

**KEEPING FAMILIES TOGETHER:  
THE PRESIDENT'S EXECUTIVE ACTION  
ON IMMIGRATION AND THE NEED  
TO PASS COMPREHENSIVE REFORM**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED THIRTEENTH CONGRESS  
SECOND SESSION

DECEMBER 10, 2014

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**WEDNESDAY, DECEMBER 10, 2014**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:31 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Mazie Hirono, presiding.

Present: Senators Hirono, Durbin, Klobuchar, Franken, Coons, Blumenthal, Grassley, Hatch, Sessions, Cornyn, Lee, Cruz, and Flake.

**OPENING STATEMENT OF HON. MAZIE HIRONO,  
A U.S. SENATOR FROM THE STATE OF HAWAII**

Chairman HIRONO. This meeting of the Senate Committee on the Judiciary will come to order. Before we begin, I would just like to remind our audience of the Committee's rules regarding this, and any, hearing.

Today's hearing deals with a serious issue and I trust that members of the public here will act accordingly. I want to note at the outset that the rules of the Senate prohibit outbursts, clapping, or demonstrations of any kind. This includes blocking the view of people around you. Please be mindful of these rules as we conduct this hearing. Thank you so much.

I would like to start with some brief remarks. Just before Thanksgiving, President Obama issued an Executive order and that order will bring nearly 5 million people in our country out of the shadows. It will allow them to work legally and pay their taxes. It will also allow them and their families to continue to contribute to the vibrancy of their communities.

Every single President since President Eisenhower has used Executive action to provide discretionary relief from deportation. Nonetheless, this President's critics have relentlessly attacked the legitimacy of his action.

This is not just some abstract discussion about legal theory. It is about real people, real families. It is about taking concrete steps toward making our families and our economy stronger. It is about who we are as a country.

Family is the cornerstone of our immigration system and the President's commonsense plan helps keep families together. Many

of these families come to the United States to pursue their dreams—dreams like starting their own businesses or working to provide for their families in a safe community.

My mother brought me to this country when I was a young girl and while we had very little as immigrants, my mom had a dream to provide a better life for herself and her three children. My story is like that of so many immigrants and others who come to our country. They have a dream.

The President's action now allows millions of hard-working parents and students to keep pursuing their American dream today. Take for example, a woman named Bianca, and her family in Hawaii. After moving to the United States on a visa over a decade ago, Bianca met her husband. They moved to the place they had always dreamed of living, Hawaii naturally, and began a family.

Bianca and her husband's work visas were temporary and like many immigrant families, they faced the tough decision to remain after their visas expired and continue building their lives here in America. Bianca and her husband started with nothing. Today they have two small businesses on Oahu and four American children. Their businesses employ American citizens. They pay their taxes and they work hard to provide for their family and be part of the community.

The President's order with the new DAPA program will allow for Bianca, and her family to no longer live in fear every single day, the fear of being torn from the life that they have built in Hawaii. Bianca and her family are not alone. Around the country countless students and parents can now have some peace of mind that they can continue working toward their dreams.

I would like to acknowledge the many DREAMers and families in attendance today. If you would like to wave, stand? Do not worry, I will not call you out of order for doing that.

[Laughter.]

Chairman HIRONO. Thank you. We are also joined today by American workers who recognize that the President's plan and immigration reform will strengthen our economy. We have heard from mayors from cities ranging from New York to Dayton, Ohio will believe that the Executive action is good for their cities and local economies. We are a nation of immigrants, except for our native peoples who were here long before the rest of us got here.

Regardless of education or background or financial means, however, immigrants do best when we have our families around us. I know that from my own experience and I remember last year when we were dealing with immigration reform in the Senate, I met a young, very highly educated woman who was an immigrant, became a naturalized U.S. citizen who only wanted to be able to bring her brother to this country and her brother was a sole surviving member of her family. Both of her parents had passed away. So for immigrants strong families and for the rest of us, frankly, equals a strong economy and that is what the President's action is all about.

The President's plan lets us focus our limited resources on the border and on deporting felons, not hard-working families. This action is smart law enforcement. We have heard from police chiefs ranging from Los Angeles to Garden City, Kansas, who support the

President's plan and believe that the status quo undermines trust and cooperation between police and the community. But the President's action is only temporary. It does not provide a permanent solution to our broken immigration system and it does not help all 11 million undocumented people living in the shadows in our country.

We need Congress to pass comprehensive immigration reform which the American people overwhelmingly support. It has been over a year since this Committee and the full Senate approved our comprehensive immigration bill. A bill that has sadly just sat over there in the House of Representatives and we must continue working to pass commonsense humane reform that keeps our families together and continues to strengthen our economy.

We have heard, as I mentioned, from many people about their support for the President's Executive order. I would like to ask unanimous consent that their statements and letters be entered into the record.

[The information referred to appears as submissions for the record.]

Chairman HIRONO. So just to mention, we have heard from families who are impacted by this Executive action. We have heard from 27 mayors who support this Executive action. We have heard from law enforcement across the country. We have heard from faith leaders like the Conference of Catholic Bishops and the Lutherans who support this action. And we have heard from business leaders like Stan Merrick, CEO of Merrick Family of Companies in Houston, Texas who also supports the President's action.

Before I introduce our witnesses, Ranking Member Grassley, would you like to say a few words?

Senator GRASSLEY. Yes, please.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY,  
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. This is a very important hearing. The United States has served as a haven for those seeking refuge and a chance to make a better life. The promise of freedom and opportunity guides those who dare to dream and work hard. One of the reasons why so many seek out a new life in America is because our Nation is founded upon the rule of law.

That rule of law in the United States is being slowly eroded as the branch of government charged with faithfully executing the law is increasingly abandoning its constitutional duty. Today it is estimated that more than 11 million undocumented immigrants live in the country. The question of how to properly handle people already in the United States is a challenging one.

Instead of trusting in Congress's role and in the democratic process, President Obama has chosen to further erode the rule of law. He is now doing what he said he lacked authority to do, he is unilaterally altering our Nation's immigration policies in one fell swoop.

President Obama's latest action on immigration is a culmination of a pattern of abuse of power. His actions on immigration are contrary to his oath of office. It is a serious blow to our system of

checks and balances and shows total disregard for the spirit of the Constitution and the rule of law.

The Constitution confers the power to make immigration laws to Congress. It charges the President with taking care that these laws are faithfully executed. But instead of doing that, the President told Federal officials to suspend enforcement and ignore the laws on the books in a blanket fashion.

When announcing this Executive action, President Obama said that “Congress has failed.” Just because Congress has not passed a comprehensive immigration bill to his liking, it does not make it right for the President to bypass Congress in the legislative process. The President has usurped the legislative branch’s responsibility to write the laws and undermined the principle of separation of powers that is the very foundation of our constitutional democracy. In doing so, he has damaged relations with Congress and I think polls show, lost some trust with the American people.

Jonathan Turley, a noted liberal law professor, said, “When a President claims the inherent power of both legislation and enforcement, he becomes a virtual government unto himself. He is not simply posing a danger to the constitutional system, he becomes the very danger that the Constitution was designed to avoid.”

The bottom line is this, the President’s action goes far beyond anything that has been done in the past. It is unprecedented and it is a threat to the Constitution.

I do not buy the argument that this Administration’s actions are similar to those of previous Presidents. In a lame excuse that even The Washington Post found fault with—The Post said that President Obama’s unilateral action on immigration “has no precedent.” The Post said its comparisons to actions taken by President George H.W. Bush in 1990 are “widely exaggerated.” The White House numbers are “indefensible” and “the scale of Mr. Obama’s move goes far beyond anything his predecessors attempted.”

The Post concluded that, “Unlike Mr. Bush in 1990, whose much more modest order was instep with legislation recently and subsequently enacted by Congress, Mr. Obama’s move flies in the face of Congressional intent no matter how indefensible that intent looks.”

The President also claims there is a firm legal basis for his actions. It is ironic given his recent claims that—and this is quoting the President—“This notion that somehow I can just change the laws unilaterally is just not true. The fact of the matter is, there are laws on the books that I have to enforce. We live in a democracy. You have to pass bills through the legislature and then I can sign it.”

