1.060** (0.028)
Log Property Crime Rate	1.013 (0.020)	—	0.995 (0.018)	0.997 (0.022)	1.083** (0.025)
Log Murder Rate	—	—	0.979 (0.034)	—	—
Log Rape Rate	—	—	1.025 (0.026)	—	—
Log Aggravated Assault Rate	—	—	0.995 (0.020)	—	—
Log Robbery Rate	—	—	1.082 (0.032)	—	—
Log Police Officers per Capita	—	—	—	1.013 (0.100)	—
Log Population Density	1.231** (0.043)	1.232** (0.043)	1.202** (0.045)	1.257** (0.058)	—
Log Income per Capita	0.945 (0.117)	0.950 (0.118)	0.886 (0.111)	0.925 (0.121)	1.266 (0.189)
Fraction in Poverty	0.474 (0.348)	0.476 (0.351)	0.391 (0.293)	0.489 (0.344)	0.213** (0.173)

*$p < 0.10$, **$p < 0.05$

Note: The table reports hazard ratios, with standard errors in parentheses. $N = 3{,}077$, except for column (4) where $N = 2{,}827$. The baseline regression in column (1) is identical to the baseline regression in column (1) of Table 3. Estimates for some variables in the baseline model are not reported in order to conserve space.

Table 4 explores three potential problems with Table 3's estimates about the relevance of crime rates. The first stems from

the close correlation between violent crime and property crime. If violent crime is, as agency officials suggest, the program's highest priority, then the inclusion of both violent and property crime in the model might, because of their close correlation, mask a strong relationship between activation and violent offenses. The equation in column (2) excludes the property crime rate from the set of explanatory variables, and the resulting estimates reject this possibility. The exclusion of property crime from the model has virtually no effect on the estimate for violent crime (or any of the other parameter estimates for that matter).

A second possibility is that our estimates are sensitive to the precise measures of crime employed. The model in column (3) replaces the total violent crime rate with those of its constituent subcategories: murder, rape, aggravated assault, and robbery. For three of these offense categories, the estimated hazard ratios are close to 1.00, implying no relationship to the activation hazard, and are statistically insignificant. The one offense category showing a statistically significant correlation with the activation hazard is robbery. But the magnitude of the estimated relationship is small. It implies that a 10 percent increase in the (log) rate of robbery over the sample average raises the hazard by 1.9 percent above the baseline hazard.

A third concern arises from the potential relationship between crime and other controls in the model. For example, it is possible that border proximity and crime are correlated. If so, then perhaps ICE targeted high-crime areas by targeting the border, such that we should count the correlation between border proximity and early activation as evidence of a crime-control agenda. It is certainly true that agency officials, right up to Secretary Napolitano, said publicly that activation along the southern border would be pursued as part of a strategy to disrupt violence related to international drug cartels.[75] Table 3 already explored this possibility by testing the sensitivity of the model to the presence of the border location variable. Were that variable highly correlated with local crime rates, its presence might mask a link between rollout timing and crime. But the estimates in

[75] See DHS, Press Release, *Secretary Napolitano Announces Secure Communities Deployment* (cited in note 49). At the level of public justification, this explanation is complicated by the fact that the prioritization of border areas was not announced by Secretary Napolitano until a number of months after Secure Communities' rollout began. The timing of the Secretary's statements undercuts the likelihood that the early rollout was designed to use border location as a proxy for crime.

column (2) of Table 3 suggest this is not the case. Omitting the border proximity variable has a negligible effect on the hazard ratios for the crime variables and does not elevate them to statistical significance.

Introducing other measures potentially correlated with crime similarly has no effect. For example, crime rates and policing tend to move together, as jurisdictions with more severe crime problems react by hiring more officers. But the results in column (4) of Table 4 show that including a measure of officers per capita has no effect on the estimated hazard ratio for violent or property crime. Moreover, while criminologists have long observed that both income levels and population density correlate with crime rates—in part because crime is more common in cities—their presence is not wholly responsible for the effectively zero estimates for the crime rates.[76] As the estimates in Table 4 show, income levels are largely unrelated to the likelihood of activation. Population density does have a consistently positive effect, raising the possibility that the estimated relationship between crime and activation is sensitive to the inclusion of the control for population density, but column (5) shows that excluding the measure of population density has a modest effect on the estimates for the crime rates.[77] When population density is excluded from the model, the estimated hazard ratios for property and violent crime both exceed 1.00 and attain statistical significance. But the size of their implied effects is smaller than those of the demographic and border variables. Raising the (log) rate of property crime by 10 percent above its sample mean implies a 5.7 percent increase in the hazard over its baseline. For violent crime, the comparable figure is 2.8 percent. In short, Table 4 suggests that the basic findings in Table 3 are not sensitive to our choice about how to measure crime rates or to the inclusion or exclusion of other variables that are correlated with crime.

