



What the President Can Do on Immigration If Congress Fails to Act

By Marshall Fitz July 2014

Center for American Progress



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Introduction and summary

This report contains a correction. See page 30.

With immigration reform legislation stalled, and deportations reaching a crisis level, President Barack Obama asked his new secretary of homeland security, Jeh Johnson, to conduct a review of the agency's deportation policies in order to identify ways to make the system more humane.¹ While that review process continues,² this report provides a roadmap for executive action on immigration by analyzing the scope of the problem, the legal authority underpinning administrative reforms, the various administrative mechanisms available to the president, and the groups of individuals who could still be protected if Congress fails to act.

In June 2013, the Senate passed a historic bipartisan immigration reform bill: the Border Security, Economic Opportunity, and Immigration Modernization Act, or S. 744. The legislation would revamp our legal immigration system and create a pathway to citizenship for the 11.7 million unauthorized immigrants living in the United States.³ This long overdue reform was embraced by virtually all stakeholders in the debate and supported by strong majorities of American voters from across the political spectrum.⁴

Since the Senate bill passed, however, House Republican leaders have talked about the need for reform but refused to bring legislation to the floor. For example, House Speaker John Boehner (R-OH) circulated a set of “standards” designed to guide the House consideration of immigration reform legislation in January.⁵ Less than a week later, he put those standards on hold, declaring that his party's distrust of President Obama made it too difficult to consider reform this year.⁶

While Congress has repeatedly tried and failed to reform our immigration laws over the past 10 years, Congress—along with successive presidential administrations—has nonetheless succeeded in escalating the enforcement of the existing broken laws. And the impact of that increased enforcement on American families, businesses, and communities has reached a crisis level. Two-thirds of all unauthor-

ized immigrants currently living in the United States have resided here for more than a decade and are long settled and well integrated into our communities.⁷ Yet immigrants are being deported in record numbers:⁸ More than 4 million people have been removed from the United States since 2001, with 2 million people removed during the Obama administration alone.⁹

The removal of these 2 million people is equivalent to wiping out the entire combined populations of Boston, Miami, Seattle, and St. Louis.¹⁰ Moreover, an estimated 200,000 parents of U.S. citizen children were deported over the two-year period between 2010 and 2012.¹¹ The Applied Research Center found that 5,100 children of immigrants were in the foster care system in 2011 because their parents were detained or deported. These removals devastate communities and leave broken families behind in the United States.¹² And these enforcement efforts have come at a heavy cost to taxpayers: The United States now spends \$3.5 billion more on immigration and border enforcement—a total of nearly \$18 billion per year¹³—than it does on all other federal law enforcement combined. That breathtaking figure is higher than the annual gross domestic product, or GDP, of 80 different countries.¹⁴

President Obama has argued that he does not have the authority to simply stop deportations for all undocumented immigrants.¹⁵ In one critical sense, he is right: Only legislation can provide a permanent solution that includes a path to legal status and eventual citizenship for the 11.7 million unauthorized immigrants living in the country.¹⁶ Any administrative relief via executive action is temporary, could be reversed by a subsequent administration, and likely cannot cover the entire undocumented population. In other words, such relief would, almost by definition, be inadequate and incomplete.

But as this report highlights, President Obama can still do much more administratively to make immigration enforcement more rational and humane while Congress delays. This is because the administration has wide latitude in establishing its enforcement priorities, including deciding how to spend the resources that Congress appropriates for immigration enforcement, and whether to pursue enforcement against certain individuals. It also has the discretion to identify individuals with certain equities—mitigating factors such as family or community ties, employment history, or length of residence in the United States—and authorize them to affirmatively request temporary relief from deportation.

Definitions

Affirmative relief: A process by which low-priority individuals—for example, those with extensive community ties or DREAMers, young unauthorized immigrants—can come forward to seek temporary protection from deportation. The Deferred Action for Childhood Arrivals, or DACA, program, which President Obama created in 2012 to allow eligible young unauthorized immigrants to apply for a two-year reprieve from deportation and a work permit,¹⁷ is one such process.

Deferred action: A form of affirmative relief that allows individuals who have committed no serious crimes to come forward and request temporary protection against deportation and work authorization. Deferred action has generally been granted to individuals who have “appealing humanitarian factors.”¹⁸

Deferred enforced departure, or DED: A presidential designation that nationals from a specific country are to be protected from removal—Liberians are one current example¹⁹—based on a variety of different factors. Individuals who receive DED are eligible to apply for employment authorization.

Enforcement reforms: Policies that define who and under what circumstances people are put into removal proceedings once they come into contact with immigration enforcement officials. These include policies that would, for example, prioritize the apprehension of individuals who were convicted of felonies over individuals who were arrested for traffic violations and policies that promote the use of alternatives to detention.

Parole in place, or PIP: Parole is a discretionary authority that allows the U.S. Department of Homeland Security, or DHS, to permit people to enter the country who are otherwise not eligible to be admitted. Parole in place is a variation of parole that allows those who are already in the country without authorization to be granted temporary legal status.

Prosecutorial discretion: The executive branch’s discretion to make choices regarding who to investigate, arrest, and prosecute—and who not to—based on judgments of how best to allocate limited resources. In the immigration context, prosecutorial discretion is applied across a range of decisions at each stage of the enforcement process.

This report begins by providing an overview of the current problems facing our broken immigration system—including a profile of unauthorized immigrants, a review of the rise in enforcement, and a description of the legislative gridlock delaying reform. It then discusses the legal authority for executive action on immigration and explores several administrative mechanisms that the president could adopt to make enforcement more sensible and humane. These mechanisms can be divided in to two related but distinct types of policies:

1. Enforcement reforms, which involve prioritizing how and whether enforcement is conducted when someone comes into contact with the authorities.²⁰ Regardless of whether Congress moves forward with immigration reform legislation, DHS should adopt these types of reforms to our enforcement policies as soon as possible.

2. Affirmative relief, which involves identifying low-priority individuals and creating a procedure for them to come forward and affirmatively seek temporary protection from deportation.

This report focuses primarily on the affirmative relief policies that are available to the administration. It describes three mechanisms that have been used to grant affirmative relief in other contexts: deferred action, parole in place, and deferred enforced departure. The report then evaluates them according to two basic criteria: the program's potential impact—both its size and the ability to maximize it—and workability—its flexibility and feasibility.

