

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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February 23, 2015

The Honorable Gene L. Dodaro  
Comptroller General  
Government Accountability Office  
441 G Street N.W.  
Washington, D.C. 20548

Dear Mr. Dodaro:

The Homeland Security and Governmental Affairs Committee asks the Government Accountability Office to determine whether the Department of Homeland Security's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Directive, as well as the December 2014 expansion to the Deferred Action for Childhood Arrivals (DACA) Directive (hereafter, "Homeland Security Directives") constitute "rules" under the Congressional Review Act (CRA). If GAO determines that the Homeland Security Directives are "rules" under the CRA, the Department of Homeland Security is required to submit a concise general statement to Congress and the Comptroller General for review before the rules may take effect.

The Congressional Review Act establishes a mandatory process for congressional review of agency rules.<sup>1</sup> Under the CRA, before a rule can take effect, the promulgating agency must submit the final rule to Congress and the Comptroller General.<sup>2</sup> Specifically, the agency must submit a copy of the rule, a concise general statement relating to the rule, including whether or not it is a "major rule,"<sup>3</sup> and the proposed effective date of the rule. These processes are essential to ensuring that administrative agencies are accountable to Congress as a co-equal branch of government, as designed by the Constitution.<sup>4</sup>

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<sup>1</sup> The CRA defines "rule" more broadly than the definition requiring notice and comment rulemaking under the Administrative Procedure Act (*see* 5 U.S.C. § 511(4), (5)); under the CRA, "[r]ule" means the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy... 'Although agency interpretative rules, general statements of policy, guideline documents, and agency and procedure manuals may not be subject the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5.'" U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-OGC-98-38, CONGRESSIONAL REVIEW ACT: IMPLEMENTATION AND COORDINATION 5 (testimony of Robert P. Murphy (quoting Rep. David McIntosh, Chairman, Subcommittee on Nat'l Econ. Growth, Natural Resources, & Reg. Affairs, H. Comm. on Gov't Reform)) [hereinafter "Testimony of Robert P. Murphy"].

<sup>2</sup> 5 U.S.C. § 801(a)(1)(A) (2006).

<sup>3</sup> If the promulgated rule is a "major rule," the Comptroller General must provide a report to Congress, as detailed in § 801(a)(2)(A).

<sup>4</sup> Testimony of Robert P. Murphy, *supra* note 1, at 1.

We believe that these Homeland Security Directives may constitute “rules” under the CRA, requiring the Department to submit the rules to Congress and the Comptroller General for review. On November 20, 2014, Secretary of Homeland Security Jeh Johnson issued an agency-wide memorandum “establish[ing]” the DAPA program and “expanding” the DACA program.<sup>5</sup> On its own terms, Secretary Johnson directed the Department to expand DACA through “[r]emov[ing] the age gap” that excluded those born before June 15, 1981; “[e]xtend[ing] DACA renewal and work authorization to three years... rather than the current two-year increments;” and “[a]djust[ing] the date-of-entry requirement... from June 15, 2007 to January 1, 2010.”<sup>6</sup>

Although Secretary Johnson said that deferred action under DAPA would be granted on a “case-by-case basis,” his directives left little room for discretion: the memorandum said that “immigration officers will be provided with specific eligibility criteria for deferred action,”<sup>7</sup> which includes “nearly 150 pages” of operating procedures.<sup>8</sup> In our view, the Homeland Security Directives are “part of an agency statement of general applicability... designed to implement... law or policy,” and as such may constitute rules under the CRA.

We are further persuaded by the February 16, 2015 United States District Court for the Southern District of Texas memorandum opinion and order, in which the court ruled that the Homeland Security Directives constitute not merely “rules” under the Administrative Procedure Act (APA),<sup>9</sup> but *substantive* rules, such that applicable APA notice and comment rulemaking procedures were violated. In granting a preliminary injunction blocking the implementation of the Homeland Security Directives on behalf of twenty-six States, the district court easily determined that the Directives constituted “rules” under the APA: “Neither [the United States of America nor the State plaintiffs] appears to contest that, under the APA, the DAPA Directive is an agency ‘rule,’ and its issuance therefore represents ‘rulemaking.’”<sup>10</sup> The court found that “[t]here can be no doubt that the DAPA Directive is a rule within the meaning of § 551 of the APA,”<sup>11</sup> and went on to decide that the Homeland Security Directives were substantive rules.

In its analysis, the court determined that the Directives were substantive rules for two reasons. First, the court found that the DAPA Directive is not “non-enforcement” but an affirmative action: “Instead of merely refusing to enforce the removal laws against

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<sup>5</sup> Memorandum from Jeh Johnson, Sec’y of Homeland Security, to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, and R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Protection 3, 4 (Nov. 20, 2014).

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Texas v. United States*, No. B-14-254, 109 (S.D. Tex. Feb. 16, 2015) (memorandum opinion and order granting preliminary injunction).

<sup>9</sup> Because the CRA’s definition of “rule” is broader than the APA’s definition, *see* note 1, the district court’s finding that the Directives constitute “rules” under the APA necessarily means that, under the same analysis, the Directives would fall within the CRA definition of “rule.”

<sup>10</sup> *Texas*, No. B-14-254, at 102.

<sup>11</sup> *Id.* at n.86.

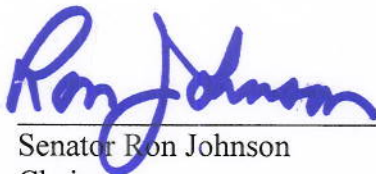
an individual, DHS has enacted a wide-reaching program that awards legal presence to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel.”<sup>12</sup> The court also noted that those receiving deferred action would be eligible for the Earned Income Tax Credit: “Bestowing a tax benefit on individuals that are otherwise not entitled to that benefit is one more reason that DAPA must be considered a substantive rule.”<sup>13</sup> Second, the court struck down DHS’s claim that deferred action constituted case-by-case decisions by USCIS personnel. Rather, if a person meets the qualifications of DAPA they will receive deferred action.<sup>14</sup> To justify this conclusion, the court cited to the fact that no DACA application that has met the criteria has been denied based on an exercise of individualized discretion.<sup>15</sup>

Under this analysis, we request that the GAO review whether the Homeland Security Directives constitute “rules” under the CRA, requiring congressional and GAO review before taking effect.

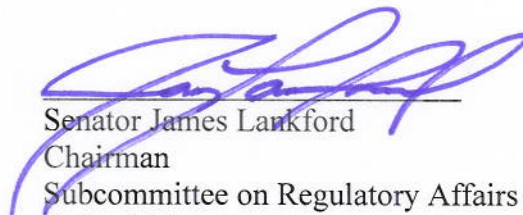
We ask for your determination and accompanying analysis as to whether the Homeland Security Directives are “rules” subject to CRA review as soon as possible, but no later than March 23, 2015.

The Homeland Security and Governmental Affairs Committee and Subcommittee on Regulatory Affairs and Federal Management has jurisdiction over the regulatory affairs of federal agencies, including the Department of Homeland Security. If you have any questions about this request, please contact Elizabeth Gorman of the Subcommittee Staff at (202) 224-3682. Thank you for your prompt attention to this matter.

Sincerely,



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Senator Ron Johnson  
Chairman  
Committee on Homeland Security and  
Governmental Affairs



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Senator James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and  
Federal Management

cc: Senator Carper  
Senator Heitkamp

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<sup>12</sup> *Id.* at 85-86.

<sup>13</sup> *Id.* at n.64.

<sup>14</sup> *Id.* at 108.

<sup>15</sup> *Id.* at n.101.