Hidden in Plain Sight: Examining the Obama Administration's Discreet Implementation of a Scaled-Down Version of Comprehensive Immigration Reform

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I. Introduction: The Political Context of Comprehensive Immigration Reform

Comprehensive immigration reform (CIR) has been on the national agenda—with varying degrees of prominence—since 2005. Congress engaged in major debates on the matter twice during President Bush's tenure but failed to enact legislation each time.[1] In both the 2008 and 2012 presidential election campaigns, President Obama promised to make CIR legislation a priority.[2] While reform efforts failed in his first term, the issue has come to the fore again in his second term.[3] Amid renewed debate over major federal legislation, however, remarkably little attention has been paid to the comprehensive suite of reforms that were enacted administratively through the first four years of the Obama Administration.

To be sure, isolated high-profile initiatives have garnered significant coverage.[4] Yet, little comprehensive analysis exists regarding the sweeping administrative reform effort undertaken largely outside the realm of legislation or even the rulemaking process. Admittedly, these changes fall substantially short of all of the elements of typical CIR proposals, as several such items—such as a pathway to citizenship and the creation of new temporary worker programs—unambiguously require legislation. Nonetheless, a thor-

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[1] Comprehensive Immigration Reform Act of 2006, S. 2612, 109th Cong. (2006) (passed Senate in May 2006); Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007) (Senate failed to invoke cloture).

[2] Brian Montopoli, *Obama: I'll Get Immigration Reform Done Next year*, CBSNews.com (Oct. 24, 2012, 5:37 PM), http://www.cbsnews.com/news/obama-ill-get-immigration-reform-done-next-year/.

[3] *See, e.g.*, DREAM Act of 2010, H.R. 5281, 111th Cong. (2010) (Senate failed to invoke cloture).

[4] *See, e.g.*, Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. Times June 15, 2012, at A1, *available at* http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

ough review of executive actions over the past four years illustrates that, through a series of memoranda, guidance documents, policy statements, rulemakings, and resource allocation decisions, the Obama Administration has fundamentally reshaped the federal government's immigration and border security institutions. While the smooth execution of these changes bodes well for the Administration's ability to implement a comprehensive program enacted by Congress, the nature and scope of these executive reforms put them in an uneasy position with respect to administrative law and regulatory policy, an uneasiness which may threaten their ability to endure.

Part II contains a brief review of the federal government's legal authority in the field of immigration administration and border control, including a brief discussion of the federal government's considerably wider latitude in this field compared to other major policy areas in which significant reforms have recently been sought or enacted. Part III outlines the expansive—and, when reviewed all at once, surprisingly cohesive—suite of immigration and border reforms the Obama Administration has implemented over the last four years, frequently outside the realm of legislation or rulemaking. Part IV concludes, assessing the implications of these reforms for both the functional objectives of CIR and the field of administrative law and regulatory policy.

II. The Federal Government's Vast Authority in Immigration and Border Management

A. *The Supreme Court's Deference in the Immigration and Border Field*

The Supreme Court has repeatedly held that the federal government possesses vast authority in the field of immigration and border management. In *Arizona v. United States*, the Court held that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens,"[5] and declared that "[t]he National Government has significant power to regulate immigration."[6] In the course of acknowledging the "pervasiveness of federal regulation"[7] in this field, the Court embraced a broad deference to the discretion of federal officials to "regulate" without much judicial interference or the need to satisfy the strict standards of judicial review common in other areas of law. The Court explained 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"—and "[i]f removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal."[8] As immigration law expert and former federal immigration official David Martin notes,

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[5] 132 S. Ct. 2492, 2498 (2012).
[6] *Id.* at 2510.
[7] *Id.* at 2500.
[8] *Id.* at 2499.

"[T]he Supreme Court emphasized the federal government's 'broad discretion' in immigration enforcement, a discretion that is grounded in the President's constitutional powers."[9]

In doing so, the Court's holding in *Arizona* added to decades of case law granting wide deference to the federal government in the areas of immigration and border management. In the 1990s, the Court held that, in the context of immigration enforcement, "[a]t each stage the Executive has discretion to abandon the endeavor."[10] In fact, the Court noted, "many provisions of [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation."[11] The Court also recognized the executive branch's authority to exercise discretion in immigration enforcement even in the absence of statutory recognition of that authority, describing this type of action by immigration authorities as a "commendable exercise in administrative discretion, developed without express statutory authorization," which can be invoked "at any stage of the administrative process."[12]

In the 1980s, the Court also explicitly acknowledged the need for judicial deference in the field of immigration and border management. The Court specifically stated that "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field."[13] In the 1970s, the Court struck a similar tone:

> Since decisions in [immigration] matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[14]

In sum, through these cases, the Supreme Court has applied *United States v. Armstrong*[15]—which grants prosecutors wide latitude in deciding which cases they choose to bring based on the President's Article II power to "take Care that the Laws be faithfully executed"[16]—to the field of immigration. As Martin explains, *Armstrong* was based, in part, on *Heckler v. Chaney*, a decision that made clear that an agency's decision *not* to enforce was, in almost all instances, not subject to judicial review under the Administrative Procedure Act.[17] The Court in *Heckler* concluded, "The agency is far

[9] David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. 167, 186 (2012).
[10] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483 (1999).
[11] *Id.* at 486.
[12] *Id.* at 484 (internal citations omitted).
[13] Plyler v. Doe, 457 U.S. 202, 225 (1982).
[14] Mathews v. Diaz, 426 U.S. 67, 81 (1976).
[15] 517 U.S. 456 (1996).
[16] U.S. CONST. art. II, § 3.
[17] Martin, *supra* note 9, at 182.

better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[18] The "constitutionally based discretion that the executive branch possesses in the criminal realm also applies to immigration enforcement . . . and it belongs not personally to line officers, but to the President and his delegates who head the relevant agency."[19] As Martin argues, this should insulate the Obama Administration, and particularly the Department of Homeland Security (DHS), from the already pending legal challenges to its sweeping exercises of enforcement discretion.[20]

To be sure, several cases applying immigration doctrine cast doubt on whether the Administration's assertive actions will withstand legal scrutiny in specific challenges. For example, in *Jean v. Nelson*, a case where the government's actions bear significant similarities to the Obama Administration's series of shifts regarding immigration enforcement, the Eleventh Circuit held that the government must engage in notice-and-comment rulemaking before making sweeping changes to immigration policy.[21] More recently, on April 25, 2013, a federal district judge rejected DHS's legal basis for the Deferred Action for Childhood Arrivals (DACA) program, preliminarily ruling that " 'DHS no longer has the discretion to refuse to initiate removal proceedings' against defined classes of migrants without Congressional approval" under the Immigration Reform Act of 1996.[22] Nevertheless, even the judge who wrote the decision acknowledged that he may not have the authority to strike down the program, and the case was later dismissed on jurisdictional grounds. In light of the long string of Supreme Court cases on point, Martin's assessment of the flaws in legal challenges to the Obama Administration's actions remains compelling.

B. *Illustrative Comparisons of Immigration and Border Jurisprudence with Environmental and Financial Regulation*

The general trend toward deference in immigration and border matters differs sharply from the jurisprudence associated with other major policy areas in which presidential administrations have sought significant reform, such as environmental or financial regulation. In these areas, the courts have rejected the discretion of senior executive-branch officials to make judgments on the shape and scope of regulation or imposed stringent, judicially enforced procedural standards on agency action, including decisions to take enforcement actions.

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[18] Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).
[19] Martin, *supra* note 9, at 183.
[20] *Id.*
[21] 711 F.2d 1455, 1482 (11th Cir. 1983).
[22] Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013); *see also* Jeremy Roebuck, *Judge Says Obama Reprieves Lacked Legal Basis*, San Antonio Express News (Apr. 25, 2013), http://www.mysanantonio.com/news/article/Judge-says-Obama-reprieves-lacked-legal-basis-4464726.php.

Specifically, in the realm of environmental policy, the Court rejected the Bush Administration's claim that it enjoyed the discretion to decide not to regulate greenhouse gases in *Massachusetts v. EPA*.[23] The Court explained:

> [The EPA's] laundry list of reasons not to regulate [including that doing so would conflict with the President's favored approach to the problem] . . . have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.[24]

To be sure, *Arizona* and *Massachusetts* are not completely analogous, and *Massachusetts* is a complicated case with implications far beyond the scope of this article. Yet, for present purposes, it serves as a clear example of the Court restricting executive discretion in a major policy area, in contrast to its general deference in the field of immigration and border management. According to administrative law experts Jody Freeman and Adrian Vermeule, *Massachusetts* may represent key justices on the Court "join[ing] forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics."[25] Freeman and Vermeule posit that the case represented an "attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies."[26]

Freeman and Vermeule argue that this rationale extends beyond environmental policy and represents a broader shift in administrative law. They note that *Massachusetts* is "an important administrative law case . . . above all because of the Court's willingness to restrict and carefully scrutinize agency discretion to 'decide not to decide,'" where the agency has the freedom to choose not to make a decision on a matter whatsoever, versus to choose one approach over another.[27] Yet, just five years later, a majority consisting of a strikingly similar lineup of Justices (the liberal bloc joined Justice Kennedy in both opinions, and Chief Justice Roberts also joined the majority in *Arizona*) embraced wide agency discretion to "decide not to decide" in the field of immigration and border management, and approvingly acknowledged the consideration of political factors in the exercise of such discretion.[28] As Martin explains, the gist of *Arizona* and dominant methods of interpreting immigration law since at least the 1950s is precisely to permit

[23] 549 U.S. 497 (2007).

[24] *Id.* at 533–34.

[25] Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 52 (2007).

[26] *Id.*

[27] *Id.* at 108.