Although all three mechanisms have certain advantages, deferred action carries the fewest operational restrictions and is therefore the optimal mechanism both for protecting the broadest number of individuals and for successful and efficient implementation.

Lastly, this report examines the various equities that the president should consider when deciding who to designate as low priorities and who to protect from removal. These factors include:

- Likelihood of legislative protection, such as people who would be eligible for legalization under S. 744²¹
- Family ties, such as undocumented parents of children living in the United States or people with a qualifying relationship that would make them eligible for permanent residency
- Employment background, such as workers from industries with large undocumented workforces
- Duration of residence, such as individuals who have been living in the United States for enough time to have deep roots in and ties to the community

According to Congressional Budget Office, or CBO, estimates for S. 744, a program based on the likelihood of legislative protection could cover as many as 8.3 million people.²² There are an estimated 4.7 million undocumented parents with a minor child living in the United States, including 3.8 million whose children are citizens.²³ Estimates of the undocumented workforce range from 6.4 million to 8 million, with nearly 1.5 million working in the retail trade sector and more than 1 million in the agricultural sector.²⁴ Finally, almost 7.5 million unauthorized immigrants have lived in the country for more than a decade.²⁵

Because an immigrant may have more than one of these equities—for example, an agricultural worker may have been here for more than a decade—these numbers are not additive. Either way, they point toward a large number of people with strong equities who could be protected from deportation.

By expanding the use of deferred action beyond DACA to other individuals with compelling equities, President Obama could help stabilize families, communities, and local economies across the country. It would also make our country safer by ensuring that resources are focused on individuals who have committed serious crimes and pose a danger to society. Such action would be, by definition, incomplete and the need for meaningful legislative reforms would remain. But it would help begin the process of fixing the system and is a lawful, just, and necessary response to an immigration enforcement crisis that Congress has cultivated through inaction.

The scope of the immigration enforcement problem

A profile of unauthorized immigrants

To understand our broken immigration system, we must first understand the unauthorized population: As of 2012, almost 7.5 million undocumented immigrants or nearly two-thirds of the total undocumented population had been living in the country for more than a decade, and 9.95 million—or 85 percent—had been here for more than five years.²⁶ According to Pew estimates, 40 percent of the unauthorized population entered the country legally but overstayed their visas, which is only a civil, rather than a criminal, offense.²⁷

Although the media tends to portray unauthorized immigrants as if they all live in the same apartment building, cut off from the rest of the population, the truth is that unauthorized immigrants live in every state. And many unauthorized immigrants live in mixed-status families—i.e., with family members who have status, including U.S. citizens or legal permanent residents. In all, 9 million U.S.-born citizens live with at least one undocumented family member, and 16.6 million people in the United States live in mixed-status families.²⁸ Unauthorized immigrants live in our neighborhoods, sit in our pews, work alongside us, and go to school with our kids.²⁹

Further complicating the issue is the reality that hundreds of thousands of unauthorized immigrants have a legitimate claim to a permanent visa through either their spouse or parent. They are blocked, however, from pursuing legal status by a Catch-22 provision that Congress enacted in 1996.³⁰ In order to apply for permanent residence on the basis of their relationship, they must leave the United States and apply at a consulate abroad. But as soon as they leave the country, they trigger a three-year—or, in most cases, 10-year—bar on re-entering the country. While there are hardship waivers available, the eligibility standard is extremely high.³¹

Nine million U.S.-born citizens live with at least one undocumented family member.

The rise of enforcement

The growth and long-settled nature of our unauthorized population is in part a product of our nation's significantly outdated immigration laws. The last real attempt to deal with the unauthorized population was the Immigration Reform and Control Act of 1986,³² and the last overhaul of the legal immigration system, which set the current levels for legal immigration, was the Immigration Act of 1990.³³

Current immigration law grants only 5,000 employment-based visas per year for lesser-skilled immigrants. As a practical matter, that means there is virtually no legal mechanism for lesser-skilled immigrants to come work in the United States on a permanent basis. And even people with a close relative in the United States face visa waiting times that range from a few years to two decades for certain Mexican and Filipino nationals.³⁴ For many immigrants, the choice has been between entering the United States without authorization—or overstaying a temporary visa—in order to support their families or face a future without opportunity.

Paradoxically, our nation's own border enforcement policies have contributed to the rise in unauthorized immigrants living in the United States. Prior to 1993, the southern border was relatively porous, and individuals—mostly male—from countries south of the U.S. border would come to the United States for a season and then return home to their families in a cycle that scholars have termed “circularity.” But starting in 1993, the United States began what has now been a two-decade effort to fortify the border, making it harder to move back and forth.³⁵

The increased difficulty, cost, and danger associated with crossing the border that resulted from this build up prompted many immigrants to bring their families to the United States and settle here permanently. The number of unauthorized immigrants living in the country rose steadily, from an estimated 1.2 million in 1990 to a high of 12 million in 2007.³⁶

Meanwhile, there has been a sharp increase in interior immigration enforcement, particularly after the terrorist attacks of 9/11.³⁷ Since 2001, we have deported more than 4 million people, with 2 million people removed during the Obama administration alone. The government is now deporting nearly 400,000 people per year on average.³⁸

On the southern border, the Border Patrol has moved away from a policy of “catch and release,” also known as “voluntary return,” which allowed people apprehended while attempting to cross the border to return home without serious consequence, to a “Consequence Delivery System,” whereby most of those apprehended face serious administrative or criminal consequences. In the Tucson, Arizona sector, for example, 90 percent of those apprehended now see penalties through the consequence system. This includes deportations via administrative mechanisms such as reinstatement of removal and expedited removal, as well as criminal prosecutions for unlawful entry and re-entry.³⁹

In fact, data from the Transactional Records Access Clearinghouse, or TRAC, shows that more than half of all federal convictions so far in fiscal year 2014 were immigration related.⁴⁰ And according to the Pew Research Center, unlawful re-entry convictions have seen a 13-fold increase since 1992.⁴¹ Classifying unlawful re-entry as a felony puts it on par with far more serious crimes—such as grand theft or violent crimes—and distorts the picture of who these immigrants are. The vast majority are not dangerous criminals but are simply returning to their families and homes and pose absolutely no threat to society.⁴²