So there is what, in politics, we consider a “flip-flop.” The President is saying he cannot do something and then he did it.

The Justice Department’s Office of Legal Counsel whipped up a memo taking the position that this action is permissible because of the Executive’s ability to exercise prosecutorial discretion. While the executive branch has the ability to decide when to prosecute and how to prioritize enforcement, that ability is not unlimited.

The Administration is taking a broad, sweeping approach to prosecutorial discretion that amounts to an illegitimate exercise of enforcement discretion. Lawful prosecutorial discretion is exercised

on an individual case-by-case basis. It is not selecting entire categories of individuals and telling them that going forward, the law will not be applied to them.

I have learned that if you reward illegality, you get more of it. The President is rewarding illegal behavior and conferring substantive benefits to those who qualify. The individuals who entered without inspection or overstayed their visas unlawfully now will receive benefits only afforded to those who abide by laws.

Unfortunately, when you have non-enforcement of our immigration laws on such a broad scale, you are suspending the enforcement of law. That is unconstitutional. The executive branch cannot suspend and dispense of laws by non-enforcement and it cannot nullify the laws by unilaterally imposing contradictory directives.

Instead, it is the duty of the executive branch to take care that the laws are carefully executed. I worry if we let the President get away with this, then what will come next? The American people are outraged by the President's actions and rightly so.

The fact is that enacting laws takes time. The Judiciary Committee engaged in a fulsome process on immigration reform in 2013. It was unfortunate that the Majority Leader refused to have an open amendment process on the floor. I ultimately voted against the bill because it failed to first secure the border, but at least the Chairman recognized the need to debate and consider the issues in the Committee. I have complimented Chairman Leahy on that several times.

This Administration has also failed to enforce the laws in the Interior. The Department of Homeland Security has released 100s of alleged murders, kidnappers, rapists and domestic abusers from its custody.

Now, where is the accountability? Instead of being held accountable, the Administration has double downed. With the President's actions, individuals here undocumented will know that even if they have committed crimes, they will be exempt from immigration enforcement and released.

This is unfair to the people who have complied with the law and tried to enter legally. It is unfair to the U.S. workers who now must compete with this population for jobs in America. Most importantly, it is unfair to the American people and to our system of government.

I yield. Thank you.

Chairman HIRONO. Thank you very much, Senator Grassley.

Chairman Leahy, unfortunately, could not attend today's hearing, but he has submitted written testimony which I would like to ask unanimous consent be entered into the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman HIRONO. I would like to introduce very briefly our witnesses today and thank them for appearing before this Committee.

We have Elizabeth Shuler who is the secretary-treasurer of the AFL-CIO; Chris Schroeder, Charles S. Murphy professor of law and public policy studies and co-director, program in public law at Duke Law School; Dr. John Eastman, Henry Salvatori professor of law and community service and director, Center for Constitutional Jurisprudence, Chapman University School of Law; Jan Ting, pro-

fessor of law, Temple University Beasley School of Law; and Astrid Silva, student at Nevada State College.

I would like to administer the oath to our witnesses. If you would all stand and raise your right hand. Do you solemnly swear that the testimony you are about to give the Committee will be the truth, the whole truth and nothing but the truth so help you God?

Ms. SHULER. I do.

Professor SCHROEDER. I do.

Professor EASTMAN. I do.

Professor TING. I do.

Ms. SILVA. I do.

Chairman HIRONO. Thank you. Let the record show that the witnesses have answered in the affirmative.

We will start with you, Ms. Shuler.

**STATEMENT OF ELIZABETH H. SHULER, SECRETARY-TREASURER, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, DC**

Ms. SHULER. Good afternoon, Chairwoman Hirono, Ranking Member Grassley, Members of the Committee. Thank you for the opportunity to testify and be here with you today.

My name is Liz Shuler. I am Secretary-Treasurer of the AFL-CIO. It is a federation of 56 unions. We represent 12.5 million working men and women across the country. The AFL-CIO—our very mission: We believe that every person who works in the country should receive decent pay, good benefits, safe working conditions and fair treatment on the job.

I travel a lot around the country, like all of you, and I talk to a lot of working people when I am visiting job sites all across the Nation. I have seen firsthand how our broken immigration system drives down wages, undercuts employers who play by the rules, and chips away at gains made at the bargaining table. We have been calling on the Administration to take action on immigration for a very long time because we know that the status quo is an invitation for employer manipulation and abuse and our entire work force ends up paying the price.

Now although this fix is temporary, the AFL-CIO supports the President's decision to provide deferred action to nearly 5 million people. Deferred action will keep families together and allow millions of people to live and work without fear.

I want to state clearly for the record that deferred action is not amnesty. The new programs simply allow parents and immigrant youth who have been in the country for 5 years to come forward and apply for work authorization and temporary relief from deportation.

The individuals who will benefit are longstanding members of our communities and our unions and like all workers in this country they deserve the opportunity to work without being exploited. It is important to note that 8 million of the 11 million undocumented immigrants in the U.S. are already working.

Allowing 5 percent of the work force to struggle to support their families without full rights and protections is wrong and it creates a dangerous environment in which wage theft, sexual harassment, death and injury on the job are all too common. When employers

can hire undocumented workers with a wink and a nod, then fire them when they try to organize a union or object to unpaid wages or unsafe working conditions, it is not just undocumented workers that suffer, but their U.S. citizen coworkers as well.

So let me bring this down to the ground with a couple of examples. Somewhere today there may be a meatpacking worker who is reluctant to complain about consumer safety concerns in a plant, a hotel worker who suffers through an injury on the job rather than risk seeing workers compensation, and a construction worker who is still trying to muster the courage to report to authorities that his paycheck does not include the overtime that he worked that week.

The cumulative effect of these abuses all put together harm our economy. Again, let me be clear on this point, the current broken system harms all workers.

Take wage theft for example, the National Employment Law Project estimates that 68 percent of low-wage workers, many of them undocumented, experienced pay violations, 68 percent. We are not talking small violations here. They accumulate annually to a loss of 15 percent of their income. That means employers steal \$2600 per year from workers who only earn about \$17,000 a year. Shockingly, wage theft, the estimates are at around 56 million per week if you take them all combined together from workers pockets—in New York City, Chicago and Los Angeles alone.

So in terms of tax dollars, the President's announcement will increase payroll taxes by \$3 billion in the first year and nearly \$23 billion over 5 years and increase wages for U.S. workers over time as well. Workers need status to fight back. They need status to fight back against injustice on this scale and we will all benefit when they finally have it.

So for these reasons and many others—I see my time is running short—I urge the Committee to support deferred action. Looking forward we will continue to urge Congress to work on comprehensive commonsense immigration reform that ensures that all workers, immigrant and native-born, have access to labor, health and safety protections and our immigration policies really should be a part of a shared prosperity agenda that unites communities and keeps families together and creates a roadmap to citizenship for those who aspire to be Americans.

We worked together with the Chamber of Commerce, I know in the original bill, the labor movement together, and we know that it can be done, this comprehensive approach, if we all put our heads together and work to solve the problems. So in conclusion, we call on you to reject failed temporary worker models that undermine wages and working conditions and instead enact the type of meaningful immigration reform that will help build a stronger economic future for our Nation and support the basic civil and human rights and dignity of all workers.

Thank you again and I look forward to any questions.

[The prepared statement of Ms. Shuler appears as a submission for the record.]

Chairman HIRONO. Thank you, Ms. Shuler.  
Professor Schroeder.

**STATEMENT OF CHRISTOPHER H. SCHROEDER, CHARLES S. MURPHY PROFESSOR OF LAW AND PUBLIC POLICY STUDIES AND CO-DIRECTOR, PROGRAM IN PUBLIC LAW, DUKE LAW SCHOOL, DURHAM, NORTH CAROLINA**

Professor SCHROEDER. Senator Hirono, Senator Grassley, Members of the Committee, thank you very much. I appreciate the opportunity to be here today to discuss the legal basis of the President's decisions and the Department of Homeland Security's policy memo of November 20.