[28] *See Arizona*, 132 S. Ct. at 2507, 2510 ("Removal decisions . . . may . . . require consideration of changing political and economic circumstances . . . . The National Government has significant power to regulate immigration.") (internal citations omitted).

this capacity to decide not to decide—for example in the case of granting parole, which is "used in hundreds of thousands of cases each year to allow arriving aliens at the port of entry to establish physical presence in the United States, without detention and without initiation of immigration court proceedings, even though these persons appear to be inadmissible."[29]

Recent activity in the D.C. Circuit with respect to financial regulation buttresses this theory about the unique nature of the federal government's authority to act unilaterally in the field of immigration and border policy. In examining a Securities and Exchange Commission (SEC) rule granting proxy access to certain shareholders of publicly held corporations, the D.C. Circuit held in *Business Roundtable v. SEC* that "the [SEC] acted arbitrarily and capriciously for having failed . . . adequately to assess the economic effects of a new rule."[30] As the court noted:

> [T]he Commission has a unique [statutory] obligation to consider the effect of a new rule upon "efficiency, competition, and capital formation," and its failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" makes promulgation of the rule arbitrary and capricious and not in accordance with law.[31]

Jill Fisch argues persuasively that *Business Roundtable* represents the D.C. Circuit "substituting its own policy judgment for that of Congress, [which] threatens not just the ability of administrative agencies to formulate regulatory policy, but also the ability of Congress to direct agency policymaking."[32] As a result, financial regulatory agencies feel " 'paralyzed' by the threat of litigation," just as they are tasked with implementing major legislation like Dodd-Frank and the JOBS Act, key elements of the Obama Administration's financial regulatory reform agenda.[33] The stinging, sweeping language of the D.C. Circuit suggests that this opinion is not merely a technocratic judgment constraining the SEC procedurally, but rather a sharp signal that the court does not feel obligated to show significant deference to the SEC's policy judgments. As Fisch notes, "language in the opinion suggested the possibility that an SEC determination that differed from that of the court (or even from that of the petitioners) was, as a result, arbitrary."[34]

This state of affairs differs markedly from the state of judicial oversight of immigration and border policy. First, while the D.C. Circuit hooks its activism onto "unique" statutory obligations of the SEC to consider the effects of its regulatory policy on "efficiency, competition, and capital formation," the courts have not identified a similar obligation for cost-benefit

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[29] Martin, *supra* note 9, at 179.

[30] Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[31] *Id.* (internal citations omitted).

[32] Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 Seattle U. L. Rev. 695, 698 (2013).

[33] *Id.* at 696.

[34] *Id.* at 701.

analysis for immigration and border policy. This is certainly not due to the difficulty of conducting such analysis in the field of immigration as compared to financial regulation; think tanks, political actors, and academics have devoted significant time and energy to devising such analyses and arguing why these analyses support their favored policy proscriptions.[35] Instead, it appears to result from differences in the statutory frameworks between the two fields, where the courts have interpreted the authorizing statutes for financial regulatory agencies to require stringent, judicially enforced standards for cost-benefit analysis but have not found a similar obligation in the authorizing statutes for immigration and border management. Second, while the courts seem willing, in the field of financial regulation, to take a more active oversight role that conflicts with what Fisch terms "more traditional deference to agency policymaking,"[36] the Supreme Court has invoked constitutional principles specific to the field of immigration and border management that appear to provide stronger protections for this independence from judicial interference.[37]

Clearly, this does not represent a comprehensive review of all judicial activity regarding all federal agency activity in policy areas of great interest to observers of regulatory policy. Further, the procedures and statutes analyzed in the cases above are not fully analogous, and many differences exist in how different courts address practices involving enforcement discretion, decisions about whether to initiate a rulemaking, and cost-benefit analysis. Yet, in an important sense, these differences are precisely the point. In each field over the past decade, a presidential administration has attempted to use regulatory policy and administrative authority to further major policy objectives. But, immigration and border policy stands out because the courts have, to this point, permitted significantly more latitude and discretion for the Administration to implement a full suite of reforms largely unencumbered by judicial oversight.[38] As the next section will outline in detail, the Obama Administration has enthusiastically—if relatively quietly—embraced this opportunity.

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[35] *See, e.g.*, ROBERT LYNCH & PATRICK OAKFORD, CTR. FOR AM. PROGRESS, THE ECONOMIC EFFECTS OF GRANTING LEGAL STATUS AND CITIZENSHIP TO UNDOCUMENTED IMMIGRANTS, (2013), *available at* http://www.americanprogress.org/wp-content/uploads/2013/03/EconomicEffectsCitizenship-1.pdf; Raúl Hinojosa-Ojeda, *The Economic Benefits of Comprehensive Immigration Reform*, 32 CATO J. 175 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247474.

[36] Fisch, *supra* note 32, at 701.

[37] Martin, *supra* note 9; *see* Plyler v. Doe, 457 U.S. 202, 225 (1982).

[38] Arguably, areas like labor law and education reform may enjoy similarly broad degrees of deference, but, in the former, the Obama Administration has not yet pursued a major suite of reforms, and in the latter, Congress explicitly authorized the most visible reform—the Race to the Top initiative. For more extensive discussion of this type of executive action to implement broad policy changes, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

III. Executing Immigration Reform Through Administrative Means

President Obama has stressed CIR as a top legislative priority since his first campaign for President, and the main elements of reform he has advocated have remained relatively consistent.[39] Now, as then, he supports four broad categories of reforms: (1) bringing undocumented immigrants out of the shadows and, ideally, on a path to citizenship; (2) bolstering enforcement against criminals, employers who exploit undocumented labor, and the use of trafficking of fraudulent documents; (3) strengthening border security; and (4) fixing the broken architecture of the legal immigration system.[40] Unsurprisingly, efforts in the Senate during 2013 focused on similar categories, as the Senate "Gang of Eight" leading the push for CIR organized their legislative package around roughly the same principles.[41] As this high-level attention demonstrates, clearly much remains to be done in the field of immigration reform that simply cannot be achieved administratively. Perhaps because a number of these distinctly legislative tasks remain, those who favor reform—particularly advocacy groups—have not trumpeted the scope, breadth, and cohesiveness of immigration reform that has been achieved administratively, often choosing instead to highlight the limits of these efforts.[42] While discreet initiatives have received substantial attention, little, if any, literature has been devoted to describing the full suite of immigration reforms that have taken place during the Obama Administration.[43] Consequently, what follows is a comprehensive description of the Administration's immigration reform efforts to date, which have made significant progress in each of the four major categories of reform.

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[39] Richard Simon, *Both Sides Tout Immigration Reform*, L.A. Times (June 29, 2008), http://articles.latimes.com/2008/jun/29/nation/na-campaign29.

[40] *See* President Barack Obama, Remarks on Comprehensive Immigration Reform at Del Sol High School, Las Vegas, Nev. (Jan. 29, 2013), http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform; *IMMIGRATION: Creating an Immigration System for the 21st Century*, The White House, http://www.whitehouse.gov/issues/immigration (last visited April 22, 2013) [hereinafter White House *21st Century* Press Release]. The White House describes "the President's four-part plan" as including: (1) continuing to strengthen border security, (2) streamlining legal immigration, (3) earned citizenship, and (4) cracking down on employers hiring undocumented workers. *Id.*

[41] *See* Sen. Charles Schumer et al., *Bipartisan Framework for Comprehensive Immigration Reform*, John McCain (Jan. 29, 2013), http://www.mccain.senate.gov/public/index.cfm/2013/1/post-87afa1c7-c0ac-6131-5e8e-9bf8904159e6. The Gang of Eight, consisting of Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake, was a Senate working group dedicated to crafting a bipartisan legislative framework for CIR.

[42] *See, e.g.*, *Room for Improvement in New DHS, ICE Detention Standards*, Human Rights First (Feb. 28, 2012), http://www.humanrightsfirst.org/2012/02/28/room-for-improvement-in-new-dhs-ice-detention-standards/.

[43] Compare the voluminous commentary on regulatory action regarding Dodd-Frank. *See, e.g.*, John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 Colum. L. Rev. 795 (2011).

A. *Gradually Bringing the Undocumented Out of the Shadows*

One major motivation of immigration reformers is the desire to "bring out of the shadows" hardworking undocumented immigrants who, other than entering or staying illegally, have obeyed this country's rules.[44] While legislative proposals include processes for these individuals to become permanent legal residents and eventually citizens, the Obama Administration has undertaken a series of actions that provide for functionally similar—though not quite as secure—status for many who would likely be eligible for a path to citizenship, while refocusing enforcement efforts on national security and public safety threats, repeat offenders, and recent border entrants.

1. *July 2009: Refocusing the 287(g) Program*

In July 2009, DHS and its component agency, Immigration and Customs Enforcement (ICE), announced revisions to the 287(g) agreements that DHS enters into with state and local law enforcement to assist in immigration enforcement.[45] Many immigrant and civil rights advocacy groups, such as the American Civil Liberties Union (ACLU), had harshly criticized these agreements, alleging that local law enforcement agencies inappropriately "used their 287(g) authority to remove immigrants stopped for traffic violations and other minor violations," leading to a "serious risk of racial and ethnic profiling."[46] In order to address these concerns, ICE implemented a new memorandum of agreement (MOA) for each jurisdiction participating in the 287(g) program, which restricted the delegated immigration authority to minimize pretextual arrests, required state and local officers operating under the authority of the 287(g) program to undergo training, and required that these officers focus their immigration efforts on ICE's identified enforcement priorities, namely criminals and other serious threats to public safety.[47] The Administration took these reforms a step further in 2012 when ICE eliminated all 287(g) agreements involving task force models (those where the state and local officials act as enforcement officers in the field rather than just in jails).[48]

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[44] *See, e.g.*, Obama, *supra* note 40.

[45] *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, U.S. DEP'T OF HOMELAND SEC. (July 10, 2009), http://www.dhs.gov/news/2009/07/10/secretary-announces-new-agreement-state-and-local-immigration-enforcement [hereinafter 287(g) Press Release].

[46] *Examining 287(g): The Role of State and Local Enforcement in Immigration Law, Hearing before the H. Comm. on Homeland Sec.,* 111th Cong. 10 (2009) (statement of Caroline Fredrickson, Director of the ACLU Washington Legislative Office).

[47] 287(g) Press Release, *supra* note 45.

[48] *FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 21, 2012), http://www.ice.gov/news/releases/1212/121221washingtondc2.htm.