This severe immigration enforcement system has wreaked havoc on families and communities.⁴³ According to the Applied Research Center and Colorlines, 200,000 parents of U.S. citizen children were deported between 2010 and 2012, and 5,100 children of deported immigrants were in the foster care system as of 2011.⁴⁴ Severe immigration enforcement has also come with significant fiscal costs to the nation: As the Migration Policy Institute illustrates, the United States now spends more on immigration enforcement agencies each year—close to \$18 billion—than all other federal law enforcement combined—around \$14 billion.⁴⁵

Legislative gridlock

As enforcement has ramped up and the unauthorized population has become even more deeply rooted in the United States, policymakers have repeatedly failed to reach an agreement on a solution for immigration reform. President George W. Bush and President Vicente Fox of Mexico were on the verge of a historic immigration accord in 2001 that would have addressed the

Enforcement by the numbers

- 4 million immigrants have been deported since 2001⁴⁶
- Nearly 2 million have been deported in just the last 5 years⁴⁷
- Nearly 400,000 immigrants are deported each year on average⁴⁸
- More than 200,000 parents of U.S. citizen children were deported between 2010 and 2012⁴⁹
- More than 5,100 U.S. citizen children were in foster care in 2011 because their parents were deported⁵⁰
- \$17.9 billion is spent each year on border and immigration enforcement, \$3.5 billion more than on all other federal law enforcement combined⁵¹

undocumented population, but it derailed after the 9/11 attacks. Congress failed to enact comprehensive immigration reform bills in 2006 and 2007 that would have provided a pathway to citizenship for unauthorized immigrants, more border security, and an overhaul of our legal immigration system.⁵² The House passed the DREAM Act in 2010 to give young unauthorized Americans a path to citizenship, but the bill failed to overcome a Republican filibuster in the Senate.⁵³

More recently, the Senate passed a historic and bipartisan comprehensive immigration reform bill, S. 744, in June 2013.⁵⁴ Since then, the House has stalled, refusing to consider a vote on the Senate bill, with House Republicans dragging their feet on introducing their own proposal.⁵⁵ The House Republican leadership floated a series of standards, laying out their vision of immigration reform in late January, but Speaker Boehner put the legislative deliberations on hold one week later, arguing that he could not move forward on immigration because his party did not trust President Obama to enforce the laws.⁵⁶

Despite the present legislative gridlock, there is a broad bipartisan consensus among voters that we must reform our immigration laws and that a central component of such reform includes creating a path for undocumented immigrants to register, undergo background checks, and earn legal status.⁵⁷ This consensus is not new—significant majorities of voters have supported this type of practical reform for years⁵⁸—but it has grown broader and more intense as the human and economic effects of legislative failures have multiplied.

Congressional inaction—coupled with grassroots advocacy⁵⁹—has already prompted the president to take administrative action to address the deportation crisis: President Obama announced the Deferred Action for Childhood Arrivals, or DACA, program in June 2012. This program, modeled after the DREAM Act, grants eligible youth a two-year reprieve from deportation and a work permit.⁶⁰ Unlike legislative action, however, DACA is only temporary, can be revoked by a future administration, and does not lead directly to any other status or ultimately citizenship.

Still, for the more than 553,000 recipients so far,⁶¹ it provides critical protection from removal and the opportunity to move forward with their lives and careers. With Congress once again deadlocked on reform, advocacy groups have been increasing their calls for President Obama to use his executive authority to affirmatively protect an even greater number of unauthorized immigrants.⁶² The president has called for a thorough review of the enforcement and deportation system.⁶³

The legal authority for executive action on immigration

The president is constitutionally responsible for faithfully executing the laws that Congress enacts.⁶⁴ However, the manner and prioritization of that enforcement—how exactly to go about enforcing the laws—is left almost entirely to the discretion of the president and the executive branch. Indeed, a president’s discretion not to enforce the criminal laws against a private individual or entity in specific circumstances is absolute.

The executive branch’s basic autonomy over enforcement decisions derives from the separation of powers that is fundamental to America’s constitutional architecture. In our legal system, that autonomy is expressed under the umbrella concept of “prosecutorial discretion.”⁶⁵ This discretion to either not “seek charges against violators of a federal law or to pardon violators of a federal law” provides the president with expansive power to protect individual liberties.⁶⁶

The executive branch’s discretion in enforcing the nation’s laws is exercised in myriad ways. Every prosecutor and police officer in the nation makes daily decisions at every stage of the law enforcement process about the best allocation of enforcement resources. They make those decisions based on the changing context and circumstances of enforcement and evolving judgments about the agency’s mission and priorities.

Although our nation’s immigration laws are technically civil and not criminal, the enforcement of immigration laws is more similar to the enforcement of criminal law than that of other civil laws. Individuals who are subject to immigration enforcement are deprived of their liberty in the same way a criminal defendant is: They are arrested, charged, jailed—frequently for years—and then banished from the country. The most significant difference is that immigrants in removal proceedings do not receive the same constitutional protections that criminal defendants do. For example, these individuals have no clear right to exclude unlawfully obtained evidence and no right to an appointed attorney. Those differences strengthen the argument that the president’s authority not to enforce immigration law against specific individuals is absolute in the same way that it is in the criminal context.

Even in the civil context, the Supreme Court has made clear that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁶⁷ The Court has repeatedly affirmed the long-standing principle that the executive branch has virtually unfettered discretion in deciding how and whether to enforce the law against individuals.

In the immigration realm, prosecutorial discretion is also exercised at every stage in the enforcement process. For example, officials decide which tips or leads will be investigated, which persons will be arrested or detained, which persons will be eligible for bond, which cases will be pursued to a final removal order, and which final removal orders will be executed. Just as local police make daily decisions to prioritize investigating murders and other violent crimes over jaywalking, immigration officials must make decisions on how best to use their limited resources.

One common-sense rationale behind this broad executive branch discretion is that enforcement of the laws requires consideration of a multitude of factors that courts are ill-suited to review. As the *Heckler* opinion asserted, federal agency decisions not to enforce a law or laws are “presumed immune from judicial review” because the executive branch is “better equipped” to conduct the “complicated balancing” of agency priorities and resources needed to fulfill its obligations.⁶⁸ Likewise, to the extent that Congress is unhappy with the way laws are being enforced, it can leverage its power of the purse to shape executive branch compliance with its views by either funding or defunding the implementation of certain policies. Ultimately, however, the primary venue to demand a change in an administration’s enforcement priorities is at the ballot box.