I do so, of course, with the benefit of a 33-page Office of Legal Counsel opinion, which I consider to be competent and thorough. It reaches the conclusion that the policies announced on November 20 are legal within the President's discretionary authority, although, it did reject one proposal that the Department of Homeland Security had asked the Office of Legal Counsel to investigate which I think demonstrates on its face that OLC does not consider the President's authority unlimited in this regard.

Now OLC's view is shared by a wide number of scholars and immigration lawyers around the country. Of course, there are dissenting views which I think will be ably defended today by my two distinguished colleagues. My opinion is that on balance the conclusion of the Office of Legal Counsel has the better of the argument.

Now it is 33 pages long. It is very detailed. I am not going to get into the weeds of it in my opening remarks. I will be happy to wade at least a little bit into them if you would care to do so in questions.

I want to make three basic points. One is that the approach of the Office of Legal Counsel is exclusively, in my judgment, to analyze the sources and limits of DHS' enforcement discretion under the immigration laws. That is language from the opinion. There is no assertion of unilateral Presidential authority in this memorandum. There is no reliance upon the ability of the President to act outside of the authorities that the statutes have granted him.

The opinion, then, as the second point also establishes, I think, to the satisfaction of a great many people and I will be surprised if my colleagues disagree with this. That enforcement discretion is a common feature of many statutes and, in fact, is considered to be particularly wide in the area of the immigration laws. This includes the ability to provide deferred action even though that particular measure is not explicitly mentioned in the statute. It has been endorsed by acts of Congress and is a longstanding administrative practice going back at least until the 1970s.

The third point I will make in these opening remarks is that having established the general background, the Office of Legal Counsel then, of course, has to turn to the statute itself because under its own brief it has to find that the authorities that are being exercised are within the discretionary bounds established by the statute. At first it finds nothing in the statute that expressly prohibits granting deferred action under these circumstances.

In fact, it finds that the deferred action elements of the policy guidance produced on November 20 are in fact consonant with a longstanding Congressional policy interest which it states in the following way—the policy that it thinks underlies these actions is the particularized humanitarian interest in promoting family unity

by enabling those parents of U.S. citizens and legal permanent residents who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States as evidenced by the length of time they have remained in the country to remain united with their children in the United States.

Now obviously, there are other policies that are reflected in the immigration laws, numerous of them and on particular matters, these policies can come into tension with one another. But when discretion has been advanced and allocated to the executive branch, it falls on the executive branch to make the appropriate balancing decisions.

In one of the seminal separation of powers cases decided by the Supreme Court, the *Chevron* decision, the Court put it this way: “An Agency to which Congress has delegated policymaking responsibilities may within the limits of that discretion properly rely upon the incumbent Administration’s view of wise policy to inform its judgments. When a challenge to an agency construction of a statutory provision fairly conceptualized really centers on the wisdom of the agency’s policy rather than whether it is a reasonable choice within the gap left open by the Congress, the challenge must fail.”

So I believe what the memorandum shows is that there is a gap speaking to the specific issue. Of course, it could have been satisfied in a number of different ways. The status maintained in the status quo would have been a perfectly legal approach for the President to take, but I believe that the actions that the President did take are also within the statutory bounds and it was the judgment of this Administration to take those steps and under *Chevron*, I think is justified for that reason.

Thank you very much.

[The prepared statement of Professor Schroeder appears as a submission for the record.]

Chairman HIRONO. Thank you, Professor Schroeder.

Dr. Eastman.

**STATEMENT OF JOHN C. EASTMAN, PH.D., HENRY SALVATORI  
PROFESSOR OF LAW AND COMMUNITY SERVICE AND DIRECTOR,  
CENTER FOR CONSTITUTIONAL JURISPRUDENCE,  
CHAPMAN UNIVERSITY SCHOOL OF LAW, ORANGE,  
CALIFORNIA**

Professor EASTMAN. Thank you Chairman Hirono, Senator Grassley, and other Members of the Committee. Thank you for inviting me to be here today.

The issue for us is not what proper immigration policy ought to be. The issue is who under a constitutional system makes it. I cannot disagree with my colleague, Professor Schroeder, more on the OLC opinion. I found it both uncharacteristically weak and even self-contradictory in its analysis.

There are three basic steps in the President’s recent actions here that need to be addressed. Only one of the three is even a close call, in my view. That is, can the President use his discretion, which everybody concedes he has, not to prosecute every single instance of violations of our law, that traditional prosecutorial discretion—can he use it on a categorical basis to effectively rewrite the law which I believe he has done with these actions.

The Supreme Court has never addressed that question directly as a holding, but has intimated on several different occasions that such a categorical use of prosecutorial discretion would be a violation of the President's "take care that the laws be faithfully executed" obligation. Prosecutorial discretion cannot be stretched so far as to give a categorical exemption or suspension of the law.

But even if you assume that this broad categorical use of prosecutorial discretion can be permissible, there are two other steps that the Secretary of Homeland Security, both Secretary Napolitano in the DACA program and the current program announced by Secretary Johnson on November 20. They first take those decisions not to prosecute, not to institute removal proceedings and not to deport as creating somehow a lawful presence in the United States while simultaneously speaking out of the other side of their mouth that this does not convey a lawful status.

Now lawful presence and lawful status is a bit too Orwellian of a fine distinction for most of us and I think it is here as well. The fact that you use prosecutorial discretion not to prosecute an instance of a violation of the law does not mean that you have the lawful authority to authorize a continuing violation of that law.

Think of the comparison here, a group of protesters occupies a military base in violation of trespass laws and through the use of prosecutorial discretion the base commander says I am not going to prosecute or forcibly remove them. That does not give them a right to be lawfully present on a continuing basis on that military base and yet Secretary Johnson's claim and the President's own statement on November 20 have repeatedly used phrases like "lawful presence" and "make you right with the law." That exceeds the scope of prosecutorial discretion under any definition.

And then the third piece of this is whether the President then has the authority to take the next step, not just treat them as lawfully present in the United States, but to give them a lawful status, a lawful work authorization, Social Security cards, drivers licenses and all of the benefits that flow from that which Secretary Napolitano announced in June 2012 that she was going to do, and Secretary Johnson has now confirmed that as well—that notion that they can take the decision not to prosecute or not to remove and deport individuals who are here unlawfully and convert that into a lawful presence that gives entitlement to work authorization is beyond anything that this Congress has authorized in the statute.

There are four words in one provision of the statute that the Office of Legal Counsel has relied on to find statutory authority for this. That statute says that it is illegal to hire somebody who is an unauthorized alien in the United States, defined as anybody who does not have lawful permanent residence or fall under an exemption under this chapter or given a waiver by the Attorney General. "By the Attorney General," those four words the Office of Legal Counsel treats as essentially giving unfettered discretion to the Attorney General to issue work authorizations whenever he or she sees fit.

The notion that those four words implies a delegation of such unfettered authority from this Congress when, as we know, every single exemption from the law that has been pushed by Congress over

the last three decades has been minutely detailed on what the criteria are—the notion that all of that is meaningless, that the President through his Attorney General could just issue work authorizations whenever he or she wants, is beyond the pale of what those words can mean.

More significantly, if, in fact, that is what those words mean, then I think there is a complete unfettered and unlawful delegation of this body's lawmaking power to the President. Article I, Section 1, of the Constitution is very clear, the lawmaking power that we the people delegated to the Federal Government is vested in this body, in the Congress of the United States, not in the Executive. The Supreme Court has routinely allowed you to delegate regulatory, fill-in-the-blank authority. But every time it has recognized that, the Court has said you have to convey an intelligible principle by which the exercise of that rulemaking authority discretion is exercised.

If these four words creates the unfettered discretion that the President and his Office of Legal Counsel claim, there is no intelligible principle whatsoever, no channeling of the discretion given to the Executive. You have handed over, without any restrictions whatsoever, complete unfettered discretion to the President. That violates the Nondelegation Doctrine and a core provision of the Constitution of the United States.

Thank you, Madam Senator.