2. *September 2009: Assisting Immigrant Victims of Crimes*

In September 2009, ICE issued new guidance to its personnel regarding undocumented immigrants who have "suffered substantial physical or mental abuse" and who assist government officials in investigating or prosecuting such criminal activity, and thus may be eligible to apply for U visas.[49] The memorandum instructs Field Office Directors to "favorably view an alien's request for a Stay of Removal if USCIS [U.S. Citizenship and Immigration Services] has determined that the alien has established *prima facie* eligibility [for a U visa]" or if "humanitarian factors related to the alien or the alien's close relatives who rely on the alien for support" are present.[50] The memorandum also provides procedural instructions that ease the informational burden on potential U visa beneficiaries, protect potential beneficiaries from removal while USCIS adjudicates their status, and "extend the stay as needed for USCIS to complete adjudication of the petition."[51] Finally, the memorandum notes that "[ICE] should release the alien while the petition is pending unless serious adverse factors weigh against release or the alien is subject to mandatory detention under the [law]."[52] As many advocacy groups have noted, undocumented immigrants may resist reporting crime or assisting the authorities due to a fear that doing so will expose them to the risk of detention and removal, making these communities vulnerable to exploitation.[53] These clear guidelines for immigration enforcement officials in the field are an important step toward alleviating and rectifying these abuses.

3. *December 2009: Refocusing Fugitive Operations*

ICE's National Fugitive Operations Program is designed to focus on the identification of immigration fugitives for removal. An immigration fugitive is defined as "a person who has been ordered deported, excluded, or removed by an immigration judge, but has not left the country; or one who has failed to report to DHS as required."[54] But the National Fugitive Operations Program came under significant criticism for sweeping up non-fugitive, non-criminal undocumented immigrants in the course of its efforts to identify

[49] Memorandum from David J. Venturella, Acting Dir., ICE, Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants 1 (Sept. 24, 2009), http://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf.

[50] *Id.* at 2.

[51] *Id.* at 3.

[52] *Id.*

[53] S. Poverty Law Ctr., Under Siege: Life for Low-Income Latinos in the South 25–27 (2009), *available at* http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf.

[54] Margot Mendelson et al., Collateral Damage: An Examination of ICE's Fugitive Operations Program 1 (Muzaffar Chishti & Doris Meissner eds., 2009), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

fugitives.[55] The Migration Policy Institute found that, in the years preceding the Obama Administration, "ordinary status violators," rather than fugitives, comprised up to forty percent of Fugitive Operations Program arrests.[56] In response, in December 2009, ICE Director John Morton issued a memorandum "to clarify the enforcement priorities of the [Program]."[57] Morton stated:

> [I]t is the policy of this agency that the program focus on its core mission—the apprehension and removal of fugitive aliens [as well as criminals and repeat immigration violators] . . . . As a general rule, the program's resources should not be used to target other classes of removable aliens . . . .[58]

Morton outlined tiers of enforcement priorities for fugitive operations teams to effectuate this policy, specifying that at least seventy percent of resources should be dedicated to tier one fugitives.[59] Finally, Morton emphasized, "*Absent extraordinary circumstances, team members should not detain aliens who are physically or mentally ill, disabled, elderly, pregnant, nursing, or the sole caretaker(s) of children or the infirm*," representing an unmistakable effort to shift agency culture to protect the types of undocumented immigrants that would most likely benefit from CIR.[60]

4. *June 2010: Articulating New Civil Enforcement Priorities*

In June 2010, Morton issued a broader statement of enforcement priorities in a landmark memorandum to all ICE employees. The memorandum explained that, effective immediately, "[t]hese priorities shall apply *across all ICE programs* and shall inform enforcement activity, detention decisions, budget requests and execution, and strategic planning."[61]

The memorandum is based on the availability of limited resources for enforcement activity, given the size of the overall unlawful population (and, in this sense, is a classic statement of how an agency will make resource allocation decisions in its enforcement practices). As Morton acknowledges, ICE only has sufficient annual resources to investigate and remove approximately four percent of the estimated 11,000,000 undocumented immigrants

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[55] *Id.* When undertaking an operation to apprehend an immigration fugitive, it is relatively common for ICE officers to encounter several non-fugitives at the location of the apprehension (as fugitives are often apprehended at their home or place of business).

[56] MENDELSON ET AL., *supra* note 54, at 13, 18.

[57] Memorandum from John Morton, Dir., ICE, Policy No. 11001.1, National Fugitive Operations Program: Priorities, Goals, and Expectations, 1 (Dec. 8, 2009), http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf.

[58] *Id.*

[59] *Id.* at 2.

[60] *Id.* at 3 (underlining in original, here formatted in italics).

[61] Memorandum from John Morton, Dir., ICE, Policy No. 10072.1, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 1 (June 30, 2010), http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf (emphasis added).

in the country.[62] Thus, the establishment of enforcement priorities can be an incredibly significant factor in the day-to-day existence of large portions of the undocumented population. On the one hand, without such enforcement priorities, ICE officers can treat virtually all undocumented individuals that they encounter the same—likely detaining them and placing them into removal proceedings. This means that all undocumented immigrants must live in fear that they can be removed at any time if they encounter an immigration officer, and thus must structure their lives accordingly. On the other hand, clear enforcement priorities that make explicit which portions of the unlawful population will receive the most focus and which are low priorities permit those who fall into the latter category to pursue a relatively stable existence in this country. ICE adopted the latter strategy in the June 2010 memorandum, with its concomitant effect on the relevant portions of the undocumented populations.

Specifically, the memorandum makes clear that ICE leadership sought to focus as its top enforcement priority on unlawful individuals who pose a threat to "national security, public safety, and border security."[63] Within these categories, ICE identified certain types of individuals as a higher priority, particularly: violent criminals, felons and repeat offenders, individuals subject to outstanding criminal warrants, gang members, and other serious risks to public safety.[64] The memorandum designates recent unlawful entrants as the second highest priority to promote border security.[65] Building on the guidance issued in December 2009 for the National Fugitive Operations Program, the memorandum designates as the third priority the "removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls."[66]

Interestingly, the memorandum itself reflects the tension between the more traditional discretion of individual officers to treat any undocumented individual as they see fit, and the administration's clear attempt to standardize and reform enforcement activity: the text contains a specific disclaimer that nothing contained within the memorandum "should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States," but it also emphasizes that "resources should be committed primarily to advancing the priorities set forth above."[67] Further, as with virtually all of the written documentation of the Administra-

[62] Memorandum from Morton, *supra* note 61. Jeffrey S. Passel, D'Vera Cohn, and Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, Pew Research Center Hispanic Trends Project (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/.

[63] *Id.*

[64] *Id.* at 2.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 3.

tion's reform efforts, the final version of the memorandum makes clear that it does not give rise to any judicially enforceable rights.[68]

5. *August 2010: Handling Cases Where Individuals Are Both in Removal Proceedings and Have Pending or Approved Applications or Petitions for Relief*

The June 2010 memorandum was prospective, meaning it did not squarely address the circumstances of undocumented immigrants already in removal proceedings but who also may have a path to permanent status (for instance, for those in removal proceedings who had previously married a U.S. citizen). Shortly after issuing the civil enforcement priorities memorandum, Morton issued a specific guidance document regarding these scenarios. Specifically, he announced a new ICE policy "to request expedited adjudication of an application or petition for an alien in removal proceedings that is pending before [USCIS] if the approval of such an application or petition would provide an immediate basis for relief for the alien."[69] The memorandum instructs ICE personnel that, if no adverse factors exist, they should "dismiss proceedings without prejudice," "release the alien pursuant to the dismissal of proceedings," and, more generally, develop "a standard operating procedure [ ] to identify removal cases that involve an application or petition pending before USCIS."[70]

While the guidance document couches this policy change as a means to achieve greater efficiency and conserve scarce resources, it is remarkable for several reasons. First, it explicitly directs ICE attorneys to exercise their prosecutorial discretion in a particular way: namely, to assist undocumented immigrants who have pending applications or petitions for relief (which adds up to 17,000 undocumented immigrants, or nearly five percent of the total number of individuals ICE removes annually).[71] Second, by its very nature, this policy primarily covers individuals already in the immigration system who, by virtue of having a plausible path to adjusting their legal status, clearly fit the mold of the long-established, noncriminal, rule-abiding immigrants that proponents of CIR repeatedly invoke in pressing for legislation that will permit such individuals to come out of the shadows.

[68] Memorandum from John Morton, Dir., ICE, Policy No. 10072.1, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 4 (Mar 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[69] Memorandum from John Morton, Dir., ICE, Policy No. 16021.1, Guidance Regarding the Handling of Removal Proceedings of Aliens With Pending or Approved Applications or Petitions 1 (Aug. 20, 2010), http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf.

[70] *Id.* at 3.

[71] *Feds to Drop Deportation of Thousands*, ARIZ. REPUBLIC, Aug. 28, 2010, http://www.azcentral.com/news/articles/2010/08/28/20100828immig-detain.html.

6. *June 2011: Increasing Consistency in the Exercise of Prosecutorial Discretion*

In June 2011, Morton issued two additional memoranda clarifying ICE-wide policy on prosecutorial discretion, which particularly focused on their application to ICE attorneys handling cases of individuals already in removal proceedings. The first memorandum states explicitly that, "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime" to avoid inhibiting "the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice."[72] As discussed above, such reticence is a major concern of immigrant advocacy groups.

In addition, Morton issued another, broader memorandum—which rescinded two Bush Administration memoranda—that sought to provide more detail on the factors and procedures that ICE personnel should rely upon when implementing the June 2010 memorandum. In doing so, the Agency moved further along the spectrum toward describing the categories of undocumented individuals that the Administration believed should benefit from its discretionary authority, and shifting the weight of the procedural burden from the undocumented to ICE.[73] The memorandum lists a wide range of factors that ICE officers, agents, and attorneys should consider "[w]hen weighing whether an exercise of prosecutorial discretion may be warranted," including whether the individual belongs to a category of undocumented immigrants who would conceivably benefit from legislative CIR.[74] Specifically, the memorandum states that "[t]he following positive factors should prompt particular care and consideration": veterans and members of the armed forces, long-time residents, minors, the elderly, pregnant or nursing women, victims of serious crimes, and those suffering from a serious mental or physical disability or health condition.[75] One could easily imagine a compromise immigration bill focusing on these incredibly sympathetic groups.[76]

Further, the memorandum includes specific procedural instructions that put the onus on ICE personnel to act "as early in the case or proceeding as possible . . . without waiting for an alien or alien's advocate or counsel to

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[72] Memorandum from John Morton, Dir., ICE, Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 1 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[73] *See* Memorandum from John Morton, Dir., ICE, Policy No. 10075.1, Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 1 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[74] *Id.* at 4.