Of course, as Part II's discussion of potential hypotheses makes clear, simply targeting communities with high crime rates is not the only way that immigration agencies might have used Secure Communities to target crime reduction and the removal of criminals. Using crime rates to set rollout strategy is one plausible strategy. But the agency might have preferred in

---

[76] See, for example, Ronald W. Beasley and George Antunes, *The Etiology of Urban Crime: An Ecological Analysis*, 11 Criminology 439, 448 (1974).

[77] Although not shown in Table 3, removing per capita income and the poverty rate from the model has a similar effect on the estimates for the crime rates.

an ideal world to prioritize rollout in areas that have *both* high crime rates and large numbers of noncitizens. If that was in fact the strategy, then the models in Table 3 risk understating the significance of crime rates for rollout timing. To test this possibility directly, Table 5 adds to the baseline model from Table 3 terms that interact both the Hispanic and noncitizen population with crime rates.

TABLE 5. MIXED ENFORCEMENT STRATEGY AND TIME-UNTIL-ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)
Fraction of Population Hispanic	1.854** (0.709)	1.854** (0.709)	2.182** (0.554)	2.111** (0.544)	2.210** (0.605)
Fraction of Population Noncitizen	0.541 (0.715)	0.541 (0.715)	0.188 (0.231)	0.042** (0.060)	0.909 (1.194)
Fraction of Population Black	0.572 (0.272)	0.572 (0.272)	0.537 (0.257)	0.536 (0.258)	0.517 (0.276)
Log Violent Crime Rate	1.009 (0.006)	1.008 (0.022)	1.006 (0.024)	1.000 (0.023)	1.012 (0.024)
Log Violent Crime Rate × Second Quartile of Demographic	1.015* (0.009)	1.009 (0.006)	1.005 (0.007)	1.007 (0.006)	1.003 (0.011)
Log Violent Crime Rate × Third Quartile of Demographic	1.032** (0.015)	1.015* (0.009)	1.013 (0.011)	1.018* (0.010)	1.017 (0.012)
Log Violent Crime Rate × Fourth Quartile of Demographic	1.039 (0.030)	—	1.049** (0.015)	—	1.016 (0.018)
Log Violent Crime Rate × 75th–90th Percentile of Demographic	—	1.032** (0.015)	—	1.054** (0.015)	—
Log Violent Crime Rate × Top Decile of Demographic	—	1.039 (0.030)	—	1.093** (0.038)	—
Demographic Interacted: Fraction of Population . . .	Hispanic	Hispanic	Non-citizen	Non-citizen	Black

*$p < 0.10$, **$p < 0.05$

Note: The table reports hazard ratios, with standard errors in parentheses. $N = 3{,}077$. Except for the interaction terms, the baseline regression in column (1) is identical to the baseline regression in column (1) of Table 3. Estimates for all other variables are not reported in order to conserve space.

The models in Table 5 interact the violent crime rate with a series of indicator variables that identify where in the distribution of a particular demographic measure a county falls. For example, the model in column (1) interacts the violent crime rate with indicators for whether a county falls within one of the top three quartiles of the fraction of population that is Hispanic. Adding these interaction terms allows us to test the hypothesis that ICE prioritized counties that had both very high crime rates and very large noncitizen populations—a sort of skimming-off-the-cream theory of rollout. If ICE pursued such a strategy, the hazard ratios on the interaction terms should grow as we move up the demographic quartiles. In theory, the hazard ratio should be largest for the interaction term that reflects the highest concentration of the relevant demographic—here the interaction terms that reflect the top decile of the relevant characteristic.