[The prepared statement of Professor Eastman appears as a submission for the record.]

Chairman HIRONO. Thank you, Dr. Eastman.

Professor Ting.

**STATEMENT OF JAN C. TING, PROFESSOR OF LAW, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, PHILADELPHIA, PENNSYLVANIA**

Professor TING. I want to thank Chairman Leahy and Ranking Member Grassley and all of the Members of the Committee for the privilege of joining this panel this afternoon.

It was my privilege to serve as the Assistant Commissioner of the Immigration and Naturalization Service at the U.S. Department of Justice from 1990 to 1993. And it is my view that the immigration system is not broken as it has become fashionable to say. What is broken, I think, is our willingness to choose between two mutually exclusive choices, either we are going to have no limits on the number of immigrants that we accept into the United States given the fact that we all admire and respect immigrants, or alternatively, we are going to enforce some sort of numerical limitation on how many immigrations we accept into the United States.

That is a binary choice. But people do not want to do it because trying to enforce any limit means turning away people who are not criminals or national security threats, who just want a shot at the American dream and who, frankly, remind us of our own ancestors.

Some people find it hard to do. And they are asking for a third choice and I think that is what President Obama has launched us on, a third choice which I characterize as let us pretend. Let us pretend that we have a limit on immigration, let us keep it in the books, but let us not enforce it. Let us have no enforcement within

the borders of the United States and if we accumulate a large number of illegal immigrants, we will just give them some sort of amnesty here. If you do not want to call it that, call it legalization or something. We are going to find a way to let them stay.

I just want to say that if we do nothing, if we do no reform at all, we are left with the most generous legal immigration system in the world, bar none. We admit every year into the United States more legal, permanent residents with a clear path to full citizenship than all the rest of the nations of the world combined. We give out more green cards every year, year after year, after year than all the rest of the nations of the world combined.

In part two of my written testimony—I think I get the prize for submitting the longest written testimony. There is a prize is there not? So I am going to summarize.

In part two, I explained why I think the deferred action plan of President Obama is both unwise and bad policy. It hurts unemployed and underemployed U.S. workers who are now forced to compete with 5 million additional illegal immigrants who are going to have work authorization. It encourages more aliens to enter the United States illegally in the expectation that they too will receive benefits further down the line. And it discourages legal immigrants who are going to have to compete with these 5 million illegal immigrants for jobs in the United States and it also discourages them because most legal immigrants given our numerical limitation have to wait in line for the privilege of coming to the United States.

Some legal immigrants have been waiting today for more than 20 years for their privilege to come to the United States. What message does this deferred action send to them? I think it tells them that they are fools for respecting American law and that we are going to reward instead people that have come illegally to the United States as recently as 5 years ago, they will get work authorization. The legal immigrant still waiting in line will not. I think that sends a bad message.

In part three of my written testimony, I want to ask Congress to consider the impact on the U.S. Treasury of the refundable earned income tax credit on this question of whether the deferred 5 million will actually pay taxes as claimed or instead will they be claiming payments from the U.S. Treasury? I am a volunteer income tax preparer. I have prepared returns for poor people in Philadelphia and I have obtained enormous earned income tax credits for my clients which is I think pursuant to a statute enacted by the Congress. Do we really mean to extend that privilege to 5 million illegal aliens most of whom are parents of children and so in position to claim the earned income tax credit? We need to look at that.

In my written testimony I have cited an IRS ruling which is still up on the website which allows the deferred 5 million to claim the refundable earned income tax credit for prior years worked when they did not have Social Security numbers. They are going to be able to claim this credit retroactively according to an IRS ruling that is in my written testimony. Congress, I hope, will look into this.

In part four, I explain why I think the deferred action for 5 million is unconstitutional and illegal. The President's referring on

this 33-page OLC opinion and it was just released less than a month ago on November 19, at opinion, relies on the Supreme Court decision in *Heckler v. Chaney* for the proposition that an agency's decision—I think in that case it was the Food and Drug Administration—not to take enforcement action should be presumed immunized from judicial review, but the Supreme Court in *Heckler* also said this, “In so stating, we emphasize that the decision is only presumptively unreviewable. The presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes either by setting substantive priorities or by otherwise circumscribing an agency's powers to discriminate among issues or cases it will pursue.”

I believe that each component of the immigration Executive order announced on November 19 violates substantive priorities of Congress as expressed by the statute. My time is short.

I just want to talk about the advance parole issue, which is one that has been largely avoided by the President. They do not mention on this deferred action although advance parole is part of the DACA program previously announced. I believe advance parole is going to serve as an illegal backdoor pathway to citizenship for most of the 9 million people that we are talking about here. It is clearly a violation of the narrow interpretation of parole under Section 212(d)(5) of the immigration law.

Here is why. Most of these 5 million will become immediate relatives of U.S. citizens. When those children reach age 21, they cannot claim the visa overseas at a consulate because they are barred under 212(a)(9)(B), barred for overstaying in the United States by more than a year. They are barred from coming back into the United States—

Chairman HIRONO. Professor Ting, I am sure you are coming to your conclusion—

Professor TING. I am coming to a conclusion. There is adjustment status under 245 only for aliens admitted or paroled. Advance parole solves all of these problems. It says that the departure is not considered a departure and it says that they are paroled backed in. Section 245 is only available to people who are admitted or paroled. These people—most of them have not been admitted, but they will be paroled.

They are going to qualify for a green card. They are going to get a pathway to citizenship.

I thank the Committee for its attention to these matters. I hope you will read my written testimony. Thank you.

[The prepared statement of Professor Ting appears as a submission for the record.]

Chairman HIRONO. Thank you, Professor Ting.  
Ms. Silva.

**STATEMENT OF ASTRID SILVA, STUDENT, NEVADA  
STATE COLLEGE, LAS VEGAS, NEVADA**

Ms. SILVA. Madam Chairwoman and distinguished Members of the Committee, good afternoon and thank you for the invitation to appear before you today to discuss an issue that is of great importance to me and to many families in the United States.

My personal story is not unique and is typical of millions of immigrants here today. That is why I also want to thank this Committee for working so hard on the comprehensive immigration reform bill last year. I watched from the gallery as the Senate called that historic vote and I believed that we were one step closer to real change.

Like many before them, my parents—one of whom is here with me today—came to this country and chose to leave everything behind in search of a better life for their children. When I was 4 years old, my parents brought me across the Rio Grande in a homemade tire raft.

I still have a vague memory of that day. I was holding onto my doll very tightly because I was so afraid of what was happening. I remember looking down and knowing that I was going to be in trouble because I had gotten mud on my brand-new patent leather shoes.

Moving to the United States provided us with many wonderful things including my little brother who was born in 1993. But for me everything I have ever known is in Las Vegas. I grew up believing that I was just like everybody else. That the only difference was that when I was little I did not speak English. The kids used to make fun of me, but then I learned English 3 months after getting here, after getting into school because of the dedication of my parents and their desire for me to do better.

When I was in middle school, I received many prestigious honors at my school. But still my parents were afraid to let me sign up for a magnetic program that I had my heart set on. They believed that the school might ask me for my Social Security number and that immigration officials would know that I was here without documentation. A teacher who believed in me encouraged me to apply and with her help I did and I was accepted to A-TECH.

I excelled and I thought that I was just like my classmates until the time came to apply for colleges. I knew that my status meant that I could not drive because I could not get a license without a Social Security card, but I did not actually understand that being undocumented would hurt my future. My guidance counselors then told me that it was the end of the road for my academic career.

I had worked very hard. I had the good grades. I had all of the extracurricular activities, but when I was at my high school graduation when all my friends were called on stage and the school that they were going to was announced along with every scholarship that they had received, I was devastated. I knew that I could not have any of that because I did not have a Social Security number.

But in 2013 when I received DACA, my life changed completely. But my fear continues to exist. I am still afraid that my mom and dad will be deported. I am afraid that one day I will come home and they will not be there. Our lives will be completely turned upside down and that we will be torn apart and separated.