Prosecutorial discretion is typically exercised on a case-by-case basis when an individual comes into contact with the authorities. But the government can also establish policies that allow individuals with certain characteristics that render them low enforcement priorities to affirmatively request discretion in their case.⁶⁹ The federal government has provided categorical deferrals of deportation on numerous occasions over the past several decades—most recently with the DACA directive—using a variety of discretionary mechanisms.⁷⁰ This exercise of discretion is not contrary to current law but simply an application of current law against the backdrop of changing circumstances, our national values, and articulated priorities.

The executive branch has virtually unfettered discretion in deciding how and whether to enforce the law against individuals.

There are, however, four central limits to this discretion—two are constitutional and two are statutory. The first limit is based on the same constitutional provision that endows the executive branch with inherent discretion in the first place: the Take Care Clause.⁷¹ The president cannot pick and choose which laws to enforce and must enforce and implement all of the laws that Congress passes. This administration has achieved record levels of enforcement, and so as long as DHS continues to actively enforce the law, there can be no claim that President Obama has violated the Take Care Clause. What's more, no court has ever invalidated a discretionary enforcement policy on those grounds.

The second constitutional limit is obvious: The government's exercise of discretion cannot be used to selectively enforce the law in a discriminatory way—e.g., deciding only to arrest, detain, and deport people of a certain race or religion. In other words, the administration's inherent discretion in executing the law does not justify a violation of the Constitution.⁷²

Just as the exercise of discretion may not violate another constitutional provision, it likewise may not violate another duly enacted law. In the immigration context, there are two generally applicable laws that discretionary policies must not violate: the Impoundment Control Act⁷³ and the Administrative Procedure Act.⁷⁴ The Impoundment Control Act requires the executive branch to spend the money appropriated by Congress toward the purpose designated by Congress. The president cannot, for example, simply reallocate appropriated money from DHS to the U.S. Department of the Interior. And the administration cannot refuse to spend the money that has been appropriated. For example, the funds appropriated for immigration enforcement must be spent on immigration enforcement.⁷⁵ The discretion relates to how and whether to conduct that enforcement against specific individuals.⁷⁶

Even if the president decides, as a matter of discretion, not to enforce the immigration laws against millions of additional low-priority undocumented immigrants, that would still leave millions of immigrants against whom the law can be enforced. And, as in any law enforcement context, some immigration enforcement activities are far more costly than others. Investigating and arresting a sophisticated human smuggler, for example, would obviously require more time and resources than questioning and detaining a nanny at the park. In other words, the president can still deploy all of the resources Congress has appropriated but focus them on higher-priority individuals who may require more resources to identify, detain, and remove.

The final limitation is procedural and relates to the Administrative Procedure Act's, or APA's, bar on the executive branch creating substantive rules without abiding by the act's rulemaking requirements—providing public notice and soliciting comments. However, as long as an administration directive is a “general statement of policy” that leaves immigration officials with discretion to consider individual facts and does not establish a “binding norm,” it is not subject to the APA's procedural requirements. So as long as there is no binding rule and each request for relief is adjudicated on a case-by-case basis—as with the DACA directive—there is no violation of the APA.

The fact remains that whatever directive the president might make to temporarily protect low-priority immigrants from removal would naturally leave other immigrants unprotected. As such, although executive action in this context can help jumpstart the reform process, it is not a substitute for legislation. Only Congress can provide a complete and lasting solution that reforms the legal immigration system while dealing realistically, responsibly, and humanely with the individuals living here without status.

But if congressional paralysis persists, the president unquestionably has ample authority to move the process forward by exercising his broad discretion in a manner that furthers the national interest in safe and stable communities. Authorizing millions of low-priority, unauthorized individuals to register and request a temporary reprieve from removal would bring them off the economic sidelines, ensure they and their employers are paying the full complement of taxes, and thereby enhance the nation's economic productivity.⁷⁷

Prosecutorial discretion in non-immigration contexts

The exercise of prosecutorial discretion is not unique to immigration enforcement. Every law enforcement agency develops context-specific discretionary policies depending on the population served, the problems presented, and the underlying laws. Ultimately, enforcement agencies pursue these policies to maximize the efficiency and effectiveness of furthering their priorities.

For example, say the mayor of a large city faces a serious problem of drunk drivers running over pedestrians. The mayor might decide that to most effectively address the problem, the city police should adopt a policy that prioritizes investigating and arresting drunk drivers and decline to arrest people for jaywalking and expired vehicle registrations. If the mayor did not issue this policy, some police officers would spend time arresting people for jaywalking, while other officers would make some drunk driving arrests, and still other police officers would train their enforcement focus on entirely different laws—noise ordinances, for example. This lack of prioritization may result in a wide range and high number of arrests and convictions, but it would not aggressively focus the agency’s resources on the city’s most serious issue: drunk driving.

This concept of prioritization and prosecutorial discretion is also utilized by federal agencies beyond DHS. The Environmental Protection Agency, or EPA, for example, uses discretion when determining what types of environmental violations to prioritize and which violators to pursue.⁷⁸ The EPA determined this year that when enforcing the Clean Water Act, enforcement officials should target “serious sources of pollution and serious violations.”⁷⁹ What does this prioritization look like in practice? Given, for instance, a light bulb factory that is pervasively contaminating a local waterway, and a single, temporary construction site that contributes a small amount to urban runoff, the EPA would devote its efforts to sanctioning the factory.

Similarly, when reviewing tax returns, the Internal Revenue Service, or IRS, focuses on specific groups of people and businesses. The audit rate for individuals whose adjusted gross income, or AGI, is greater than \$10 million is 26 percent whereas the audit rate for individuals whose AGI is between \$50,000 and \$70,000 is a mere 0.62 percent. The IRS does not enforce our laws evenly across the income distribution but instead targets specific groups—such as high-income earners—that will yield the highest return on their investment of investigative resources. Ultimately, prosecutorial discretion and policies such as those pursued by the EPA and IRS allow agencies to maximize the effectiveness of their enforcement efforts.⁸⁰

Exercising discretion in the context of immigration

Executive action aimed at altering immigration enforcement practices can be accomplished through two types of discretionary policies. Though the two categories are related, for the sake of clarity they can be distinguished by the terms “enforcement reforms” and “affirmative relief.”