The model in column (1) offers weak support for this hypothesis. The hazard ratios on the interaction terms are all slightly greater than 1.00, and they are larger in counties with proportionately larger Hispanic populations. For example, the hazard ratio on the interaction of violent crime with the second quartile of Hispanic population is 1.015, and for the top quartile, it is 1.039. By contrast, the main effect of the violent crime rate has a hazard ratio that is almost exactly 1.00, implying that aside from the interaction terms, varying the rate of violent crime has no impact on the hazard for activation. Taken at face value, the estimates suggest that a higher violent crime rate slightly accelerated the activation time in counties with a relatively large Hispanic population and had almost no impact on the time-until-activation in other counties. Raising the (log) rate of violent crime by 10 percent over the sample mean implies a less than 1 percentage-point increase over the baseline hazard rate for a county with a Hispanic population in the lowest quartile, but it implies a 1.8 percent increase over the baseline hazard rate for a county with a Hispanic population in the highest quartile. The model in column (2) provides a further test by looking at counties with the very highest share of Hispanic population—counties in the top decile. Its pattern is similar to that seen in column (1).

Columns (3) and (4) present estimates of analogous interactions for the fraction of the population that is noncitizen, and here, the patterns are somewhat more pronounced. The effect of a higher crime rate on the activation hazard is larger when

noncitizens comprise a larger fraction of a county's population. Again, the violent crime rate has almost no effect on the activation hazard in counties with few noncitizens. But as the share of noncitizens in a county grows, the impact of the violent crime rate on the speed of activation rises monotonically. The model in column (4) implies that raising the (log) rate of violent crime by 10 percent over the sample mean in a county with a noncitizen population in the top decile raises the activation hazard by 4.3 percent over the baseline hazard rate. Unlike the earlier interactions with the Hispanic population, the interaction terms with the noncitizen population are statistically significant. These results are consistent with the hypothesis that ICE prioritized for activation counties with higher rates of violent crime and proportionately larger noncitizen populations.

The final column of Table 5 presents a type of placebo test. It includes interactions of the violent crime rate with measures of the fraction of a county's residents who are black. As noted above, we would not expect the size of a county's black population to relate to the speed of activation. The estimates in column (5) confirm this prediction. The interactions do not correlate strongly with the timing of activation, and their presence has no effect on the estimates for the other variables. The absence of a correlation for these racial variables should give some confidence that the patterns for ethnicity and citizenship status are not spurious.

The results in Table 5 lend support to the view that ICE assigned higher priority for activation to counties with both proportionately more noncitizens and higher violent crime rates. While crime rates themselves do not appear to predict rollout, crime does matter in those areas that have large noncitizen populations.

That said, it is important to note that controlling for these interactions does not undermine the estimated effect of other influences we identified earlier. Even in the models in Table 5, the fraction of the county population that is Hispanic and the proximity to the southern border remain strongly related to the speed of activation. In fact, they remain the strongest predictors: the implied magnitude of these influences is much larger than the interaction of violent crime and the size of the noncitizen population. Thus, the possibility that ICE prioritized counties with proportionately more noncitizens and higher violent crime rates can explain only a part of the observed pattern of activation.

The most powerful explanations remain the two identified earlier: the county's Hispanic population fraction and its proximity to the border.

3. The politics of rollout.

The final explanatory variables in Table 3 investigate our third hypothesis about the activation of Secure Communities—that the degree of local political support is a crucial predictor of early activation. The large literature on cooperative federalism suggests that such support may be relevant. The difficulty, of course, is that it is hard to gauge directly which local communities favor increased immigration enforcement of this sort and which oppose it. We therefore test several potential measures.

The first rough measure of local attitudes is the vote share the Republican presidential candidate received in the 2004 election. At least in recent years, support for the Republican Party (and ideological conservatism more generally) is significantly correlated with opposition to immigration and support for increased immigration enforcement.[78] Nonetheless, Table 3 shows that local support for Republicans does not correlate meaningfully with activation. The estimates for Republican vote share are statistically insignificant in every regression. Moreover, if the point estimates were taken at face value, they would imply an effect opposite of the one anticipated, as the hazard ratio is less than 1.00 in every specification.

A potentially more precise measure of local sentiment is a count of the number of anti-immigrant laws enacted locally. Rather than forcing us to rely on partisanship in the presidential election as a proxy, this measure permits us to observe directly the actions taken by local politicians that relate to immigrants and immigration enforcement. The tally of local anti-immigrant legislation was generously provided by Pham and Pham, who collected the information as part of a project to create an index capturing each state's climate for immigrants.[79] The more pre-

---

[78] See Pratheepan Gulasekaram and S. Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism* *4 (forthcoming 2013), online at http://www.karthick.com/workingpapers_assets/GR-submission-2-23.pdf (visited Mar 4, 2013); *Trends in American Values: 1987–2012; Partisan Polarization Surges in Bush, Obama Years* 11–12, 20 (Pew Research Center June 4, 2012), online at http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf (visited Mar 4, 2013).