No matter how many degrees I am able to get, what is going to happen to me if I walk across the stage and nobody is there? My parents are hard-working. They are good people and they want nothing more than the opportunity to work hard and watch my brother and I grow up. My dad works very long hours in the Las Vegas heat where as we know it can get up to 120 degrees. He never complains. In his free time, he collects can tops to raise money for Ronald McDonald house. My mother, who has become a community mom and volunteers at a lot of local nonprofit organizations—she is here with me today

My family knows firsthand the value of the President's new Executive action. Several years ago, my dad was detained by immigration enforcement officers. It was the most traumatic experience of my life. In an effort to get right with the law, my dad had paid a notario, a notary, someone who he thought was a lawyer, to file an immigration application. Unfortunately like a lot of other people, we were taken advantage of.

She took advantage of my dad's lack of immigration knowledge and never told us that his application had been denied. She dragged us along telling us that immigration just takes a very long time in the United States. While she was doing this, she was draining our life savings.

As a result of that experience, my dad was issued a deportation order and picked up for detention. He is just one of thousands of parents who have been separated from their children. My family spent 1 week without my dad, but it was the longest week of my life. We did not know what would happen to him or to us.

When we were told that he was going to be deported, they told me that I could give him a 10-pound bag with toiletries. I wondered to myself how could the country that we love so much be brought down in a 10-pound bag.

My brother, he is United States citizen, he felt like his country had betrayed him. He said, Astrid, how can they do this to our dad? I understand I may not have rights here because I am undocumented, but my brother was born here. He has lived here his entire life. He is as American as any of the Senators in this room. He could not believe that day that our data had been taken.

The latest efforts by President Obama will keep my family together. It will keep millions of other families together. Of course, there are many families that will not benefit from this. I have many friends whose parents will not qualify. I have many friends who do not have children and will also not qualify. I feel tremendously lucky that I first received DACA, but now my parents will fall into a category of people that can be legally protected because they meet the qualifications.

But there are so many countless others who are not as lucky, but they are just like us. They are people that like my family are only making our country a better place. They volunteer in our communities, they go to church with us, they go to school with us, they have jobs and take their responsibility seriously. We must continue to work with Congress to pass a permanent legislative fix to our country's broken immigration system so all mothers and fathers can be home with their children.

The bipartisan comprehensive immigration reform package that passed the Senate in 2013 was certainly not perfect, but it was fair and permanent. It was a fix to the problem. I and so many of my friends will continue the fight to pass a bill. But in the meantime, we will also fight to protect and defend the President's action.

When people attack the President for the action or challenge his legal authority, the same authority that has been used before, they are attacking me, they are attacking my mom, they are attacking the hundreds of thousands of children who need their parents to take care of them. They need their parents to tell them that there are no monsters under the bed. They are attacking the workers who are contributing to our economy and they are attacking me with every single word that they say.

You are not attacking a stranger. You are attacking the girl who sits next to your grandson in chemistry class. You are attacking the man who spends his day making sure that your roses are beautiful every single spring and more importantly, attacking America and everything that has made our country this strong.

I hope that you will continue to see that this action not only helps make our country stronger, it makes it a more diverse nation, but it also demonstrates what we stand for as the United States, the American dream and the belief that if you work hard, you will be able to provide for your family and live without fear of persecution.

Thank you.

[The prepared statement of Ms. Silva appears as a submission for the record.]

Chairman HIRONO. Thank you, Ms. Silva.

Members will have 5 minutes each to ask questions of the witnesses.

I have a question for Professor Schroeder. We have heard testimony that one of the major problems with the President's Executive order is that this is a categorical—it applies to a category of people. Would you agree with that characterization of the Executive order that somehow people who apply through the Executive order do not have to go through a whole range of other questions, so would you consider that a categorical designation of people who will automatically get the status?

Professor Schroeder. No, Senator. I would not. The Johnson memorandum is quite clear that every applicant for the program has to be reviewed on a case-by-case basis. It sets up some initial qualifications that make you prima facie eligible for consideration, but then it instructs the line officers and inspection officers to do a case-by-case evaluation of each application.

Chairman HIRONO. And is that pretty much a process that was followed with the other Executive orders in this area by other Presidents, Eisenhower, Reagan?

Professor SCHROEDER. Senator, I assume that to be the case. I have not gone back and read the text of each of those INS or Department of Homeland Security guidance documents, but I believe that the department in this instance was following deferred action practices that have been established over a course of 40 years.

Chairman HIRONO. Ms. Shuler, we have here testimony that this is going to result in 5 million people taking away jobs from American citizens. Do you have a response to that?

Ms. SHULER. Sure. As I said in my prepared remarks, we believe 8 million out of the 11 million are already working in the United States. But I think the larger point is that when we have workers that are working in a shadow economy, that are working for low wages because they are afraid to speak out, they are afraid to make waves, it actually lowers standards and wages for everyone. So we believe that having workers come out of the shadows and have a legal way of actually having those protections, we think that is going to benefit all workers.

Chairman HIRONO. Ms. Silva, I know that you fully recognize that the President's Executive order is temporary and so there are people who may be afraid to come out of the shadows to register to be identified in that way. What would you say to them?

Ms. SILVA. Senator, when deferred action was announced in 2012, there were many people who told me to not apply because I would be put on a list to be deported even faster. But it has been 2 years and what deferred action did was change my life. I have been able to get a job to save up enough money so that I can finish my education now. I have been able to learn how to drive, something that I had never done in my life before. I am able to now drive to school. So to me people that are doing this are obviously trying to instill fear in people, but I think that this is going to be at least a temporary solution to a problem that is much bigger. But I will continue to fight in Congress because I know that we need a law.

Chairman HIRONO. So are you saying that you are willing to take the risk to come out of the shadows even if this is a temporary kind of a stay on potential deportation?

Ms. SILVA. There is the risk at any moment that if you do not have any type of protection that you can be deported. People are being deported every single day. People are afraid sometimes to call 911 because they think that they are going to get deported. So this would just give them that protection to at least know that they can contribute and not be afraid.

Chairman HIRONO. Ms. Shuler, I think you mentioned that the positive impact on our economy if all of these people who are impacted by this Executive order can come out of the shadows, pay their taxes—could you tell me again what that figure was?

Ms. SHULER. Well, in the testimony, basically we think that the President's announcement is going to increase payroll taxes by \$3 billion in the first year and nearly \$23 billion over 5 years. That also applies to overtime as well.

Chairman HIRONO. Thank you. We met with a number of people who wanted to make sure that we focus on family unity as a guiding principle of immigration reform. Ms. Silva, can you just tell us how important keeping the family together is for people in your situation, for immigrants.

Ms. SILVA. To me it is the most important thing. My parents left everything that they knew. They left behind their own parents so that they could give me a better life. And now to be here with them is the most important thing to me. Just to have my dad in a deten-

tion center for 1 week was devastating. I am 26 years old and to me it was scary. I cannot imagine a five- or 6-year old coming home and not knowing where their mom and dad are. Knowing now that we are going to be able to plan our holidays, we did not have that 3 weeks ago. We did not know if my mom or dad would be deported. My dad has an order of deportation because of the scam that he was under. We did not know if this was going to be the last Christmas where we were together.

Chairman HIRONO. Thank you, my time is up.

Senator Grassley.

Senator GRASSLEY. I probably will only have a chance for three questions. My first question will be to Professors Ting and Eastman. The second one also. The third one I would like to ask Ms. Shuler.

Professors Ting and Eastman, how is the President able to stay within the boundaries of the prosecutorial discretion which requires a case-by-case analysis and still grant deferred action to millions of people? Let me ask a second related question, what are the outer limits of doctrine of prosecutorial discretion? Do the President's recent actions exceed those boundaries? And I would like to have both of you give me your opinion, but not repeat each other so we can move fast.

Professor EASTMAN. I think the OLC Memo recognizes what the line is. It says it has to be on a case-by-case basis and it repeats that phrase over and over again. But the conclusion it draws utterly ignores the language. And I do not think you need to take my word for it. You can take one of the other witnesses at this panel, Ms. Silva, who just announced that her parents now qualify to be here legally "because they meet the qualifications."