[75] *Id.* at 5.

[76] *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101-09 (2013) [hereinafter Gang of Eight Bill].

request a favorable exercise of discretion."[77] In other words, despite formally making decisions "on a case-by-case basis," this essentially constitutes an instruction to ICE personnel to proactively identify undocumented immigrants who fit one of a variety of positive categories systematically and take swift action to remove them from the removal process or not place them in removal proceedings in the first place.[78] Functionally, the contents of this memorandum seem strikingly similar to the adjustment-of-status provisions of most legislative CIR proposals, other than omitting a path to citizenship and formal work authorization. ICE continued these types of efforts in October 2012, with a memorandum clarifying that ICE officials should treat "committed, long-term, same-sex relationship[s]" as included in the positive discretionary factor of "family relationships,"[79] and in December 2012, with a memorandum on the use of detainers that further formalizes the process outlined in the June 2011 memorandum.[80]

7. *August 2011: Announcing Systematic Review of All Individuals in Removal Proceedings*

In August 2011, Secretary Napolitano announced a "case-by-case review of all individuals currently in removal proceedings to ensure that they constitute our highest priorities," as well a review of new cases to ensure that they also met the Department's priorities.[81] Napolitano also announced that guidance would be issued on how to provide for appropriate discretionary consideration to be given to compelling cases involving a final order of removal in order to implement the June 2011 prosecutorial discretion memorandum.[82] This initiative was designed to identify cases that had entered the immigration enforcement system (and were currently pending there) before ICE implemented its new enforcement priorities in 2010. Importantly, similar to the June 2011 guidance, this policy requires significant *proactive* effort by DHS officials.

Likely sensitive to the functional similarities of these actions to legislative immigration reform proposals, Secretary Napolitano stressed that the

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[77] Memorandum from John Morton, *supra* note 73, at 5.

[78] *Id.* For the significant value that shifting default behaviors and options can have, see generally Cass R. Sunstein, Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych (May 19, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171343.

[79] Memorandum from Gary Mead, Exec. Assoc. Dir., ICE, Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships 1 (Oct. 5, 2012), http://www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf. The impact of this directive is likely less significant now in light of *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[80] Memorandum from John Morton, Dir., ICE, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems (Dec. 21, 2012), https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[81] Letter from Sec'y Janet Napolitano to Senator Dick Durbin 2 (Aug. 18, 2011), *available at* http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

[82] *Id.*

review "will not provide categorical relief for any group. Thus, this process will not alleviate the need for passage of the DREAM Act or for larger reforms to our immigration laws."[83] Nonetheless, subsequent guidance documents[84] made clear that the review would apply to all of the approximately 300,000 cases pending in immigration courts.[85] Despite the detailed listing of favorable and unfavorable characteristics and the strong implication that lawyers should pursue "administrative closure"[86] for those in the former categories—ICE leadership even provided a "template for a joint motion to administratively close proceedings"[87]—the guidance documents insisted on no provision of a mechanical "'bright-line' test."[88] This resistance to categorical grants of relief would soon begin to fade.

8. *November 2011: Reducing Risks Associated With Applying for Immigration Benefits*

Despite the many changes to enforcement priorities, undocumented immigrants can still face significant risks in voluntarily encountering the immigration system. One major risk involves applying to USCIS for any sort of immigration benefit or adjustment of status. Prior to November 2011, virtually every individual who unsuccessfully applied for an immigration benefit was issued a formal notice to appear, which initiated removal proceedings. Consequently, if an individual applied for a benefit solely based on the mistaken belief or even the bad advice of unethical counsel, not only would her benefit application be denied, but she also would automatically be placed in removal proceedings. This generated two negative phenomena: it sowed distrust and fear among even the most sympathetic members of the undocumented population, and it subverted efforts to focus enforcement resources on higher priorities for removal, as—almost by definition—those most likely to believe they may be eligible for an immigration benefit are members of low-priority populations. To address this problem, in November 2011, USCIS issued revised guidance aligning USCIS's practices regarding the issuance of notices to appear in discretionary cases with the ICE enforce-

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[83] *Id.*

[84] *See, e.g.*, U.S. Immigration & Customs Enforcement, Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review (Nov. 17, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf [hereinafter ICE Nov. 2011 Memo]; Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, Policy No. 16021.1, Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

[85] Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1.

[86] *EOIR Notice Regarding Prosecutorial Discretion and Administrative Closure*, U.S. DEP'T OF JUSTICE (July 23, 2012), http://www.justice.gov/eoir/press/2012/PD_Notice_July2012.htm. Administrative closure takes the case out of immigration proceedings and essentially off the docket, but does not provide individuals with work authorization.

[87] Memorandum from Peter S. Vincent, *supra* note 84.

[88] ICE Nov. 2011 Memo, *supra* note 84.

ment priorities outlined above.[89] As a result, individuals whose applications are denied by USCIS now generally only receive a notice to appear if they have a criminal record, are a security risk, or have committed fraud.[90]

9. *June 2012: Announcing the Deferred Action for Childhood Arrivals (DACA) Program*

In June 2012, President Obama hosted a Rose Garden press conference to announce precisely the sort of categorical relief that the Administration had resisted for almost all of his first term, "specifically for certain young people sometimes called 'Dreamers.'"[91] Notably, the President described the new policy as simply an improvement on the series of actions regarding enforcement discretion described above, stating, "We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education . . . . We've improved on that discretion carefully and thoughtfully . . . . [T]oday, we're improving it again."[92] The President emphasized, "This is not a path to citizenship. It's not a permanent fix."[93]

Similarly, Secretary Napolitano's official announcement and memorandum to the heads of Customs and Border Protection (CBP), ICE, and USCIS explicitly portray the DACA program as an enhancement of existing policy to apply discretion on a case-by-case basis.[94] Yet, the directive provides for a standardized new procedure for a large category of individuals to receive a renewable grant of deferred action, including the ability "to apply for work authorization," a significant change from mere administrative closure of a case.[95] Further, the directive makes eligible any undocumented individual who came to the United States when he or she was under sixteen and is currently no older than thirty; has resided in the United States for at least five years; "is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran"; and does not have a serious criminal record or otherwise

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[89] U.S. Citizen & Immigration Servs., PM 602-0050, Revised Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

[90] *Id.*

[91] President Barack Obama, Remarks by the President on Immigration (Jun. 15, 2012), http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

[92] *Id.*

[93] *Id.*

[94] Memorandum from Janet Napolitano, Sec'y of Homeland Security, DHS, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[95] *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, U.S. Dep't of Homeland Sec. (June 15, 2012), http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low.

pose a threat to national security.[96] Estimates of the number of individuals who satisfy these criteria reach as high as 1.76 million—approximately sixteen percent of the entire undocumented population in the United States.[97]

10. *January 2013: Facilitating the Adjustment of Status for Relatives of U.S. Citizens*

The Obama Administration did issue one key rule as part of its transformation of immigration enforcement. It addressed a grim cross-pressure experienced by undocumented individuals who are immediate relatives of U.S. citizens: the three-year bar (if they have been unlawfully present in the United States for six months to a year) or ten-year bar (if they have been unlawfully present in the United States for over a year) on returning to the United States if they depart the country voluntarily, which they must do if they seek to adjust their status based on their relation to a U.S. citizen.[98] These individuals can obtain waivers, but under the old rule, "immediate relatives [could] not file a waiver application until *after* they . . . appeared for an immigrant visa interview abroad . . . ."[99] In other words, "Immigrants [would] have to choose between leaving the country and taking the risk they might not be able to return [for years or whatsoever], or remaining in the country illegally."[100] The new rule "establishes a process that allows certain individuals to apply for a provisional unlawful presence waiver *before* they depart the United States . . . ."[101] This procedure not only reduces the amount of time these individuals are separated from their U.S. citizen relatives,[102] it also provides encouragement to initiate and complete the adjustment-of-status process in the first place, instead of perversely incentivizing individuals who qualify for legal permanent residence to remain in the shadows, as the prior system did.

B. *Cracking Down on Criminals, Egregious Employer Violators of Immigration Law, and Fraud*

Over roughly the same time period that DHS introduced its spectrum of enforcement reforms, it also implemented a series of initiatives and policy

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[96] Memorandum from Janet Napolitano, *supra* note 94, at 1.

[97] *As Many as 1.76 Million Unauthorized Immigrant Youth Could Gain Relief From Deportation Under Deferred Action for Childhood Arrivals Initiative*, Migration Policy Inst., (Aug. 7, 2012), http://www.migrationpolicy.org/news/2012_08_07.php.

[98] *Secretary Napolitano Announces Final Rule to Support Family Unity During Waiver Process*, U.S. Citizenship & Immigration Servs. (Jan. 2, 2013), http://www.uscis.gov/news/secretary-napolitano-announces-final-rule-support-family-unity-during-waiver-process [hereinafter DHS Family Unity Press Release].

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

[100] *So Close and Yet So Far: How the Three- and Ten-Year Bars Keep Families Apart*, Immigration Policy Ctr. (July 25, 2011), http://www.immigrationpolicy.org/sites/default/files/docs/3_and_10_year_bars_072511.pdf.

[101] DHS Family Unity Press Release, *supra* note 98 (emphasis added).

[102] *Id.*

changes to crack down on exploitative or egregious employers of undocumented workers, criminals, and other individuals who pose a threat to public safety or the integrity of the immigration system, as well as the use and trafficking of fraudulent documents. These efforts, in addition to frequently outpacing the performance of the Bush Administration, also parallel a major focus area of virtually all legislative CIR proposals.