Enforcement reforms involve establishing and adhering to policies regarding the treatment of low-priority immigrants who come into contact with immigration enforcement officials. These types of policies refine the enforcement process by, for example, declining to put noncriminals or people with extensive community ties into removal proceedings. They represent smart law enforcement prioritization and reflect a set of values that result in balanced and humane enforcement practices. These types of policies should be adopted irrespective of whether Congress acts on legislative reform.

Affirmative relief, on the other hand, involves identifying low-priority individuals—again, such as noncriminals or people with extensive community ties—and creating a procedure for them to come forward and affirmatively seek temporary protection from deportation. One example of such a policy is the aforementioned DACA program, which allows eligible young unauthorized immigrants to apply for a two-year reprieve from deportation.⁸¹ Expanding this type of discretionary policy would enhance the quality of DHS enforcement practices by narrowing the target enforcement population to higher priorities. This type of affirmative relief program only becomes imperative, however, if the legislative process remains gridlocked.

Enforcement reforms

This report focuses primarily on affirmative relief and ways that the president could expand temporary protection from deportation to a greater number of people if Congress refuses to act. But it is worth emphasizing that the administration can and should also take a number of steps to ensure that low-priority individuals

do not end up in immigration detention and subject to removal proceedings in the first place. Unlike affirmative relief, which is only necessary if legislation remains stalled, the administration should implement these enforcement reforms regardless of congressional action.

The Obama administration, like its predecessors,⁸² has issued a series of policy memos articulating its priorities for immigration enforcement. In March 2011, for example, Immigration and Customs Enforcement, or ICE, Director John Morton laid out ICE's civil enforcement priorities, including "Aliens who pose a danger to national security or a risk to public safety," called Priority 1; "Recent illegal entrants," known as Priority 2; and "Aliens who are fugitives or otherwise obstruct immigration controls," or Priority 3.⁸³ In a June 2011 follow-up memo, Director Morton announced a policy of prosecutorial discretion in which the department would focus its resources on those three priority categories, rather than low-priority individuals, such as non-criminals or people with extensive community ties.⁸⁴

But as the Immigration Policy Center and the Migration Policy Institute point out, DHS continues to deport people who have only committed minor violations and people with no criminal record at all.⁸⁵ And more than half of all federal convictions so far in fiscal year 2014 were for immigration violations.⁸⁶ This has created a vicious cycle in which immigration violations are criminalized and those with the resulting criminal convictions become immigration enforcement priorities.

The administration can and should do more to further refine—and more effectively adhere to—its existing priorities. For example, it should ensure that individuals are only considered Priority 1 if they have been convicted of a felony not related to their immigration status and for which they served a year or more in prison. The administration should also define "recent illegal entrant" in Priority 2 to mean individuals without established ties to the United States who are apprehended within 30 days and within 25 miles of the border. And it should eliminate Priority 3 altogether.⁸⁷

The administration must also take action on a host of other enforcement reforms. Such actions include—but are in no way limited to:

- Reforming the federal detainer process to establish a uniform policy ensuring that detainer requests are only issued to state and local police when someone in their custody has been convicted of a serious felony⁸⁸

- Ensuring that immigrants facing removal have a chance to go before an immigration judge, abandoning the dramatic trend toward summary removals through the expanded use procedures such as expedited removal and reinstatement of removal
- Expanding the use of alternatives to detention, implementing court decisions finding that any immigrant detained for a prolonged period is entitled to a bond hearing,⁸⁹ dramatically scaling back the overbroad use of detention, and ensuring that those who are detained are not detained indefinitely

These are just a handful of examples of highly effective and critical reforms that comport with the administration's articulated priorities that could and should be made as soon as possible. There are scores of additional recommendations authored by numerous stakeholders that have broad support, have been presented to DHS, and should also be adopted.⁹⁰

Affirmative relief

The president has an array of affirmative relief mechanisms he could deploy to address the deportation crisis. If Congress fails to advance legislation, these mechanisms could at least start us on the path to immigration reform.⁹¹ They involve identifying low-priority individuals with some shared equity—such as family ties or length of time in the country—and creating a procedure for them to come forward and affirmatively seek temporary protection from deportation.

The existence of such a variety of mechanisms is a byproduct of the fact that, over many decades, an array of crises relating to foreign nationals living in the United States have required presidents to address hardship and inequities using their executive discretion. As the Congressional Research Service has illustrated, categorical grants of affirmative relief to non-citizens have been made 21 times by six presidents protecting millions of immigrants just since 1976. What's more, in many instances, Congress was actively considering legislation that would have provided relief to the groups of people protected by the executive action.⁹²

That, of course, is precisely the case today. Although House Republicans have for the moment put the brakes on immigration reform legislation, their rationale for delay has been one of political timing rather than substantive opposition. To the contrary, there is a broad consensus in the House, including among Republicans, that immigration reform is necessary and that it must enable undocumented immigrants who have committed no serious crimes to pursue legal status. And

Categorical grants of affirmative relief to non-citizens have been made 21 times by six presidents.

the inverse is true as well: Only a small minority of House members believe that the nation's current de facto deportation-only policy is a viable approach to fixing the system.⁹³ This broad consensus is likewise reflected in the attitudes of the American public: In a recent Global Strategy Group/Basswood Research poll, for example, 79 percent of Americans were in favor of immigration reform, and nearly three out of four said they would be disappointed if Congress fails to act this year. Close to three-quarters of all Latino voters say it is very or extremely important for Congress to pass reform before the midterm elections.⁹⁴

Against this backdrop, if legislation continues to stall, the time will be ripe for the president to jumpstart the process and extend affirmative protection against removal to low-priority individuals who in all likelihood will eventually be eligible for legislative relief. In choosing among the affirmative relief mechanisms available to him and how to deploy them, President Obama should focus on two central factors:

1. Most importantly, given the scope of the deportation crisis and the socially, fiscally, and economically counterproductive effects of our current enforcement efforts, he should consider which strategies would have the greatest impact: Where is the crisis most acute? And which mechanisms and what articulation of priorities would provide the most relief to the families, businesses, and communities that have suffered under the weight of our failed laws?
2. He should put a premium on workability and efficiency: Which administrative mechanisms are flexible enough to be deployed on a large scale in as streamlined and transparent a fashion as possible? And which would help lay the foundation for success in implementing future legislative reforms?