That means that everybody else in the country, despite what OLC says in its memo and despite what Professor Schroeder said, are ignoring that case-by-case language in the memo because it is clear that the memo itself, the directive from Secretary Johnson, ignores that case-by-case requirement as well.

Here is what the memo says, "With respect to individuals who meet the above criteria and are not yet in removal proceedings, ICE and CBP should immediately exercise their discretion on an individual basis and here is how they shall exercise that discretion in order to prevent low-priority individuals from being placed into removal." And it goes on, it uses that, "You should do it this way." I mean, woe to the line officers in the immigration services who do not take that language on what they should do seriously.

This is not a case-by-case adjudication. If you meet those criteria, you are given the status that these memos set out. That is what runs afoul of what the Supreme Court has repeatedly said moves from prosecutorial discretion to an utter suspension of the law.

Professor TING. I would just add to that, summarizing what Professor Eastman has said, that this case-by-case reference in the OLC memo strikes me as window dressing. They know they have to do it case-by-case, so they say we are going to do a case-by-case, end of story. What more do you want?

I think we demand more than that. The most important thing I think is our constitutional system of government which is the notion that the American people govern themselves through our elect-

ed representatives, through a deliberative process of checks and balances, that is the most important thing that we ought to be concerned about here. If the President is making up the rules as he goes along in defiance of the statute, we are getting away from the most important constitutional principle of all.

Senator GRASSLEY. Without reading a long introduction, I want to refer to the fact that the President's OLC opinion cited things that Presidents Reagan and George H.W. Bush did. The question is to you two again. We all know that this is a grossly mischaracterized comparison. Would you explain how the actions of Presidents Reagan and Bush do not provide support for President Obama's actions? Are there other factors distinguishing their actions from those of the President?

Professor TING. I will take this one. In my written testimony, I state that all of the alleged precedence cited are in fact distinguishable. The defenders of the President's actions say, while numbers do not matter, case-by-case or 5 million, the same principle. It seems to me that is on its face questionable, if not obviously false. Numbers do matter and the small groups that have been deferred in the past, while their constitutionality has not been judged by the courts so they do not really set a constitutional precedent at all, but they are clearly distinguishable because of the numbers concern.

Now there have been examples of larger groups incorporated by category, but I think those are distinguishable to the extent that the President, when invoking them, cites the President's foreign-policy power. I think the Congress has acknowledged the President has significant powers in the area of foreign policy and foreign affairs.

If the President says I am exercising my foreign affairs power, which he did not on November 19, I think that does create a different situation. The numbers are different. There is no citation of foreign powers of authority. Now I know people point to the 1990 Family Fairness example, but I think that is clearly distinguishable because in 1990, as some Members of this Committee know, the Bush administration was engaged in active negotiations with the Congress leading to the 1990 immigration act which solved this problem by statute.

So I quote Justice Jackson in *Youngstown* who said that the President is at the peak of his authority when he is acting with the concurrence of Congress, either explicitly or implicitly. And his power is at the lowest ebb when he is acting without the explicit or implicit consent of Congress. That is what I think distinguishes the 1990 Family Fairness initiative from the November 19 deferred action initiative.

Professor EASTMAN. And Senator Grassley, there is one other piece and that is that, at the time, the Immigration and Naturalization Act, Section 242(b), specifically gave discretion to the Attorney General to issue extended delayed voluntary departure. We have no statutory authority comparable to that now. That statute has subsequently been repealed. It was first limited in time and then repealed altogether. But there was specific statutory authority for that. The notion that that action then serves as a basis for the

President to take actions without any statutory authority is not correct.

Senator GRASSLEY. I am done.

Chairman HIRONO. Thank you.

Senator Franken.

Senator FRANKEN. Well, I might as well follow up with this. It seems to me what Ms. Silva was sort of saying was that her father now fits within a certain set of criteria and it seems to me that what the Office of Legal Counsel was doing was defining a set of criteria under which people on a case-by-case basis—it could be determined whether they qualify for this. Do I understand that wrong, Mr. Schroeder?

Professor Schroeder [off microphone]. No. I think, Senator, you have it exactly right.

Senator FRANKEN. Say the first part, “Mr. Senator, you have it right.”

[Laughter.]

Professor SCHROEDER. Yes, Senator Franken, I think you have it exactly right.

Senator FRANKEN. Thank you. Now it is on the record.

[Laughter.]

Professor SCHROEDER. And in fact, if you look at the last of the criteria that are listed in the memorandum, it is that the applicant present no other factors in the exercise of discretion that makes the grant of deferred action inappropriate. So I am not going to put words in the mouth of Ms. Silva, but I think what she was anticipating is that her parents are not going to trip up on that last criteria. But, of course, they will have to go through the process of somebody determining that on a case-by-case basis.

Senator FRANKEN. Right. That is sort of how I understood it and, for example, in DACA there are a lot of people who were denied, like 30-some thousand; right?

Professor SCHROEDER. Yes. I think the latest number on the website is 32,000 denials.

Senator FRANKEN. Okay. And that was done on a case-by-case basis, those 32,000?

Professor SCHROEDER. Yes, Senator.

Senator FRANKEN. I see. Okay. Thank you. We have clarified, for me, something.

Ms. Silva, thank you for coming here today and having the courage to tell your very powerful story. President Obama’s recent Executive action stands to help a lot of people in Minnesota and a lot of people in this country including you and your family.

In your testimony you mentioned the constant fear of living in the shadows knowing that your father could be deported any day. I think we need to do everything possible to prevent families from being torn apart and children being abandoned. This was a focus of mine during the debate on the Senate immigration bill last year and that was partly because of an ICE raid on a meatpacking plant in Worthington, Minnesota which resulted in many children, many of them very young, many of them U.S. citizens, being abandoned at home without their parents, without legal guardians. We are talking like a 2-year-old being left at home and having her 6-year-old brother come home and not knowing where his parents were

and having to take care of his sister for a while until his grandma came.

This kind of stuff is repeated over and over again. Can you talk a little bit more about what it was like just to grow up in the fear that your parents would be separated?

Ms. SILVA. Thank you, Senator. Also to follow up on that—children, I know as a question—children are not allowed to be given to another person who is undocumented which leads to a lot of people—that is why the children are being left alone.

I cannot even fully express what it would mean for my parents to be deported at this time. Again, to follow up on the actual deportation of them and how this is going to actually make it so that our families are at least remaining together. The action is not everything that is necessary right now, but our families cannot continue waiting for a step to be taken by Congress because we need it now.

Senator FRANKEN. Thank you. I would like to thank my Republican colleagues. When we marked this up in Committee, I had an amendment to the bill that was unanimously agreed to—on kids in deportation proceedings, how they are cared for. I want to thank every one of you for voting for that.

I have run out of time, so I will not ask Mr. Schroeder to repeat how he started his testimony. Thank you.

Chairman HIRONO. We heard him. Thank you.

Senator Lee.

Senator LEE. Thank you, Madam Chair. Thanks to each of you for joining us today for this important hearing.

The President of the United States has told us repeatedly that his recent Executive actions do not clear the pathway for citizenship and we have heard a repetition of some of those themes today. And yet, notwithstanding those denials, it is clear that the President and his Administration are removing certain statutory obstacles to citizenship, obstacles that were put in place by law, by acts of Congress. It is clear that the President and his Administration know what they are doing and it is also clear that this is illegal, that it violates the law.

Professor Ting, you used to be the Assistant Commissioner of the INS. You know this area well, so help me out here if you can. The Administration has announced that it will be granting something called “advance parole,” that you referred to in your written statement and in your opening remarks, to deferred action recipients.

This thing called “advance parole” enables them to leave the country and then return to the country, crossing back into the United States, as parolees as we call it. Now to be clear, if the Administration in fact gives “advance parole” to the new beneficiaries of deferred action, new beneficiaries of deferred action who have U.S. citizen children, assuming that they are not inadmissible for some other reason, will those people who are eligible under that program be able to adjust their status, get green cards and eventually citizenship as a result of that?

