

**The Department of Homeland Security's Authority to Prioritize  
Removal of Certain Aliens Unlawfully Present in the United States  
and to Defer Removal of Others**

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Memorandum Opinion for the Secretary of Homeland Security  
and the Counsel to the President

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws.

First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest."

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she [satisfies various regulatory criteria specified below.] You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program....

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA

recipients would not be a permissible exercise of enforcement discretion.

## I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others....

### A.

... [T]he Immigration and Nationality Act of 1952 ("INA"), as amended, ... established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States* (2012)....

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney* (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] ... a number of factors which are peculiarly within its expertise." ...

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy* (1950)....

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer* (1952). These limits, however, are not clearly defined....

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake

the action,” or “whether agency resources are best spent on this violation or another.” *Id.* Other relevant considerations may include “the proper ordering of [the agency’s] priorities,” and the agency’s assessment of “whether the particular enforcement action [at issue] best fits the agency’s overall policies.” *Id.*

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* (an agency may not “disregard legislative direction in the statutory scheme that [it] administers”). In other words, an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, “‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, “the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law”).

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above.... That does not mean that all “general policies” respecting non-enforcement are categorically forbidden: Some “general policies” may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores* (1993) (explaining that an agency’s use of “reasonable presumptions and generic rules” is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses “special risks” that the agency has exceeded the bounds of its enforcement discretion.

## B.

We now turn, against this backdrop, to DHS’s proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long employed guidance instructing immigration officers to prioritize the

enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others.... The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to “provide clearer and more effective guidance in the pursuit” of DHS’s enforcement priorities; namely, “threats to national security, public safety and border security.” Johnson Prioritization Memorandum. [This refers to a draft memorandum by Jeh Johnson, then Secretary of Homeland Security, Nov. 17, 2014, regarding policies for apprehension, detention, and removal of undocumented immigrants.]

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States.

- The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully.
- The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs.
- The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014.

The policy would also provide that none of these aliens should be prioritized for removal if they “qualify for asylum or another form of relief under our laws.”

The policy would instruct that resources should be directed to these priority categories in a manner “commensurate with the level of prioritization identified.” It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, “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.” Similar discretionary provisions would apply to aliens in the second and third priority categories....

DHS has explained that the proposed policy is designed to respond to the

practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. The proposed policy explains that, because DHS “cannot respond to all immigration violations or remove all persons illegally in the United States,” it seeks to “prioritize the use of enforcement personnel, detention space, and removal assets” to “ensure that use of its limited resources is devoted to the pursuit of” DHS’s highest priorities. Johnson Prioritization Memorandum.

In our view, DHS’s proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly “within [DHS’s] expertise.” *Chaney*. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS’s organic statute itself recognizes this inevitable fact, instructing the Secretary to establish “national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5). And an agency’s need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion....

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS’s enforcement activities ... Congress has directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.” .... The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern.... The policy thus raises no concern that DHS has relied “on factors which Congress had not intended it to consider.”

Further, although the proposed policy is not a “single-shot non-enforcement decision,” neither does it amount to an abdication of DHS’s statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of

ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system....

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances.... Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended.....

For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.

## II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above....

### A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States.... The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS (July 16, 1973). This form of administrative discretion was later termed "deferred action."

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court.... Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States— and it may be revoked by immigration authorities at their discretion. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time....

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend

ad hoc deferred action if they “encounter cases during [their] normal course of business that they feel warrant deferred action.” An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing “[a]n explanation as to why he or she is seeking deferred action” along with supporting documentation, proof of identity, and other records.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens.... On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action....The memorandum discusses deferred action for battered aliens petitioning under the Violence Against Women Act of 1994; for applicants under the Victims of Trafficking and Violence Protection Act of 2000; for foreign students affected by Hurricane Katrina; for certain widows and widowers of U.S. citizens; and, under a program called *Deferred Action for Childhood Arrivals* (DACA) for certain young people (often called “Dreamers”) brought to the U.S. before the age of 16.]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice. On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens.

For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners.... Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be “eligible for deferred action and work authorization.” [*Other similar examples are omitted.*]

## B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS’s authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed....