[79] Pham and Pham, *Measuring the Climate for Immigrants* (cited in note 62). The paper by Pham and Pham includes counts of both pro- and anti-immigrant legislation at the county level. We excluded the small number of local laws categorized as pro-immigrant.

cise measure of attitudes on immigration provided by local legislation also fails to correlate with activation. The hazard ratios are statistically insignificant in every specification and are very close to 1.00 in all instances. Perhaps surprisingly, the presence of local anti-immigrant legislation does not have a meaningful influence on the timing of a county's activation.

Nor do other potential measures of local sentiment.[80] Recent work by political scientists suggests that communities in which the Hispanic population has grown most rapidly might be those in which a political backlash and calls for stricter immigration enforcement are more likely to occur.[81] The equation in column (6) of Table 3 tests this hypothesis by including a variable for the change in Hispanics' share of the population over the past decade. The estimated hazard ratio for this variable is statistically insignificant and, like the Republican vote share, is less than 1.00, contrary to the backlash hypothesis. Also, the inclusion of the growth measure has little effect on the estimates for the other variables.

In addition, while their paper also includes state-level legislation, that legislation is coextensive with our state fixed effects and was therefore omitted.

[80] In addition to political sentiment, we also attempted to test for local financial incentives. Some critics of Secure Communities have argued that local governments with excess jail capacity will have an incentive to participate in order to get paid for housing immigrant detainees identified by the program. See, for example, Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, Huffington Post (June 7, 2012), online at http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html (visited Mar 4, 2013); Jessica M. Vaughan and Russ Doubleday, *Subsidizing Sanctuaries: The State Criminal Alien Assistance Program* 1 (Center for Immigration Studies Nov 2010), online at http://www.cis.org/articles/2010/subsidizing-sanctuaries.pdf (visited Mar 4, 2013). While this potential financial payoff for participating is hard to calculate—and many counties have complained that federal reimbursements for detention do not cover their costs—we examined the pattern of activations for the fifty counties with the largest prison systems. Within that set, counties with prisons operating below capacity activated a statistically insignificant twenty-six days earlier than counties with prisons operating at or above capacity. Nineteen counties with capacity exceeding 100 percent activated in an average of 565.2 days while 31 counties with less than 100 percent capacity activated in an average of 539.0 days. Running our basic hazard model using these fifty counties (and leaving out state fixed effects) yields a hazard ratio of 1.00 (standard error = 0.0086) for the percentage of prison capacity, which is also consistent with the presence of excess bed space having no effect on rollout.

[81] See, for example, Martin Halla, Alexander F. Wagner, and Josef Zweimüller, *Does Immigration into Their Neighborhoods Incline Voters toward the Extreme Right? The Case of the Freedom Party of Austria* *1–3, 27 (University of Zurich Department of Economics Working Paper No 83, July 1, 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103623 (visited Mar 4, 2013).

The only potential measure of local support that does correlate with activation is whether a local government has a 287(g) cooperative enforcement agreement with the federal government. The presence of a 287(g) agreement in a county corresponds to an estimated increase in the activation hazard of roughly four times over the baseline hazard. That said, the relationship between 287(g) agreements and activation is far from clear evidence of a connection between activation and local political support. The willingness of local law enforcement to enter into such an agreement may reflect local political support for increased immigration enforcement—support that in turn influenced activation. Alternatively, the connection between 287(g) agreements and activation may simply reflect operational efficiency. Local police participating in the 287(g) program already have an established relationship with federal officials, and the existence of this relationship may facilitate an early activation of Secure Communities.

Regardless of the political variable employed, therefore, the estimates for these variables provide little support for the hypothesis that local political support or opposition was a factor in activation. There are, of course, other minor wrinkles. Some might argue, for example, that the border proximity variable should be interpreted as a political variable, as proximity to the border might correlate with increased local support for immigration enforcement. Certainly there are high-profile instances of border state politicians complaining loudly about the failure of federal immigration enforcement. On balance, however, the basic patterns in the hazard models do not provide much support for the hypothesis that political support was a crucial factor in Secure Communities' rollout.

IV. DISCRETION, PREDICTION, AND THE FUTURE OF IMMIGRATION ENFORCEMENT

Immigration enforcement has long been criticized as ad hoc and arbitrary, with the possibility of punishment for violating the immigration code turning more on happenstance or the caprice of low-level bureaucrats rather than anything else.[82] The principle that "like cases must be treated alike," often taken as central to

[82] For a few recent versions of this decades-long critique, see generally Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Harvard 2007); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum L Rev 1 (1984).

the very idea of justice,[83] has seemed to many to be honored only in the breach when it comes to immigration law.