Professor TING. My conclusion is that they will. I have also come to the conclusion that the Administration is doing this deliberately, conscious of the implications and deliberately concealing the fact

that they are setting forth a path to citizenship for most of these 5 million for the reasons that you have noted.

Senator LEE. Okay. But does not Federal law currently say, statute on the books, does not Federal law currently say that if you are in the United States unlawfully and you leave the United States while here unlawfully and then you try to come back that you will be inadmissible for a period of either 3 years or 10 years?

Professor TING. Right. Ten years if you have been in the country illegally for a year or longer. That was the intent of Congress and it has been enacted into law. But the Administration is taking the position that someone who leaves the country pursuant to an "advance parole" is not making a departure for purposes of 212(a)(9) and therefore, they are not subject to the 10-year bar and they are able to return to the country on a parole when they come back.

Senator LEE. Okay. You are familiar with INS action 212(d)(5)(A) which is the parole statute. This is the law that defines the circumstances in which the Government can grant parole. Let me read the relevant part of that statute. It says, "The Secretary [of Homeland Security] may parole into the United States temporarily under such circumstances as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."

Now, I want to place in the record USCIS form number I-131 and the accompanying instructions. These have been handed out to Members of the Committee and staff.

[The information referred to appears as submissions for the record.]

Senator LEE. This is the form that deferred action recipients fill out in order to receive "advance parole"; correct?

Professor TING. Yes.

Senator LEE. These instructions say, "USCIS may in its discretion grant advance parole if you are traveling outside the United States for educational purposes, employment purposes or humanitarian purposes. Educational purposes include, but are not limited to, semester abroad programs or academic research. Employment purposes include, but are not limited to, overseas assignments, interviews, conferences, training or meetings with clients."

Now, Professor, is granting parole for things like conferences or meetings with clients, are those things within the lawful meaning? Are those things lawful basis upon which this Administration can grant parole?

Professor TING. Absolutely not. It is clearly not within the statute. Indeed, in 1996, when that language that you read was added, the House Judiciary Committee, in its report, said that parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening medical emergencies or for specified public interests reasons such as assisting the Government in a law enforcement activity. It should not be used, the House Judiciary Committee said, to circumvent Congressionally established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.

Senator LEE. Okay. So let us suppose that an alien approaches the border and seeks entry into the United States and announces

to the officials who greet him at the border, look, I do not have a visa. I am not a citizen, but I do have a meeting in Tulsa or Salt Lake City or Denver. I have a meeting with a client. May I come in? May I be paroled into the country?

Professor TING. Well, I have no doubt what should happen. I hope even this Administration would recognize that is not grounds for admission to the United States and would turn the individual around.

Senator LEE. And yet this program that we are dealing with here would allow an alien to get “advance parole” and ultimately a green card, ultimately potentially citizenship so long as that person has a meeting with a client in Toronto, rather than Tulsa.

Professor TING. Yes. I think that is a correct interpretation.

Senator LEE. And you think that violates Federal law?

Professor TING. I am convinced it violates Federal law as enacted by the Congress.

Senator LEE. Thank you, Mr. Ting. Thank you, Madam Chair.

Chairman HIRONO. Thank you, Senator Lee.

I am expecting other Members, Democratic Members, to appear, but I will exercise a prerogative of the Chair and ask possibly at least one more question.

We were informed that the President’s Executive action places our communities at risk because it undermines respect for the law. I do have a letter from the LA Police Department Chief, Chief Beck, who says in his written testimony that will be part of the record of this hearing, “Many of these undocumented individuals have been and continue to be victimized and exploited by others in our community. Law enforcement is often unable to take action to stop this victimization as the undocumented immigrants and others fear that stepping forward will result in their identification and removal.” He goes on to talk about being victimized by criminal gangs and others who seek to intimidate members of this community.

[The letter appears as a submission for the record.]

Chairman HIRONO. I wanted to ask Ms. Silva how has DACA and potentially DAPA, that would apply to your parents, change your family’s ability to interact with the police, force do you think?

Ms. SILVA. Thank you, Senator. My family will now be able to not fear that if they call, again, 911 or if they call an ambulance that something will happen to them. It has been the case in prior years where people were asked for a social security number. They did not exactly know if they were allowed to answer or not and so it instills a fear.

We have in our very own community—the pin that I am wearing today is a Tomasama Ciaz [sic] and she was one of our DREAMer moms who was not documented. She passed away on June 9 because she had a stroke and she was afraid that if she called 911, they were going to ask her for her social security number. So she just took pain medication and thought it would go away.

Unfortunately, she had a stroke. That is what the pain was and she passed away several weeks after from complications due to the stroke.

So I know that it happens. I know that people are afraid and she was very well-versed on what she was and was not allowed to do

as an undocumented immigrant. But it is still the fear that even though you can call 911, you are afraid to do it. And that is just her case of being afraid to get medical attention.

There are people that are afraid to report a crime. People, in particular, in domestic abuse cases where people are afraid to denounce their abuser because they are afraid that if they go to the police that they are going to be able to look them up and see if they have a social security number or not. I have had friends that do not report that their license plates were stolen because they are afraid to go down there and you have to fill out a form.

Again, my parents were afraid for me to apply for a magnet school because they thought that my social security number would be asked. These are questions that the community has and people are afraid of it.

Chairman HIRONO. So it is clear that there is a lot of criminality that goes unreported within the undocumented community. And it also goes to the testimony that you provided, Ms. Shuler, about exploitation in the workplace of all of these people who are undocumented.

So when we talk about disrespect for the law, that is already happening to 11 million people in our country who are afraid to step forward. So thank you.

We will go to Senator Hatch.

Senator HATCH. Well, thank you, Madam Chairman.

My heart goes out to you, Ms. Silva. As you know, I was the original author of the DREAM Act. But let me just make this comment, our liberty requires that Government actually obeys the limits on its power including the separation of powers. The Constitution provides authority to establish what it calls a uniform rule of nationality to Congress, which means it denies that authority to the President.

The action the President announced last month, in my opinion, amounts to exercising power that belongs up here in Congress. Now my time is limited, so I would appreciate concise answers to just a few questions that I have because I would like to get through my questions that I have prepared.

Professor Ting, the Obama Administration says his Executive action is simply a different way to enforce the deportation rules. But I think he is changing the rules themselves. Do you agree with that?

Professor TING. Absolutely.

Senator HATCH. Okay. Let me just keep going. Under current Federal law, Congress put the burden on persons in the country illegally to show that they are entitled to stay. The President's action puts the burden on the Government to show that those persons must leave. Do you agree that this is not a change in enforcement, but a change in the law and that the President does not have that authority?

Professor TING. Yes I do.

Senator HATCH. You are not alone. I feel very deeply about these issues, about Ms. Silva and others just like her, but my gosh, if we do not follow of law, we are in trouble.

Professor Eastman, the OLC opinion attempting to justify the President's action claims that it is similar to those by past Presi-

dents. Now the opinion, however, concedes that the INS or DHS changed enforcement priorities in the past when Congress told them to do so. The President today says that he can change enforcement priorities without Congressional authorization.

Now I may be missing something, but how can receiving prior approval by Congress in the past be precedent for not receiving prior approval by Congress today? Does that make any sense to you?

Professor EASTMAN. Senator Hatch, that struck me as particularly odd as well.

Senator HATCH. Well, it is. Immigration activists have long asked President Obama to stop deportations until Congress changes the law. On July 1, 2010, President Obama said that doing so would in his words be unwise and unfair and would lead to a surge in illegal immigration. But that is precisely what is new Executive action does. It stops deportations for millions until Congress changes the law.

Does it not appear that the President has taken a step that he not only knows, but that he actually predicted could make the problem significantly worse, Professor?

Professor TING. Yes, it does. I think the logic of the President's action—you know, why not extend it to all 11 million undocumented people in the United States? Why not extend it to all of the people who will enter illegally in the future? Why should they not qualify?

Senator HATCH. How about all of those standing in line right now who played by the rules?

Professor TING. Yes. I think that the logic we have heard up to this point is, well, why not? They need to talk to the police too. Even the people who enter next year should qualify because they need to talk to police.