1. *April 2009: Reshaping Worksite Enforcement*

In April 2009, ICE issued a revised worksite enforcement strategy that bluntly acknowledged, "The prospect for employment in the United States continues to be one of the leading causes of illegal immigration" and "employers are not sufficiently punished or deterred by the arrest of their illegal workforce."[103] The strategy lists three objectives for the new approach to worksite enforcement: "1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to take advantage of well-crafted compliance tools."[104] The memorandum identifies "the most important administrative tool" as the Form I-9 audit, but also describes civil fines and debarment—"preclud[ing] companies that have knowingly hired illegal workers from securing work on federal contracts"—as key tools in the reinvigorated effort to deter employers from relying on undocumented workers.[105] This strategy represented a marked departure from the approach of the prior Administration, which had been characterized by high-profile workplace raids that disrupted the lives of many law-abiding undocumented workers but "would not consistently punish the employer" or "target individuals who posed a public safety threat," despite the fact that "they sometimes required hundreds of agents and thousands of hours to complete."[106]

The Obama Administration implemented this shift in focus quickly. By November 2009, Secretary Napolitano boasted that ICE "audited more employers suspected of hiring illegal labor in a single day in July [2009] than had been audited in all of 2008."[107] After nearly two years, ICE reported its success in bringing pressure to bear on employers violating immigration law, including doubling the number of worksite enforcement investigations and surpassing the previous highs for numbers of criminal arrests of employers; notices of inspection to employers; final orders requiring employers to cease

[103] Memorandum from Marcy M. Forman, Dir. of Office of Investigations, ICE, Worksite Enforcement Strategy 1 (Apr. 30, 2009), http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

[104] *Id.*

[105] *Id.* at 3.

[106] Sec'y Janet Napolitano, Remarks on Smart Effective Border Security and Immigration Enforcement at American University (Oct. 5, 2011), *available at* http://www.dhs.gov/news/2011/10/05/secretary-napolitanos-remarks-smart-effective-border-security-and-immigration.

[107] Sec'y Janet Napolitano, Remarks on Immigration Reform at the Center for American Progress (Nov. 13, 2009), *available at* http://www.dhs.gov/news/2009/11/13/secretary-napolitanos-speech-immigration-reform.

violating the law; judicial fines, forfeitures, and restitutions; and businesses and individuals debarred from contracting with the federal government due to violating immigration law.[108] In other words, without legislative action, ICE executed a significant crackdown on employers of undocumented labor, a critical element of most CIR proposals.

2. *Expanding and Requiring Secure Communities*

The Bush Administration initially designed the Secure Communities program, but the Obama Administration has largely—and controversially—directed its implementation and rapid expansion. Secure Communities is a program whereby the fingerprints of individuals booked into state or local jails and prisons—records that state and local jurisdictions share with the FBI—are automatically shared with DHS. As a result, DHS can, by searching its electronic databases and performing other records checks, determine whether the individuals are removable and decide whether to apprehend them when they are released from state or local custody. The program is the result of a significant increase in the resources provided by Congress to ICE for efforts that focus on removable individuals who are in the criminal justice system. Congress did not initially appear to have a specific sense of a "Secure Communities" program, but rather provided the funds to expand and enhance ICE criminal initiatives more generally.[109]

Nonetheless, the Obama Administration quickly embraced this mandate, specifically the deployment of "interoperability" capability that facilitated the automatic sharing of information between the FBI and DHS.[110] On January 30, 2009, Secretary Napolitano issued an "Action Directive" on immigration and border security to DHS leadership.[111] The very first item in a long list of questions designed to spur action and reform asked: "How can we best accelerate [Secure Communities'] development and expansion?"[112] From then on, ICE sought to increase the pace of the program's deployment across the country. These efforts included entering into MOAs with each

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[108] *ICE Worksite Enforcement—Up to the Job?: Hearing Before the Subcomm. on Immigration and Policy Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 83 (2011) (statement of Kumar Kibble, ICE Deputy Director).

[109] *See* U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement, Plan to Utilize the FY 2009 Appropriation for the Removal of Criminal Aliens in Alignment with Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens 1 (2008), *available at* http://epic.org/privacy/secure_communities/appropriation utlizationplanfy09.pdf; U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement, Secure Communities: Quarterly Report, Fiscal Year 2009 Report to Congress, First Quarter 1 (2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy091stquarter.pdf.

[110] *See* U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement, Secure Communities Crash Course 6–8 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.

[111] *Secretary Napolitano Issues Immigration and Border Security Action Directive*, U.S. Dep't of Homeland Sec. (Jan. 30, 2009), http://www.dhs.gov/news/2009/01/30/immigration-and-border-security-action-directive-issued [hereinafter Action Directive Press Release].

[112] *Id.*

state where ICE sought to deploy the program in advance of it beginning operation in any jurisdiction within that state.[113]

In November 2009, Secretary Napolitano and Director Morton touted the fact that the program had "identified more than 111,000 aliens in local custody charged with or convicted of crimes during its first year," and called for program deployment to "every law enforcement agency in the nation by 2013."[114] In Morton's June 2010 memorandum on enforcement priorities, he identified "new Secure Communities levels" in rank order to guide removal decisions:

- Level 1 offenders: aliens convicted of aggravated felonies, or two or more felonies
- Level 2 offenders: aliens convicted of any felony or three or more misdemeanors
- Level 3 offenders: aliens convicted of misdemeanors.[115]

Although these priorities include individuals who have committed misdemeanor offenses, Morton specifically cautioned ICE personnel that "[s]ome misdemeanors are relatively minor and do not warrant the same degree of focus as others," particularly "minor traffic offenses such as driving without a license."[116]

As a result of the Obama Administration's intensive commitment to enforcement measures targeting criminals, DHS achieved, and vigorously promoted, "record-breaking immigration enforcement statistics . . . including unprecedented numbers of convicted criminal alien removals and overall alien removals . . . ."[117] Morton emphasized the role played by Secure Communities—among other enforcement programs. He noted in a 2011 press release, heralding another record-breaking year of removals, that "Secretary Napolitano has directed ICE to focus its resources as effectively as possible

[113] *Secretary Napolitano Announces Secure Communities Deployment to All Southwest Border Counties, Dep't of Homeland Security Facilitating Identification and Removal of Convicted Criminal Aliens*, U.S. Dep't of Homeland Sec. (Aug. 10, 2010), http://www.dhs.gov/news/2010/08/10/secretary-napolitano-announces-secure-communities-deployment-all-southwest-border.

[114] *Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Aliens Charged With or Convicted of Crimes in Its First Year*, U.S. Dep't of Homeland Sec. (Nov. 12, 2009), http://www.ice.gov/news/releases/0911/091112washington.htm.

[115] Memorandum from John Morton, *supra* note 61, at 2.

[116] *Id.* at n.4.

[117] *Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration*, U.S. Dep't of Homeland Sec. (Oct. 6, 2010), https://www.dhs.gov/news/2010/10/06/secretary-napolitano-announces-record-breaking-immigration-enforcement-statistics. Subsequently, DHS has revised the total numbers slightly, but they remain historic highs. *See* Spencer S. Hsu & N.C. Aizenman, *DHS Corrects Report That Overstated ICE Deportations Under Obama*, Wash. Post (Mar. 8, 2010), http://voices.washingtonpost.com/44/2010/03/dhs-corrects-report-that-overs.html.

on key priorities. This includes expanding the use and frequency of investigations and programs like Secure Communities . . . ."[118]

Notably, the Obama Administration maintained its steadfast support for the program in the face of sharp criticism by advocacy groups, congressional allies, and state and local partners themselves.[119] In fact, by June 2011, the Governors of New York, Illinois, and Massachusetts all declared that law enforcement in their states would suspend the use of Secure Communities, arguing they had the right to opt out of the program under the MOAs on Secure Communities each had previously signed with ICE.[120] In response to these criticisms, Secretary Napolitano appointed a Task Force on Secure Communities consisting of state and local law enforcement, leaders of stakeholder groups, representatives of ICE employees, and immigration law experts, and she asked them for input on ways to improve the program and alleviate these types of concerns while still focusing on "individuals who pose a true public safety or national security threat."[121]

Yet, before the Task Force completed its work, Morton announced in a letter to governors across the country ICE's plans to terminate all existing MOAs with states regarding the program because "ICE has determined that an MOA is not required to activate or operate Secure Communities for any jurisdiction" and would go forward with deploying the program to all jurisdictions by 2013.[122] In other words, upon further review, ICE's legal analysis concluded that states did not have the right to opt out of the program.[123] When it did complete its work the next month, the Task Force noted that, despite DHS's contention that it has a statutory obligation to operate Secure Communities, disputes exist over (1) whether Secure Communities was "established solely on the basis of executive branch authority," and (2) the soundness of the legal basis for making participation in the program

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[118] *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security*, U.S. Immigration & Customs Enforcement (Oct. 18, 2011), http://www.ice.gov/news/releases/1110/111018washingtondc.htm.

[119] *See, e.g.*, *ACLU Statement on Secure Communities*, ACLU (Nov. 10, 2010), https://www.aclu.org/immigrants-rights/aclu-statement-secure-communities; *NDLON: Tide Turning Against Discredited "Secure Communities" Jail Deportation Program*, Uncover the Truth (June 1, 2011), http://uncoverthetruth.org/media/press-releases/ndlon-tide-turning-against-discredited-secure-communities-jail-deportation-program-pr/.

[120] Julia Preston, *Immigration Program Is Rejected by Third State*, N.Y. Times, June 6, 2011, at A13.

[121] Homeland Sec. Advisory Council, Task Force on Secure Communities Findings and Recommendations 4 (Sept. 2011), *available at* http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf.

[122] Letter from John Morton, Dir., ICE, to Hon. Jack Markell, Gov. of Del. 1 (Aug. 5, 2011), *available at* http://lgdata.s3-website-us-east-1.amazonaws.com/docs/213/275867/SGN_RSP_for_Jack_Markell.pdf.

[123] Draft Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, ICE, Secure Communities – Mandatory in 2013 1 (Oct. 2, 2010), *available at* http://epic.org/privacy/secure_communities/ice-secure-communities-memo.pdf.

mandatory for all law enforcement agencies that submit fingerprint data to the FBI (in other words, all law enforcement agencies).[124]

The dispute about the legal basis for mandating Secure Communities has generated significant attention and debate in the media, particularly since the program continues to operate.[125] What is also notable, however, is that, similar to the establishment of systematic processes for providing administrative relief to favored classes of undocumented immigrants explored above, DHS again implemented a major policy change without specific accompanying legislation or (with few exceptions) rulemakings to require nationwide adoption of a program to target disfavored classes of undocumented immigrants.[126] In both cases, the objectives of the executive actions track one of the four major pillars of legislative proposals for CIR and inspire fierce opposition by major blocs of Congress—conservative Republicans in the former case, and liberal Democrats in the latter.