Whatever the historical accuracy of claims about the disorganization of immigration enforcement, it is clear that today there is an ongoing project to systematize and centralize the exercise of discretion within the immigration bureaucracy. Perhaps the most prominent example of this trend is President Obama's announcement that his administration will not seek to deport many young people who came to the United States without authorization as children.[84] But this recent development is far from an election-year outlier. Instead, it is but a piece of a much broader effort to regulate the use of prosecutorial discretion within the agencies that administer immigration policy.[85] Moreover, these efforts have deep roots in a central structural feature of modern immigration law. Modern immigration law effectively renders huge numbers of noncitizens presumptively deportable—a structural feature that delegates tremendous policymaking authority to the executive.[86]

The rollout of Secure Communities is both further evidence of the power of the president over immigration policy and an additional means of centralizing the use of discretion within the executive branch.[87] Before Secure Communities, people arrested by local police were screened for immigration violations in only a small number of communities around the country.[88] Soon such screening will be universal. Local officials will have no power to pick and choose directly which arrestees get screened (though, of course, they do have the power to decide whom to arrest). And for those arrestees who are identified as potentially deportable, the consolidation of the screening function facilitates the more

---

[83] David A. Strauss, *Must Like Cases Be Treated Alike?* *18–19 (Chicago Public Law and Legal Theory Working Paper No 24, May 8, 2002), online at http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf (visited Mar 4, 2013); H.L.A. Hart, *The Concept of Law* 155 (Clarendon 1961).

[84] See Preston and Cushman, *Obama to Permit Young Migrants*, NY Times at A1 (cited in note 38).

[85] See Morton, Memorandum, *Exercising Prosecutorial Discretion* at 4 (cited in note 37).

[86] See Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L J 458, 463 (2009).

[87] See DHS, Press Release, *Secretary Napolitano's Remarks* (cited in note 35) (contrasting Secure Communities with earlier ad hoc approaches).

[88] See text accompanying notes 2–14.

uniform exercise of discretion. If DHS chooses, it can more frequently ensure that like cases are treated alike.[89]

These changes in immigration enforcement parallel important trends in modern criminal law. In both prosecutors' offices and law enforcement agencies, efforts are underway in many places to discipline the vast discretion historically held by the individual prosecutor and the lone cop on the beat. Prominent prosecutors' offices have begun adopting internal controls designed to promote the more uniform administration of justice.[90] Major police forces have increasingly come to rely on data-driven models of crime prevention and officer accountability.[91] DHS, which houses both the prosecuting arm and police force for immigration law, has drawn on both of these developments in structuring Secure Communities.

In all of these contexts, the benefits of centralizing discretion often come with hidden costs. As Bernard Harcourt and others have noted in the criminal context, for example, these more "rational" models of policing can often obscure the ways in which seemingly neutral rules can in practice concentrate the burdens of law enforcement on minority communities.[92] Our findings about Secure Communities suggest that this may be precisely what happened during the program's rollout. Early activation under the program is highly correlated with the size of a county's Hispanic population—a possibility that has been obscured by both the official justifications for Secure Communities

---

89 We are exploring whether there is evidence that the agency is actually doing just this as part of our larger empirical assessment of Secure Communities. See Adam B. Cox and Thomas J. Miles, *The Future of Immigration Federalism* (on file with authors).

90 See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan L Rev 869, 915–21 (2009); Center on the Administration of Criminal Law, *Establishing Conviction Integrity Programs in Prosecutors' Offices: A Report of the Center on the Administration of Criminal Law's Conviction Integrity Project* 4–5 (NYU School of Law 2012), online at http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__centers__center_on_administration_of_criminal_law/documents/documents/ecm_pro_073583.pdf (visited Mar 4, 2013).

91 The rise in the role of prediction and systematization in law enforcement has been documented by Bernard Harcourt, who has given it the (slightly pejorative) label "actuarial justice." Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* 2–3 (Chicago 2007). The trend has even penetrated deeply into pop culture, with the cult crime show *The Wire* revolving centrally around CompSTAT—a real-world data-analysis tool designed to help police departments allocate resources efficiently and centralize discretion within their organizations.