Deferred action, however, differs in at least [two] respects from more familiar and widespread exercises of enforcement discretion.

- First, unlike (for example) the paradigmatic exercise of prosecutorial

discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion)....

- [Second], class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear.

The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement.... Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion....

The [second] unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs ... may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. Like the establishment of enforcement priorities discussed in Part I, the establishment of



threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief....

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact [as discussed above] that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs.... These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy “rather than embarking on a frolic of its own.” *Cf. Dames & Moore v. Regan* (1981)....

### C.

We now turn to the specifics of DHS’s proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she:

- (1) is not an enforcement priority under DHS policy
- (2) has continuously resided in the United States since before January 1, 2010;
- (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action;
- (4) has a child who is a U.S. citizen or LPR; and
- (5) presents “no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate.”

Johnson Deferred Action Memorandum. [The reference is to another memo of Nov. 17, 2014 by Secretary Johnson, this one on “prosecutorial discretion” with respect to individuals who came to the U.S. as children, and others.] You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program....

### 1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency’s expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs: [(1) the need to conserve scarce enforcement resources, and (2)

humanitarian considerations]

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. The agency must therefore make choices about which violations of the immigration laws it will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion....

DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens.... And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents.... Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate

to circumvent the limits Congress has placed on the availability of those benefits....

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program....

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply.

We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause... [W]hile the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy.... And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief.... This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context....

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful....

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present .... And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members.... But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. Although they may presumptively remain in the United States, ... that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners ... —or enabled their undocumented children to petition for visas on their behalf.... [A] concern with furthering family unity alone would not justify the proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States....

DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

### III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

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After the announcement of the policy discussed in Part II.C.1 of the Thompson memo—referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—Texas led twenty-five other states in suing to challenge the policy. The district court granted a preliminary injunction, and the Fifth Circuit affirmed. It held that the state had standing because of the likely costs of “issuing driver’s licenses to DAPA beneficiaries.” On the merits, the Fifth Circuit found it “unnecessary to address or decide the challenge based on the Take Care clause.” Rather, it relied on the Administrative Procedure Act to hold that DAPA was “...not in accordance with [statutory] law” and therefore had to be “h[e]ld unlawful and set aside.” The court explained:

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and “we 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.” ...

[T]he INA’s specific and intricate provisions ... prescribe[] how parents may derive an immigration classification on the basis of their child’s status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress’s careful plan; the program is “manifestly contrary to the statute” and therefore was properly enjoined.

The Fifth Circuit emphasized that “[w]e do not address whether single, ad hoc grants of deferred action made on a genuinely case-by-case basis are consistent with the INA; we conclude only that the INA does not grant the Secretary discretion to grant deferred action

and lawful presence on a class-wide basis to million otherwise removable aliens.”

The Supreme Court granted certiorari and then divided evenly on the question in June 2016. As is typical in such cases, its ruling consisted of one sentence: “The judgment is affirmed by an equally divided Court.” There was no decisive ninth vote, because Justice Antonin Scalia had died that February. Although Democratic President Barack Obama had in March nominated former federal prosecutor and D.C. Circuit Judge Merrick Garland for the empty seat, the Republican-controlled Senate refused to hold hearings on the nomination. Garland’s nomination lapsed when President Obama left office ten months later.

### **Questions.**

1. Does the Fifth Circuit’s opinion mean that the OLC memo was wrong? If not, what about the Supreme Court’s decision? If not, what would it mean for OLC to “get it wrong” in approving presidential action under these circumstances?
  2. Justice Scalia’s seat was open for more than a year. It was filled in the summer of 2017 with the confirmation of Justice Neil Gorsuch, who had been nominated by the new President, Donald Trump. Was Merrick Garland a “bad” nomination by President Obama? Was the Senate wrong to refuse to hold hearings on Merrick Garland? Or did the system basically work in filling Justice Scalia’s seat? What additional information would you need to decide these questions? (Consider also this thought experiment: Suppose a liberal member of the Court died in February of 2008, George W. Bush’s last year in the White House, and Bush nominated a moderate conservative for the advice and consent of the then-Democratic Senate. Would your reactions to the analogous questions change?)
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