3. *Bolstering Anti-Fraud Efforts*

Virtually every CIR proposal includes major enhancements to anti-fraud and verification initiatives. DHS, and specifically USCIS, has implemented a range of initiatives over the past four years to make significant progress towards these objectives.[127]

Prominent advocates for CIR have called for stricter employer verification standards.[128] In this vein, the Obama Administration announced that it would finalize a rule in September 2009 implementing Executive Order 13465, which was originally issued by President Bush to amend Executive Order 12989. Executive Order 13465 stated that the federal government must require contractors "to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security."[129] In finalizing the rule, DHS designated E-Verify, "a free web-based system operated by DHS in partnership with the Social Security Administration" which "compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers' employ-

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[124] HOMELAND SEC. ADVISORY COUNCIL, *supra* note 121, at 5.

[125] *See, e.g.*, Josh Gerstein, *Administration Folds in Immigration FOIA Fight, Admits Error*, POLITICO, Jan. 9, 2012), http://www.politico.com/blogs/under-the-radar/2012/01/administration-folds-in-immigration-foia-fight-admits-110124.html.

[126] Although various ICE appropriations bills first funded ICE's general efforts to focus on removable individuals in the criminal justice system, and then funded Secure Communities specifically, Congress never specifically authorized or mandated the nationwide deployment of the Secure Communities program.

[127] *Statement from USCIS Director Alejandro Mayorkas on the Realignment of U.S. Citizenship and Immigration Services Organizational Structure*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 11, 2010), http://www.uscis.gov/archive/archive-news/statement-uscis-director-alejandro-mayorkas-realignment-us-citizenship-and-immigration-services-organizational-structure (last updated Oct. 25, 2013).

[128] *See* White House 21st Century Press Release, *supra* note 40; Gang of Eight Bill, *supra* note 76, at Title III.

[129] Exec. Order No. 13465, 3 C.F.R. 33285 (2009).

ment eligibility," as this system.[130] The rule specified that "E-Verify must be used to confirm that all new hires, whether employed on a federal contract or not, and existing employees directly working on these contracts are legally authorized to work in the United States."[131] Further, USCIS has implemented a series of enhancements to E-Verify to bolster its antifraud capabilities—such as photo matching for identification like passports.[132] Moreover, USCIS has implemented a series of major security reforms to documents such as Green Cards and Certificates of Naturalization, and has launched the Administrative Site Visit and Verification Program (ASVVP) to detect and deter visa fraud, particularly regarding H-1B visas.[133]

C. *Strengthening Border Security*

Perhaps the most common refrain in the immigration reform debate is the need to secure, or further secure, the Southwest border. From the outset, the Obama Administration focused on resource allocation decisions and policy changes that would serve this purpose, and even achieved limited legislative support for their efforts.

1. *Announcing the Southwest Border Initiative, Deploying the National Guard, and Winning Limited Legislative Support*

In March 2009, Secretary Napolitano announced the "Southwest Border Initiative," a series of allocation decisions, redeployments, and policy changes to bolster Southwest border security in light of growing violence in Mexico along the Southwest border.[134] Specifically, Napolitano deployed hundreds of additional personnel, ordered 100 percent southbound rail screening, moved additional inspection technology assets to the border,

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[130] *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify*, U.S. Dep't of Homeland Sec. (July 8, 2009), http://www.dhs.gov/news/2009/07/08/administration-commits-e-verify-strengthens-employment-verification.

[131] *Federal Contractors Required to Use E-Verify Beginning Sept. 8, 2009*, U.S. Citizenship & Immigration Servs. (Sept. 1, 2009), http://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/far-rule-1-sep-09.pdf.

[132] *Secretary Napolitano and USCIS Director Alejandro Mayorkas Announce Anti-Fraud Enhancements to E-Verify*, U.S. Dep't of Homeland Sec. (Nov. 10, 2010), https://www.dhs.gov/news/2010/11/10/secretary-napolitano-and-uscis-director-alejandro-mayorkas-announce-anti-fraud.

[133] *USCIS To Issue Redesigned Green Card*, U.S. Citizenship & Immigration Servs. (May 11, 2010), http://www.aila.org/content/default.aspx?docid=31962; *USCIS Redesigns Naturalization Certificate to Enhance Security*, U.S. Citizenship & Immigration Servs. (Oct. 25, 2010), http://www.uscis.gov/news/uscis-redesigns-employment-authorization-document-and-certificate-citizenship-enhance-security-and-combat-fraud; *USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative*, U.S. Citizenship & Immigration Servs (May 2, 2011), http://www.aila.org/content/default.aspx?docid=31962.

[134] *Press Briefing by Secretary of Homeland Security Janet Napolitano, Deputy Secretary of State Jim Steinberg and Deputy Attorney General David Ogden on U.S.-Mexico Border Security Policy*, U.S. Dep't of Homeland Sec. (Mar. 24, 2009), https://www.dhs.gov/news/2009/03/24/press-briefing-secretary-napolitano-us-mexico-border-security-policy.

deployed Secure Communities to high-risk counties in the region, and announced additional grant funding for law enforcement along the Southwest border.[135] Notably, DHS asserted that all of these actions would be "funded by realigning from less urgent activities, fund balances, and, in some cases, reprogramming"—in other words, they would require little to no additional action from Congress.[136]

Yet, in 2010, recognizing that the Administration could not maintain these heightened levels of activity without further steps or funding, President Obama took two additional actions. First, in May 2010, he "authorized the deployment of up to an additional 1200 National Guard troops to the border to provide intelligence surveillance and reconnaissance support; and immediate support to counter-narcotics enforcement until [CBP could] recruit and train additional officers and agents to serve on the border."[137] Second, he requested, and Congress enacted, a Southwest Border Security Supplemental Appropriations bill.[138] The supplemental as enacted tracked very closely with the Administration's Southwest Border Initiative, as it included funds to maintain and increase heightened levels of Border Patrol agents, CBP Officers (who staff the ports of entry), ICE agents, and other federal law enforcement officers at the border; deploy additional tactical communications technology and unmanned aerial detection systems; enhance security infrastructure; and support collaborative efforts with Mexico.[139]

2. *Canceling SBI*net *and Announcing a New Border Technology Plan*

Launched in September 2006,[140] the Secure Border Initiative-network (SBI*net*) was a "large and complex program" primarily designed to deploy new advanced technology to the border.[141] The program's initial focus was "on the southwest border investments and areas between ports of entry that CBP has designated as having the highest need for enhanced border security due to serious vulnerabilities."[142] Yet, as early as February 2007, the Gov-

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[135] *Secretary Napolitano Announces Major Southwest Border Security Initiative*, U.S. DEP'T OF HOMELAND SEC. (Mar. 24, 2009), https://www.dhs.gov/news/2009/03/24/napolitano-announces-major-southwest-border-security-initiative [hereinafter SBI Press Release].

[136] *Id.*

[137] *Statement on the Passage of the Southwest Border Security Bill*, WHITE HOUSE (Aug. 12, 2010), http://www.whitehouse.gov/the-press-office/2010/08/12/statement-president-passage-southwest-border-security-bill.

[138] *See Fact Sheet on the President's Strategic and Integrated Southwest Border Security Strategy*, WHITE HOUSE (Aug. 12, 2010), http://www.whitehouse.gov/the-press-office/2010/08/12/statement-president-passage-southwest-border-security-bill.

[139] SBI Press Release, *supra* note 135.

[140] Dannielle Blumenthal, *SBInet Contract Goes to Boeing*, U.S. CUSTOMS & BORDER PROT. TODAY (Oct./Nov. 2006), *available at* http://www.cbp.gov/xp/CustomsToday/2006/october_november/sbinet.xml.

[141] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-504T, SECURE BORDER INITIATIVE: SBI*net* Planning and Management Improvements Needed to Control Risks (2007), *available at* http://www.gao.gov/assets/120/115569.pdf.

[142] *Id.* at 2.

ernment Accountability Office (GAO) identified major "possible cost and schedule overruns and performance problems."[143] Nevertheless, then-Secretary of Homeland Security Michael Chertoff continued to defend the program,[144] and Congress continued to appropriate funds for it, including under the American Recovery and Reinvestment Act of 2009, despite misgivings about its effectiveness.[145]

The Obama Administration, however, took a dim view of the SBI*net* program. In 2009, Secretary Napolitano requested a preliminary analysis of the program[146] given the criticism by GAO and others.[147] In light of the preliminary analysis, in 2010, Napolitano "ordered a Department-wide reassessment of the SBI*net* program . . . to determine if SBI*net* was the most efficient, effective and economical way to meet our nation's border security needs with respect to technology."[148] In the interim, Napolitano announced that the Department would "redeploy $50 million of Recovery Act funding originally allocated for [SBI*net*] to other tested, commercially available security technology along the Southwest border" and freeze all SBI*net* funding beyond the very first parts of the system that were near completion.[149] Finally, in January 2011, Secretary Napolitano announced that the Department would cancel the entire SBI*net* system in favor of an alternative, conceptually different border technology plan to "utilize existing, proven technology tailored to the distinct terrain and population density of each border region," rather than continuing to pursue the "highly integrated," "one size fits all" approach of SBI*net*.[150] The new approach to technology that DHS developed, which focused on tailoring commercially available technology to

[143] *Id.* at 4.

[144] *See* Chris Strohm, *Chertoff Defends Border Actions, Calls for Immigration Bill*, Gov't Exec. (July 18, 2008), http://www.govexec.com/defense/2008/07/chertoff-defends-border-actions-calls-for-immigration-bill/27282/.

[145] *See* U.S. Dept. of Homeland Sec., Customs & Border Prot., SBI*net* Program: Program-Specific Recovery Act Plan 2 (2009), *available at* https://www.dhs.gov/xlibrary/assets/recovery/CBP_SBInet_Program_Final_2009-05-15.pdf.

[146] *See After SBInet - the Future of Technology on the Border: Hearing Before the House Comm. on Homeland Sec., Subcomm. on Border and Maritime Sec.*, 112th Cong. 11 (2011) (statement of Mark Borkowski, Assistant Cmm'r, CBP Office of Tech., Innovation, & Acquisition; Michael Fisher, Chief, U.S. Border Patrol; and Michael Kostelnik, Assistant Cmm'r, CBP Office of Air and Marine), http://www.dhs.gov/news/2011/03/15/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime [hereinafter *After SBInet*].