In short, President Obama should look at high-impact measures that would be easy to implement and help smooth the ultimate transition to legalization under legislative reform. Of the numerous discretionary mechanisms that exist, three have been used in recent years and discussed as possible solutions to the current crisis: deferred action, parole in place, and deferred enforced departure. This report concludes that deferred action provides the flexibility needed to protect the largest number of individuals with the fewest restrictions.

Deferred action

The Immigration and Naturalization Service, or INS, formally recognized deferred action as a form of prosecutorial discretion in 1975. The INS Operating Instructions indicated that deferred action was warranted when “adverse action would be unconscionable because of the existence of appealing humanitarian factors.”⁹⁵

This form of discretionary relief became well known when the Obama administration decided in June 2012 to grant deferred action to undocumented individuals brought here before the age of 16, the so-called DREAMers.⁹⁶ In announcing the DACA policy, the administration set forth certain criteria for who could affirmatively apply for relief. The eligibility criteria include those who:⁹⁷

- Were under age 16 at time of original entry
- Maintained continuous presence in the United States for at least five years preceding the date of the memorandum
- Are in school, graduated from high school or obtained a GED, or were honorably discharged from the military
- Have not been convicted of a felony, a significant misdemeanor, or multiple misdemeanors and are not a threat to public safety
- Are age 30 or younger

These criteria loosely track the requirements that undocumented youth would have to meet to be eligible for permanent residence and eventual citizenship in the various iterations of the DREAM Act.⁹⁸ It is estimated that 950,000 undocumented individuals presently meet these criteria and are eligible for DACA.⁹⁹ And more than 553,000 individuals had been granted deferred action under this program as of March 2014 out of the approximately 643,000 who have applied.¹⁰⁰

This program, by all measures, has been a resounding success.¹⁰¹ From a law enforcement perspective, it made absolutely no sense to expend resources enforcing the law against these low-priority individuals. The public overwhelmingly supports legalizing these individuals,¹⁰² and a bipartisan supermajority of the Senate voted to do just that as part of the immigration reform bill that passed in June 2013.¹⁰³ And by removing them from the enforcement grid, it has allowed DHS to focus its resources on other priorities.

Moreover, it has enabled hardworking, motivated individuals who grew up in this country and have lived here for years to move forward with their lives. CAP has previously estimated that bringing these individuals off the economic sidelines and onto the playing field through passage of the DREAM Act would increase the U.S. GDP by \$329 billion and create 1.4 million jobs over the course of two decades.¹⁰⁴ And while deferred action is not a substitute for the DREAM Act, it has allowed these DREAMers to secure work authorization and, in most states, to obtain drivers licenses, thereby expanding their employment prospects.¹⁰⁵ It has also enabled them to travel out of the country to visit family they had been walled off from for years and, most importantly, to live and function without the constant fear of deportation.

Although the creation of DACA was a dramatic development for many people in various ways, it is still very much a stopgap measure. A grant of deferred action under DACA is only valid for a two-year period—after which time it must be renewed—and could be rescinded at any time. The memorandum establishing the program’s parameters highlights the truly tenuous nature of this and any other grant of administrative relief. According to the U.S. Citizenship and Immigration Services, or USCIS, deferred action confers no “substantive right, immigration status, or pathway to citizenship. Only Congress, acting through its legislative authority, can confer these rights.”¹⁰⁶

A DACA-like program could be extended to other individuals with strong equities—undocumented parents, for example. This program already meets the basic criteria highlighted above: It could extend temporary protection to potentially millions of additional low-priority individuals—demonstrating high impact—and it would be fairly straightforward to implement given that it has already had a successful trial run with DACA. And rather than create a new program, it makes sense from an operational efficiency standpoint to build on the successes and learn from the shortcomings of DACA’s implementation.¹⁰⁷ Moreover, by requiring extensive background checks and the submission of other biographic and circumstantial data, it would smooth the process of legislative legalization in the future.

Requiring extensive background checks would smooth the process of legislative legalization in the future.

Parole in place

Another affirmative discretionary mechanism is an immigration concept known as “parole.” Parole has some advantages but, as described below, is also saddled with some limitations that make it a less attractive option for use on a broad scale than deferred action.

Parole is a discretionary authority recognized by statute that empowers DHS to permit individuals to enter the country on a case-by-case basis who are otherwise ineligible for admission because of “urgent humanitarian reasons or significant public benefit.”¹⁰⁸ While historically this authority has been used to enable DHS to authorize the entry of people from outside the country, it has been expanded in recent decades to cover people who are already physically present in the United States without authorization. This has come to be known as “parole in place,” or PIP.

An early application of PIP came during the so-called Mariel boatlift in the early 1980s. Some 125,000 Cubans were paroled into the United States after having already arrived on U.S. shores.¹⁰⁹ More recently, DHS established a policy authorizing undocumented family members of individuals serving in the U.S. military to be paroled in place.¹¹⁰

An advantage of this tool is that it would enable certain family members—people already entitled to legal status based on their familial relationships—who entered the country without inspection to adjust their status in the United States. Without parole, they would be required to leave the country and endure a potentially lengthy separation from their family members while applying for permanent residence. Programs such as PIP for military family members help ease that burden in addition to providing interim protection.¹¹¹

Similar to deferred action, a PIP program for individuals with certain equities has the flexibility to be constructed in a variety of ways. For example, there are no specific limits on the time period for which parole may be granted. Much like deferred action, numerous administrations have relied on it as a tool to help deal with the effects of an unexpected crisis.¹¹² And as with deferred action, individuals receiving PIP are also eligible for employment authorization.¹¹³

Unlike deferred action, however, parole currently contains an important limitation: It is not presently used for people who overstayed their visas, which includes an estimated 40 percent of the current undocumented population.¹¹⁴ Visa overstayers were formally admitted to the United States before they violated their status, whereas parole has historically been used to authorize entry of those who were inadmissible at the outset or crossed the border without inspection. In other words, unless parole was reinterpreted, its use on a broad scale would implicitly preference individuals who crossed the border without authorization over those who overstayed their visas.¹¹⁵

Relatedly, there is also some uncertainty as to whether PIP is only available to people who would otherwise be eligible to become permanent residents. Whether it is only available to individuals who already have a qualifying relationship, such as marriage to a legal permanent resident, is another interpretive hurdle that would need to be overcome.¹¹⁶

Given these potential limitations to a broad application of PIP, deferred action appears to be the more flexible and clear-cut mechanism to anchor an expansive affirmative relief policy. Parole in place, however, could be used as a complement or alternative to deferred action in cases where an individual would otherwise be eligible to adjust their status to permanent residence.