92 Id at 4–6.

and the less-than-transparent "risk-based" model that DHS has said it used to set activation priorities.[93]

The tight correlation under Secure Communities between activation and ethnicity is obviously troubling. Nor can it be dismissed as an artifact of the government's focus on the border or on areas containing large pockets of noncitizens. Instead, as the detailed analysis in Part III demonstrated, the correlation between activation and Hispanic population is extremely persistent: it remains large and statistically significant even when we control for border proximity and myriad other factors on which the government might have relied in deciding where to target its limited enforcement resources.

To be sure, our findings do not necessarily mean that those designing the rollout strategy engaged in racial profiling. In the parlance of equal protection jurisprudence, the data reveal a disparate impact, but cannot identify disparate treatment—the intentional singling out of a racial or ethnic group. Still, one can imagine that some might defend the resulting pattern on the ground that, regardless of the government's motive, singling out predominantly Hispanic communities for increased immigration enforcement is rational because the number of immigration violators in a community is correlated with the size of the Hispanic population. A number of commentators have argued in other contexts that racial profiling is perfectly rational and should be lawful—so long as the government relies on accurate statistical generalizations about the profiled group.[94] And many years ago the Supreme Court suggested that Hispanic ethnicity could in fact be used by law enforcement officers as a factor in determining whether there is reasonable suspicion that a person has violated immigration law.[95]

Figuring out whether targeting Hispanic communities in the rollout is consistent with rational profiling, understood in the above sense, is well beyond the scope of this paper. We should note, however, that the data in our larger empirical

---

93 See note 44 and accompanying text.

94 See, for example, Heather Mac Donald, *Are Cops Racist?* 9–10, 28–29 (Ivan R. Dee 2003); Frederick Schauer, *Profiles, Probabilities, and Stereotypes* 18–19 (Belknap 2006).

95 See *United States v Brignoni-Ponce*, 422 US 873, 884–87 (1975) (holding that apparent ethnicity could be *one* factor, but not the sole factor, in a stop). But see *United States v Montero–Camargo*, 208 F3d 1122, 1131–35 (9th Cir 2000) (en banc) (holding that Hispanic ethnicity could no longer be a factor in the reasonable suspicion calculus because of post-*Brignoni-Ponce* changes to the demography of border areas).

study of Secure Communities cast some doubt on such a claim.[96] For while the rollout itself correlates highly with the fraction of a county's population that is Hispanic, the fraction of that county's submissions that yield matches against ICE's biometric database does not.[97] In other words, "hit rates" under the program do not appear to correlate meaningfully with a county's Hispanic population. Yet if the proportion of a county that was Hispanic were truly correlated with the proportion of the county that was in violation of immigration law, then all else equal one would expect hit rates to correlate with ethnicity.

Ultimately, our aim is not to resolve fully the concerns raised by the pattern of Secure Communities' rollout. Instead our principal goal has been descriptive—to provide the first large-scale empirical study of the way in which discretion has been wielded in the most important immigration enforcement initiative adopted in recent history. Our findings have important implications for Secure Communities itself, raising questions about the program's putative focus on crime and revealing a troubling correlation between ethnicity and the program's deployment. More broadly, our findings highlight important similarities between the structure of modern criminal and immigration enforcement, findings that we hope will spur the integration of scholarship on both subjects.

---

[96] As we noted earlier, our dataset includes comprehensive statistics on the productivity of Secure Communities in each community where it was activated—including the number of monthly submissions, hits, arrests by ICE agents, and, ultimately, deportations. See Part III.

[97] See Cox and Miles, *The Future of Immigration Federalism* (cited in note 89).

APPENDIX

TABLE 1. SUMMARY STATISTICS OF MAIN VARIABLES

Variable	Mean (Standard Deviation)
County Is on Southern Border with Mexico	0.009 (0.097)
County Is on Gulf of Mexico	0.018 (0.133)
Percent Population Hispanic	0.076 (0.127)
Change in Percent Population Hispanic 2000–2010	0.022 (0.024)
Percent Population Noncitizen	0.027 (0.036)
Log Violent Crime Rate	4.747 (1.761)
Log Property Crime Rate	6.994 (1.987)
Log Population Density	3.748 (1.678)
Log Income per Capita	10.290 (0.229)
Poverty Rate	15.099 (6.222)
Percent of Vote in 2004 for Republican President	0.603 (0.126)
Percent Population Black	0.090 (0.143)
Count of Local Anti-Immigrant Legislation	0.040 (0.314)
Local 287(g) Agreement	0.015 (0.121)
Log Police Officers per Capita	2.058 (0.646)

Note: $N = 3{,}077$, except for police per capita where $N = 2{,}827$.