[147] *See, e.g.*, *The Secure Border Initiative: SBInet Three Years Later: Hearing Before the House Comm. on Homeland Sec., Subcomm. on Border, Maritime, and Global Counterterrorism*, 111th Cong. (2009), http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57597/html/CHRG-111hhrg57597.htm.

[148] *After SBInet*, *supra* note 146.

[149] Statement by Homeland Security Secretary Janet Napolitano, U.S. Dep't of Homeland Sec. (Mar. 16, 2010), https://www.dhs.gov/news/2010/03/16/statement-secretary-napolitano-southwest-border-security-technology.

[150] *After SBInet*, *supra* note 146; *Napolitano Cancels Virtual Border Fence Project, Proposes Alternative*, FoxNews.com (Jan. 14, 2011), http://www.foxnews.com/politics/2011/01/14/napolitano-cancels-virtual-border-fence-project-proposes-alternative/%20NOTE:%20different%20date.

the needs and realities of specific border regions, is one that some leading legislative proposals in 2013 essentially adopted.[151]

3. *Confronting Challenges in Arizona Head-On: Launching the Alliance to Combat Transnational Threats*

"[A]pproximately half of all drugs seized and illegal immigrants apprehended entering the United States are seized or apprehended in Arizona."[152] Some key legislators specifically cited this state of affairs as a major impediment to CIR, particularly for provisions that would provide a path to citizenship for undocumented immigrations. For example, in opposing passage of the DREAM Act in 2010, Senator John McCain bluntly stated: "I cannot put the priorities of these students, as difficult and unfair in many respects as their situation is, ahead of my constituents and the American people who demand that the Federal government fulfill its Constitutional duty to secure our borders before we undertake other reforms."[153]

In response to these types of concerns, the Obama Administration launched the Alliance to Combat Transnational Threats (ACTT) with "over 60 federal, state, local and tribal agencies in Arizona and the Government of Mexico."[154] ACTT was designed to leverage the wide range of law enforcement resources on both sides of the border to combat the "scope and complexity of criminal smuggling organizations" specifically in the Arizona-Sonora corridor.[155] The initiative has resulted in the seizure of over a million pounds of illegal drugs and 270,000 apprehensions in between ports of entry—approximately sixty percent of all annual Border Patrol apprehensions.[156] Even Senator McCain acknowledged the success of these efforts, stating that "the improvements made in the Yuma Sector [in Arizona] over the past few years have been a great accomplishment . . . [and] this progress was neither easy nor a foregone conclusion."[157] In fact, in the period after ACTT's initial successes, both senators from Arizona, McCain and Senator Jeff Flake, became members of the most prominent group of legislators advocating for reform in 2013, the "Gang of Eight."

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[151] *See, e.g.*, Gang of Eight Bill, *supra* note 76, at § 1106.

[152] *Fact Sheet: Alliance to Combat Transnational Threats – Arizona/Sonora Corridor*, CUSTOMS & BORDER PATROL (Feb. 8, 2011), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/border/arizona_factsheet.xml.

[153] *Statement by Senator John McCain on the DREAM Act*, JOHN MCCAIN (Dec. 18, 2010), http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=fa569b87-be5a-a559-5a1f-8b3f0d770421.

[154] ICE Part of Unprecedented, Multi-Agency Effort Securing Border in Arizona: 'ACTT' Combats Border-Related Threats in High-Risk Areas to Bolster Safety (Feb. 8, 2011), http://www.ice.gov/news/releases/1102/110208tucson.htm.

[155] *Id.*

[156] *Id.*; *Fact Sheet: Department of Homeland Security 2010 Accomplishments & Reforms*, U.S. DEP'T OF HOMELAND SEC. (Dec. 21, 2010), http://www.dhs.gov/xlibrary/assets/department-accomplishments-and-reforms-2010.pdf.

[157] *Securing the Border: Building on the Progress Made*: *Hearing before the S. Comm. on Homeland Security and Gov't Affairs*, 112th Cong. 2 (2011) (statement of Sen. John McCain).

D. *Fixing a Broken Immigration System*

While the most-discussed elements of "fixing our broken immigration system" typically involve reforming the visa process and streamlining backlogs, President Obama and others have also highlighted the need for reform that "better addresses humanitarian concerns."[158] Perhaps the most glaring humanitarian deficiency of the immigration system at the outset of the Obama Administration was an immigration detention system marked by abuse, neglect, and dysfunction.[159] While some advocates have declared that "the [detention] system cannot be fully cured without comprehensive legislative reform,"[160] the Obama Administration has implemented a series of policy changes—mostly through memoranda and formal policy statements—that achieve many of the advocates' objectives.

1. *Assessing the Problem and Committing to Reform*

As part of her Action Directive on Immigration and Border Security issued in January 2009, Secretary Napolitano ordered a wide-ranging assessment of immigration detention policies and programs.[161] Two major 2009 actions grew out of this directive. First, in August 2009, ICE Director John Morton announced "a major overhaul of the agency's immigration detention system"—referred to as "comprehensive detention reform"—which included the launch of the Office of Detention Policy and Planning to oversee reform efforts and the Office of Detention Oversight to "inspect facilities and investigate detainee grievances."[162] Second, in October 2009, Secretary Napolitano and Director Morton initiated a series of reforms to address the "seven major components" of the comprehensive review generated by Napolitano's Action Directive.[163]

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[158] *Fact Sheet: Fixing Our Broken Immigration System so Everyone Plays by the Rules*, White House (Jan. 29, 2013), http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules.

[159] *See, e.g.*, Nina Bernstein, *Another Jail Death, and Mounting Questions*, N.Y. Times, Jan. 27, 2009, at A14; Nina Bernstein, *U.S. Issues Scathing Report on Immigrant Who Died in Detention*, N.Y. Times, Jan. 16, 2009, at A14.

[160] *ACLU Reacts to DHS OIG Report on ICE Detainee Deaths and Medical Care*, Am. Civil Liberties Union (July 1, 2008), https://www.aclu.org/immigrants-rights/aclu-reacts-dhs-oig-report-ice-detainee-deaths-and-medical-care.

[161] Action Directive Press Release, *supra* note 111.

[162] *ICE Announces Major Reforms to Immigration Detention System*, U.S. Immigration & Customs Enforcement (Aug. 6, 2009), http://www.ice.gov/news/releases/0908/090806washington.htm.

[163] *Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives*, U.S. Dep't of Homeland Sec. (Oct. 6, 2009), https://www.dhs.gov/news/2009/10/06/new-immigration-detention-reform-initiatives-announced.

2. *Implementing Specific Reforms*

a. *Reporting and Investigating Detainee Deaths*

In October 2009, ICE issued an internal policy statement to address complaints regarding the lack of transparency about undocumented immigrants who had died in ICE custody, particularly in cases involving suspicions of neglect or abuse.[164] The Directive requires the relevant Field Office Director to notify applicable federal, state, and local offices, congressional committees, and the news media within days. This is for both informational and investigative purposes: these notifications trigger a required investigation "into the circumstances surrounding the death of the detainee," as well as "an internal review of ail [sic] facility inspection records for the detention facility at which the death occurred, and a review of all contract documentation for the detention facility where the death occurred."[165]

b. *Releasing From Detention Asylum Seekers With a Credible Fear*

When DHS encounters individuals who have recently arrived in the United States relatively near the border, the individuals can be removed without going through immigration court, through a process known as "expedited removal." Yet, individuals sometimes claim that they will be subject to persecution if returned to their home countries. If a USCIS official determines that their fear is credible, they are not subject to expedited removal. Under a 2007 ICE Directive, ICE's default procedure was to detain such individuals while their proceedings before immigration court were pending unless they "affirmatively request[ed] parole [temporary administrative release] in writing."[166]

In December 2009, ICE announced a new policy, shifting the default for arriving individuals who meet certain criteria to "generally release from detention."[167] Specifically, while the prior policy permitted ICE officers to "grant parole based on a determination of the public interest," the new policy "mandate[s] that all such arriving aliens should automatically be considered for parole"[168] and explicitly defines public interest such that it "is served by paroling arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and for whom no additional factors weigh against their release," essentially

[164] Policy Directive from John Morton, Assistant Sec'y, ICE, Dir. No. 7-9.0, Notification and Reporting of Detainee Deaths 1 (Oct. 1 2009), http://www.ice.gov/doclib/dro/pdf/notification_and_reporting_of_detainee_deaths.pdf.

[165] *Id.* at 4–5.

[166] *See Fact Sheet: Revised Parole Policy for Arriving Aliens with Credible Fear Claims*, U.S. Immigration & Customs Enforcement (Dec. 16, 2009), http://www.ice.gov/news/library/factsheets/credible-fear.htm [hereinafter Credible Fear Press Release].

[167] *ICE Issues New Procedures for Asylum Seekers as Part of Ongoing Detention Reform Initiatives*, U.S. Immigration and Customs Enforcement (Dec. 16, 2009), http://www.ice.gov/news/releases/0912/091216washington.htm.

[168] *Id.*

standardizing and expanding these acts of discretion.[169] Further, under the new policy, officers must affirmatively "explain the new process to arriving aliens who have been determined to have a credible fear of persecution or torture, including providing information regarding appropriate documentation the aliens may provide to help establish their eligibility for release."[170]

c. *Instructing Enforcement Agents Not to Detain Certain Categories of Undocumented Immigrants*

As part of his June 2010 memorandum to all ICE employees, ICE Director John Morton included a fairly unusual new requirement for detaining undocumented immigrants that fall into certain categories. Specifically, he instructed that:

> *Absent extraordinary circumstances or the requirements 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, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.* To [do so], ICE officers or special agents must obtain approval from the field office director.[171]

By requiring an officer or agent who plans to place an individual falling into one of these categories into detention to "obtain approval" from a supervisor, the directive makes clear that this is a systematic, leadership-driven policy reform to functionally permit, to the extent possible, members of these groups to live in the United States undisturbed by immigration enforcement agents. In fact, in July 2012, ICE implemented a more formal Risk Classification Assessment to guide detention and custody classification decisions nationwide along these lines.[172]

d. *Locating and Transferring Detainees*

In July 2010, ICE launched the Online Detainee Locator System, which provides users with basic location and contact information for detainees and the facilities in which they are being held to increase transparency regarding individuals in its custody.[173] The system only requires that family members, advocates, or attorneys provide the detainee's first name, last name, country

[169] Credible Fear Press Release, *supra* note 166.