Deferred enforced departure

A third administrative mechanism for providing affirmative relief is known as deferred enforced departure, or DED. DED is a presidential designation that protects nationals of a specific country from removal. Similar to PIP, DED contains important limitations that make it less useful than deferred action for expanding administrative relief.

The executive branch's inherent authority to exercise discretion in faithfully executing the laws derives from many sources. In the immigration context, it relates in part to the president's authority to conduct foreign relations.¹¹⁷ This is especially relevant to DED, which carries obvious foreign relations implications.¹¹⁸

Since 1960, presidents have extended DED—or its former iteration, extended voluntary departure, or EVD—to foreign nationals of more than a dozen countries.¹¹⁹ Currently, foreign nationals from Liberia¹²⁰ are protected by DED, following decades of civil war in their home country. Other recent designations include Haitians in 1997,¹²¹ Salvadorans in 1992,¹²² and certain Chinese nationals in 1990.¹²³ DED designations are typically issued via executive orders or presidential memoranda.

DED contains a great deal of flexibility in why and under what conditions it can be deployed. The principal limitation of DED, however, is that to date it has only been used for nationals of specific countries.¹²⁴ Given that the current U.S. undocumented population is composed of nationals from scores of different countries,¹²⁵ any decision on which nationals should receive DED would necessarily leave out others. This inevitable exclusion of certain individuals from protection is, of course, a function of the limitations inherent in executive action and another example of why legislative action is ultimately the only solution.

Even though DED could provide major relief if applied to a country such as Mexico, whose nationals make up 52 percent of the undocumented population,¹²⁶ selecting one nationality for protection seems arbitrary and disconnected from the nature of the deportation crisis and the rationale for enforcement prioritization.¹²⁷ The harm experienced by individuals in communities across the country is based on familial and other connections here in the United States, not on their country of origin. And the judgment about how to prioritize resources should be carefully considered and values-based rather than an arbitrary designation.

In short, because of its country-specific limitation, DED appears to be a less flexible mechanism for providing affirmative relief than deferred action based on an articulation of equities and priorities.

The equities: Who should be covered by deferred action?

This section outlines some of the equities, or factors, that should be considered in the process of prioritizing enforcement efforts. In setting enforcement priorities about the undocumented population and deciding who might be designated for affirmative relief, it is critical to consider how deeply rooted most of these individuals are in our communities. There are countless equities that could be considered and what follows should neither be construed as an exhaustive list, nor an assessment that one group is more deserving of protection than another. This is merely an attempt to highlight individuals who share an important characteristic or equity that could lead them to be presumptively treated as low priority and eligible for relief.

It is important to acknowledge that while the president indisputably has broad discretion to provide affirmative relief, what is contemplated here is a significant expansion in the scope of such relief. But it is equally important to acknowledge why that is: We are facing an immigration enforcement landscape that is unprecedented in our history and will require a uniquely bold response if legislation remains stalled. We have a massive population of undocumented residents who are more deeply integrated and more geographically dispersed throughout the country than ever.¹²⁸ And we are spending close to \$18 billion each year attempting to drive them out of the country rather than finding a way for them to realize their social and economic potential here.¹²⁹

The crisis that has grown out of these conflicting realities has reached a breaking point and something has to give. Continuing to try to enforce our way to a solution given the size and integrated nature of this population would be, in the words of the Deferred Action Operating Instructions, “unconscionable.”¹³⁰ Smart prioritization that begins to fix the broken system is the only sensible response to the political paralysis currently preventing legislative reform.

Likelihood of legislative protection

The first category of individuals to consider is also potentially the broadest: individuals who would be eligible for legalization under S. 744. These are individuals who a bipartisan supermajority of senators voted to protect, who the president has repeatedly supported protecting, and who the American public strongly supports being protected.¹³¹ In other words, the vast majority of Americans and lawmakers believe these individuals should be eligible to remain in the United States and earn the privilege of permanent residence. Deporting these individuals while the House dithers creates policy dissonance and moral incoherence.

The basic eligibility criteria to apply for provisional legal status under S. 744 include:

- Physical presence in the United States before January 1, 2012
- No conviction for a felony or three misdemeanors occurring on different dates
- Not inadmissible based on security, criminal, or other safety grounds

There is considerable precedent for granting temporary immigration relief to the potential beneficiaries of pending legislation. Examples include:

- DACA recipients in 2012 with the DREAM Act pending
- DED to Haitians in 1997 before the Haitian Refugee Immigration Fairness Act passed in 1998, allowing Haitian refugees in the country since before 1995 to apply for a green card¹³²
- Deferred deportation of unauthorized spouses and children of individuals legalized under Immigration Reform and Control Act, or IRCA, in 1987, and then expanded in 1990—before the Legal Immigration Family Equity, or LIFE, Act, which allowed certain people without status to adjust to permanent residence, passed later in 2000¹³³
- Nicaraguans in 1987 when legislation was pending—10 years before the Nicaraguan Adjustment and Central American Relief Act, which allowed certain people from Guatemala, El Salvador, and other countries to apply for permanent residence, passed in 1997¹³⁴

This category of individuals is admittedly broad. CBO has estimated that the number of individuals who would meet these criteria and initially register under the Senate bill is 8.3 million.¹³⁵ Some will argue that granting deferred action to these individuals would carve out such a large part of the immigrant population that Congress has declared removable that DHS will not be able to fulfill its

mandate to faithfully execute the laws. In other words, they will argue that protecting such a large class of people makes it impossible for the agency to deploy the resources Congress has appropriated to enforce the law in violation of the Impoundment Control Act.

That legal conclusion, however, can only be drawn by answering a question of fact: Is the agency currently able to focus all of its appropriated resources on immigrants who have committed crimes or represent a danger to society or who have arrived here without authorization after January 2012? This report does not attempt to answer that question conclusively, since the necessary data about operational costs required to make a fair assessment are not available. At a minimum, however, it seems plausible that priorities could be reshaped and resources redirected in a way that makes such a policy viable.

Even if the administration answers that question in the negative, it still makes sense to utilize the Senate-protected population as the starting point for considering which equities should be prioritized. This population represents a clear articulation of whom we, as a nation, believe should be eligible to earn the privilege of citizenship over time. It also reflects whom we believe should not be removed from this country.