[170] *Id.*

[171] Memorandum from John Morton, *supra* note 61, at 3–4 (underlining in original, here formatted in italics).

[172] *Immigration Enforcement: Hearing Before the Subcomm. on Homeland Security, H. Comm. on Appropriations*, 113th Cong. 4 (2013) (statement of John Morton, Dir., ICE), http://www.ice.gov/doclib/news/library/speeches/130314morton.pdf.

[173] *See ICE Announces Launch of Online Detainee Locator System*, U.S. Immigration & Customs Enforcement (July 23, 2010), http://www.ice.gov/news/releases/1007/100723washingtondc.htm.

of birth, and date of birth.[174] As a number of advocacy groups highlighted in a joint letter, this tool is quite "valuable for advocates and family members of ICE detainees, and represent[s] a substantial improvement" over the prior state of affairs.[175]

Further, recognizing the many complaints from attorneys and advocates that detainee transfers often "violate [detainees'] right to fair treatment in court, slow down asylum or deportation proceedings, and extend their time in detention,"[176] ICE issued a new policy directive on detainee transfers in January 2012.[177] The directive instructs detention officials that detainees should generally not be transferred if they have an attorney of record or immediate family member in the area, have pending or ongoing removal proceedings in the area, or have been granted bond or have a bond hearing scheduled.[178] Further, the directive specifies permitted reasons to initiate a transfer—many of which facilitate humanitarian treatment of detainees—including fulfilling the transfer request of a detainee or providing medical or mental health care.[179] Moreover, the directive requires that ICE inform the detainee "in a language or manner he/she can understand, that he/she is being transferred to another facility and is not being removed," and provide basic information about the transfer to the detainee's attorney of record within twenty-four hours of the transfer.[180]

e. Issuing Updated Detention Standards

The 2009 comprehensive review recommended that ICE "review and revise the Performance Based National Detention Standards [PBNDS] to reflect the requirements and other needs that are unique to the population of immigrant detainees."[181] The ACLU described updating the PBNDS as a vital step to responding "to a crisis in immigration detention conditions."[182] In 2012, ICE heeded this call. Specifically, the new standards include provisions "to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with de-

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[174] *Id.*

[175] Letter from ACLU, Am. Immigration Lawyers Ass'n., Lutheran Immigration and Refugee Serv., and Nat'l Immigration Justice Ctr., to Mary E. Callahan, Chief Privacy Officer, DHS 1 (June 2, 2010), https://www.aclu.org/files/assets/Comments_to_ODLS.pdf.

[176] *See US: Bounced Around the Country*, Human Rights Watch (June 14, 2011), http://www.hrw.org/news/2011/06/14/us-bounced-around-country; *see generally* Dora Schriro, U.S. Immigration & Customs Enforcement, Immigration Detention Overview and Recommendations (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (providing overview of ICE detention system).

[177] Policy Directive from John Morton, Dir., ICE, Policy No. 11022.1, Detainee Transfers (Jan. 4, 2012), http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.

[178] *Id.* at 2–3.

[179] *Id.* at 3.

[180] *Id.* at 4.

[181] Schriro, *supra* note 176, at 28.

[182] *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration Policy and Enforcement*, 112th Cong. 90 (2012) (statement of the ACLU).

tainees with no or limited English proficiency, improve the process for reporting and responding to complaints, and increase recreation and visitation."[183]

f. Combating Sexual Assault in Detention Facilities

Sexual assault and abuse in immigration detention has occurred with tragic frequency, according to a wide variety of reports.[184] Initially, the Department of Justice determined that the Prison Rape Elimination Act (PREA) of 2003 did not apply to "facilities that are primarily used for the civil detention of aliens pending removal from the United States."[185] Instead, DHS adopted policies, including the PBNDS and the Sexual Abuse and Assault Prevention and Intervention Directive, to prevent sexual abuse in ICE detention facilities.[186] Yet, advocates pressed the White House to change course to ensure stronger protections that would have the force of law.[187] In May 2012, President Obama issued a memorandum directing agencies including DHS "to work with the Attorney General to propose, within 120 days[,] . . . any rules or procedures necessary to satisfy the requirements of PREA and to finalize any such rules or procedures within 240 days of their proposal."[188] In December 2012, DHS submitted a notice of such a proposed rulemaking to the Federal Register.[189]

g. Providing Counsel for Detainees With Cognitive Disabilities

Some of the most harrowing immigration detention experiences have involved detainees with cognitive disabilities. This is not an isolated issue: "[r]oughly 15 percent of the non-citizen population in detention, or around

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[183] U.S. Immigration & Customs Enforcement, Performance-Based National Detention Standards 2011 i (2013), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

[184] *See, e.g.*, Human Rights Watch, Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention 3 (2010), *available at* http://www.hrw.org/node/92630.

[185] National Standards to Prevent, Detect, and Respond to Prison Rape, 60 Fed. Reg. 6248, 6250 (Feb. 3, 2011).

[186] *See* U.S. Immigration & Customs Enforcement, *supra* note 183, at 150; Policy Directive from John Morton, Dir., ICE, Policy No. 11062.1, Sexual Abuse and Assault Prevention and Intervention 1 (May 11, 2012), http://www.ice.gov/doclib/foia/dro_policy_memos/sexual-abuse-assault-prevention-intervention-policy.pdf.

[187] *See* Letter from a coalition of immigration, labor, faith-based, women's rights, community, and victim advocacy organizations to Cecilia Muñoz, Dir., White House Domestic Policy Council 1–2 (Apr. 2, 2012), *available at* https://www.aclu.org/files/assets/coalition_letter_to_white_house_urging_prea_coverage_for_all_immigration_detainees_final.pdf.

[188] Memorandum from President Barack Obama, Implementing the Prison Rape Elimination Act (May 17, 2012), http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act.

[189] *See Secretary Napolitano Announces Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, U.S. Dep't of Homeland Sec. (Dec. 6, 2012), http://www.dhs.gov/news/2012/12/06/secretary-napolitano-announces-standards-prevent-detect-and-respond-sexual-abuse-and.

57,000 people, have a mental disability."[190] To address the unique challenges faced by these detainees, in April 2013, the Departments of Justice and Homeland Security announced a new policy for unrepresented immigration detainees who have cognitive disabilities.[191] This policy includes efforts to identify individuals with serious mental disorders or conditions when they enter immigration detention, provide independent competency evaluations when necessary, appoint a qualified representative for individuals determined to have cognitive disabilities, and provide bond hearings for all such unrepresented detainees when they have been detained for six months (even if they are subject to immigration detention).[192]

IV. Conclusion: Implications of the Obama Administration's Sweeping Reforms

As a matter of policy substance and indicative metrics, the Obama Administration's immigration and border security reforms appear to have been quite successful in making substantial gains towards the goals of CIR. Particularly when considered all at once, the facts and data tell a fascinating story of a fundamental policy transformation—despite being underappreciated throughout its incremental implementation. Perhaps the greatest testament to this feat is the substantial overlap between the Administration's initiatives and the Gang of Eight's legislative proposal that dominated the CIR discussion in 2013. Through initiatives that make partial progress on these objectives or achieve similar goals, the Administration has demonstrated that the executive branch is willing and able to implement an extensive suite of immigration and border reforms. Further, the Administration has illustrated its ability to balance multiple facets of reform that may appear in tension. Such versatility is critical, as many elected officials who oppose these proposals, such as Senator David Vitter, argue that "promises of enforcement never materialize" while so-called "amnesty happens immediately."[193] Thus, the Administration's efforts may have laid the crucial groundwork for finally passing comprehensive legislative reform by showing Congress—and the public—that it is indeed possible to effectively increase border security, create an interior enforcement system focused on public safety and national security risks, and crack down on the employment

[190] Travis Packer, Immigration Policy Ctr., Non-citizens With Mental Disabilities: The Need for Better Care in Detention and in Court 4 (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Non-Citizens_with_Mental_Disabilities_112310.pdf.

[191] *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees With Serious Mental Disorders or Conditions*, U.S. Dep't of Justice (Apr. 22, 2013), http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html.

[192] *Id.*

[193] Karen Tumulty, *Why Immigration Reform in 1986 Fell Short*, Wash. Post (Feb. 3, 2013), http://articles.washingtonpost.com/2013-02-03/politics/36728655_1_immigration-reform-illegal-immigrants-immigration-laws.

of illegal labor and fraud, all while adopting humanitarian detention measures and creating a more secure and stable situation for deserving individuals who, although having entered or remained in the United States illegally, are productive members of their communities.

By contrast, as a matter of administrative law and regulatory policy, the verdict on the Obama Administration's fundamental immigration and border policy transformation is decidedly more mixed. The Administration has acted with general authorization from broad, organic statutes and the sweeping language of the major Supreme Court opinions on the topic, and Congress has provided implied consent by continuing to fund the activities that have undergone major changes. Yet, on most items detailed above, the Administration has acted not only without specific legislation codifying the change, but also without promulgating rules with the force of law. The ultimate effects of this type of aggressive administrative action that so frequently eschews rulemaking are not yet clear.

On the one hand, the legal arguments underpinning the Administration's actions could hold, which could represent a unique path to circumventing the ossification caused by congressional gridlock and challenges to rulemaking in the modern era.[194] On the other, the preliminary district court decision in the challenge to the DACA process may indicate the beginning of a judicial effort to rein in administrative immigration initiatives largely lacking express statutory authorization or rule promulgation.[195] It seems conceivable that the courts could decide that the Obama Administration pushed the envelope too far and end the standing deference the executive has enjoyed in immigration policy matters. The judiciary could introduce the more proactive and procedurally demanding oversight that they have demanded in other areas of administrative government. This approach, should the courts pursue it, could easily have collateral effects in other policy areas where the executive has typically received less discretion, and could further limit the flexibility of executive agencies to accomplish significant policy reforms through policy memoranda and guidance. Either way, the Obama Administration's actions are likely to resonate in the immigration space and the larger field of administrative law for years to come.

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[194] *Cf.* Barron & Rakoff, *supra* note 38 (arguing that administrative agencies' muscular use of waiver authority is a positive new development that can help facilitate policymaking in era of Congressional gridlock).

[195] *See* Roebuck, *supra* note 22.