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Family ties

One of the central crises created by our supercharged deportation system is the separation of families. Family unity has long been a hallmark value informing our nation's immigration laws and policies,¹³⁶ but the forced estrangement of millions of family members has recently become one of the system's ugliest byproducts. As such, protecting the family unit through an expansion of deferred action should be another way of thinking about resetting the agency's enforcement priorities.

This protection could be done in a number of ways. Society obviously has a deep interest in maintaining the core family unit of parents and children. When children lose parents or fear losing their parents to deportation, it has severe emotional, social, and economic effects.¹³⁷ Protecting against those separations by deprioritizing undocumented parents would be a rational, humane, and defensible policy approach.

But other family relationships beyond parents and children are critically important as well. Another way to give weight to family-based equities would be to deprioritize individuals who have a familial relationship that would qualify them for permanent residence. Hundreds of thousands of undocumented immigrants have been sponsored for—or could be sponsored for—a green card by a qualifying relative, but they cannot adjust their status because they are presently undocumented. These include, for example, the spouses of legal permanent residents, the adult children of U.S. citizens or legal permanent residents, and the siblings of U.S. citizens. Given their threshold eligibility for permanent residence and the value that we place on strong family structures, treating them as low priorities who are eligible for relief makes good sense from a law enforcement perspective.

Employment background

Another approach to considering equities and prioritizing enforcement is to look at the role that undocumented individuals play in the nation's workforce. An estimated 8 million workers are undocumented—more than 5 percent of the nation's total workforce—but they are not evenly distributed across industries. In some industries, they are significantly overrepresented in the workforce. For example, an estimated 50 percent of agricultural crop workers are undocumented. In total, there are 1 million undocumented workers in the agricultural sector at large.^{142*}

One way to consider prioritization efforts would be to protect workers in industries that are highly dependent on undocumented workers. Undocumented farm workers are clearly critical to the agricultural industry and, in turn, are the backbone of America's food supply. These workers are among the most vulnerable in America because of the difficulty of the work, the remoteness of their worksites, and the fact that they are not protected by wage and hour rules.

Legislation that would create a path to earned legalization for these workers—known as AgJOBS—has been introduced almost every year since 1998.¹⁴³ It represents an agreement between growers and farmworkers to fix the problems facing an undocumented workforce now and going forward. It has historically had bipartisan support and has been the model for broader comprehensive reform

What do family ties look like?

- The number of unauthorized immigrants with relatives in the United States, by group:
- 4.7 million unauthorized immigrants have at least one minor child in the United States¹³⁸
- 3.8 million of these are parents of U.S. citizen children¹³⁹
- 1.7 million unauthorized immigrants have a spouse who is a U.S. citizen or legal permanent resident¹⁴⁰
- 400,000 unauthorized immigrants have at least one U.S. citizen sibling¹⁴¹

legislation. But, as with the broader legislation, political paralysis has prevented it from becoming law.¹⁴⁴ And instead of being protected, this population remains isolated, subject to exploitation by unscrupulous employers,¹⁴⁵ and lives under the threat of immigration enforcement.

Given the importance of this workforce, its vulnerability, and the consensus that agricultural workers deserve relief, the argument in favor of an affirmative grant of protection to this group makes eminent sense. There are other discrete workforces, however, that have similar equities but a less visible role in the public debates. They too could be candidates for a grant of affirmative relief.

Duration of residence

One clear and obvious equity that should be considered relates to the rootedness of immigrants and their connections to the community. Given the protracted failure of Congress to produce a legislative solution, the undocumented population has become increasingly well settled in communities around the country. One easy proxy for assessing rootedness is the length of time an individual has lived in the country. Nearly two-thirds of the population had lived in the United States for more than 10 years as of 2011.¹⁴⁶

The more rooted individuals are, the more harm and dislocation that occurs in tearing them from their family and community. Removing them from the United States does not only leave families struggling with loss, but it also creates holes in businesses, churches, sports leagues, and school committees. It means that a family might not be able to continue paying the mortgage, rent, or car payments. It means that a whole web of social and economic relationships will be destroyed. In other words, their removal takes a significant toll on all of us.

The criteria for DACA contemplated length of residence as one of several equities. Recipients had to have been both brought to the country before the age of 16 and lived in the country for five years. This tracked the DREAM Act's requirements, but it also reflected a value that individuals who have been living here for an extended period of time and are more deeply ensconced in American schools and communities should be very low priorities for removal.

There are obviously different ways to assess rootedness, and duration of residence is only one. In constructing a program for protecting individuals who are deeply settled, a combination of equities could be considered.

Likelihood of legislative protection, familial connections, employment background, and rootedness are some of the principal equities that could inform an affirmative relief policy. But choosing one characteristic or a combination of characteristics meriting affirmative discretionary relief will likely leave other deserving individuals out. And either way, affirmative relief cannot provide the type of permanent solution that legislation would offer.

Conclusion

The deportation crisis has taken an incalculable human toll on millions of U.S. citizens and immigrants who have lost their family members, their livelihoods, and their faith in the American Dream. It has strained our economy, divided our communities, and stained our national identity. The deportation crisis must be resolved, and the only way to do so in a complete and lasting fashion is through congressional enactment of comprehensive immigration reform.

But if House Republicans continue to block a long-term immigration solution, President Obama will be left with no choice but to begin the process of fixing the system by utilizing the full breadth of his extensive discretionary authority to address the situation.

By expanding the use of deferred action beyond DACA to other individuals with compelling equities, the president can help stabilize families, communities, and local economies across the country. Such action would, by definition, be incomplete and the need for meaningful legislative reforms would remain. But it is the lawful, just, and necessary response to a crisis.

***Correction, July 7, 2014:** This report incorrectly stated different figures for the number of undocumented workers in the agricultural sector. The correct number is 1 million.

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Marshall Fitz is the Director of Immigration Policy at the Center for American Progress, where he directs the organization's research and analysis of the economic, political, legal, and social impacts of immigration policy in America and develops policy recommendations designed to further America's economic and security interests. Fitz has been one of the key legislative strategists in support of comprehensive immigration reform and has served as a media spokesperson on a broad array of immigration policy and legislative issues. He has also been a leader in national coalitions that advance progressive immigration policies. He regularly advises members of Congress on immigration policy, politics, and strategy and has helped draft major legislation. Fitz is a graduate of the University of Virginia School of Law.

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