Senator HATCH. Madam Chairman, I ask consent that a Wall Street Journal editorial of November 24, be placed in the record.

Chairman HIRONO. Without objection.

[The editorial appears as a submission for the record.]

Senator HATCH. This editorial says that the OLC opinion attempting to justify the President's action is embarrassing, more political than legal. It makes his abuse of power look even worse and I agree. I think it really hurts your case rather than helps it when the President does not obey the rule of law.

Now before I go, I want to say a word about the future of immigration reform. As everybody knows, I voted for the Senate bill. I helped to amend that Senate bill and I feel deeply that we have got to come up with legislation to resolve these problems the right way and I want to talk about the future of immigration reform.

The President has taken this Executive action, the very step that he once said was unwise and unfair, and simply tells Congress to pass a bill. But it should be obvious to everyone that the President's unilateral and unlawful action makes that very goal even more difficult.

Perhaps that is what he intended all along. I do not know. I hope not. I believe strongly, however, that we can make real progress on immigration reform despite the President's action.

Employers in the technology section were told for years that high-skilled immigration reform would happen only as part of comprehensive immigration reform. But now that the President has taken action, look who is left holding an empty bag, the technology industry.

Well I believe we can find common ground and achieve legislative success in an area like high-skilled immigration. This is a no-brainer. My I-Squared bill has 26 bipartisan cosponsors. We would have a lot more—we have not gone out to get them at this point in the Senate, including Senators Klobuchar and Coons on this Committee and broad support in the technology sector of our economy.

Now I am calling on everyone from the President and both sides of the aisle in Congress to the tech industry to get behind this bill and use it as a launching for more progress on immigration reform. The President's action was—as he had previously admitted—unwise and unfair. I also believe that it is unlawful. But we have to find ways to make progress and solve some of the real problems facing our Nation.

My I-Squared bill is one of those—I should say Senator Klobuchar, Coons, Rubio and myself, our bill is one of those ways. I want to work with everyone to get it done.

Now having said all of that, we have got to solve this problem, but it ought to be solved the right way so that everybody in this country at least knows what the law is and everybody in this country knows that this country is a decent, righteous country that really will live up to the law. I am going to work very hard to get this done, but what the President has done is abominable. I am telling you. If we can have Presidents do things like that, kiss the Separation of Powers Doctrine goodbye.

Sorry, Madam Chairman.

Chairman HIRONO. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Madam Chairman. Thank you to all of the witnesses. I am sorry we had a Rail Safety hearing, so I was a little late here.

I just wanted to lead by adding my support to the I-Squared bill. Senator Hatch and I are the original cosponsor of that bill, along with Senator Coons and Rubio. We are very proud of that bill and I think we all know that there are a lot of needs here when it comes to immigration reform, whether it is issues at the border, whether it is issues with the path to citizenship that we had in the comprehensive bill that we are so proud of in the Senate and I appreciated Senator Hatch's support for that bill out of this Committee, but it also is the workers that have really been the backbone of this country.

My grandparents on one side were Swiss and the other side Slovenian immigrants. My grandfather on the Swiss side actually came through Canada and somehow made it through to Wisconsin with \$40 in his pocket and here I am a United States Senator. So that is the story of our country.

I think one of the things that I wanted to build off of what Senator Hatch was talking about—maybe I can ask you this, Mr. Schroeder, is the bill that I have with Senator Hatch, which was basically included in the comprehensive reform is about green

cards, its about the fact that Mayo Clinic doctors come in and they cannot bring their spouse or agriculture workers at the Morris Dairy in Morris, Minnesota where the unemployment rate is 2 percent. They come, they work at the dairy, and they bring their spouses and then their spouses cannot work for 7 years even though they are legal. The spouses coming are legal. There are just so many rules right now that we were trying to fix with the comprehensive bill.

My question is, with the President's action, does any of that take away from what we could do if we actually passed a bill? My point is, I know that Senator Hatch and I may have a disagreement on what the President did. And that is fine. We have disagreements on this Committee. But I just want to make clear, we have some—understandable from some people—there is anger about that action. However, does that stop us from taking action on these other things that we need to do or, again, passing a comprehensive reform bill?

Professor SCHROEDER. Senator Klobuchar, no it does not, in any way shape or form. As a matter of fact, the President has called for comprehensive immigration reform and has quite expressly stated that anything about the temporary actions that the Department of Homeland Security took on November 20, can be altered by legislation, revised in any way this body sees fit. And I am sure he is hoping to continue to be able to work with the Congress on such reform going forward. But there is nothing in the temporary actions that he has taken that prejudice in any way moving forward on constructive commonsense legislation.

Senator KLOBUCHAR. Yes and I think that economic impact of the reform—I see Senator Durbin is here and Senator Flake—and there were so many people that worked hard on getting that comprehensive bill done in the Senate and I think some of the best arguments for it were actually the economic argument for it. We know that the nonpartisan CBO report showed that comprehensive immigration reform would actually reduce the deficit by \$158 billion over 10 years and much, much more, \$700 billion, I believe, over 20 years and increase the Nation's gross domestic product by 3.3 percent in 10 years. That is pretty phenomenal for people that want to do something about the debt and that is the CBO that brought back that score and that is why Grover Norquest has made this such a priority because it brings down the debt.

So I wondered if you, Ms. Schuler, could just comment on the economic reason that the AFL-CIO is behind this bill and how you see that as fitting into the arguments that we are talking about today.

Ms. SHULER. Sure. Earlier we had talked about payroll taxes and the impact it would have, but I think our main concern is about raising wages—raising wages for not just undocumented workers but for all workers and the fact that what the President did is a beginning step to doing that. Certainly we would prefer comprehensive reform. That is our top priority, but we think that this is a step in the right direction and that when we give workers the opportunity to, as we said earlier, kind of come out of the shadows, we have an underground economy essentially where workers are being paid less because they are afraid to speak out and afraid to

actually speak out when something unsafe is happening on the job or when employers are cutting corners. There is a whole host of reasons why they are fearful and you heard it earlier too from Ms. Silva.

We are coming at this from an economic angle because we believe that when we lift the floor and we start providing fair wages for all working people in this country that it actually is going to benefit everyone, and we need a raise in this country, as you know. We have been fighting on many fronts.

Senator KLOBUCHAR. I think we have seen the sentiment for that in a lot of the States. Thank you.

Before I run out of time here, Mr. Schroeder, do you want to answer that from an economic standpoint? The debt argument, and other things we could see if we, one, in part, with some of the work from the President's action but really what we would need was, the comprehensive reform, and some of these other things as well, in order to realize that full economic benefit with the debt reduction and also with the economic—the increase in the productivity and the increase in the GDP?

Professor SCHROEDER. I think it is just undisputable that the specific actions that the DHS is taking will have a beneficial impact, but the real impact on the economy will be if we can fix the immigration system, solve the problem that you and Senator Hatch are working on, solve the other bottlenecks in the immigration system and use the immigration laws to support the engine of economic recovery instead of often frustrating it.

Senator KLOBUCHAR. And I think some of those things could not be done by Executive order. I am sure my colleagues would argue should not have been anyway, but let us just put that aside for right now.

Some of these things that we have been working on really hard with the green cards and the visas and the agriculture jobs, they just simply could not be done by Executive order because of the law and it is just another argument for why we need the comprehensive reform.

Professor SCHROEDER. Absolutely right.

Senator KLOBUCHAR. All right. Thank you.

Chairman HIRONO. Senator Flake.

Senator FLAKE. Thank you madam Chairman. Thank you for your testimony.

Let me just say from the beginning that I am one of those who believes we have to have a permanent immigration solution. I was part of the Gang of Eight process here to write the Senate bill. While in the House, I wrote several bills that would have dealt with this in a comprehensive way. We need reform desperately. We need people to come out of the shadows. It is no fun being in the shadows. It is no fun living in fear. We need a permanent solution, one that addresses our situation on the border, one that addresses our problems with interior enforcement and employment, one that deals with our long-term issues with workers, whether that is high tech workers or other workers and also a mechanism that deals with those who are here illegally. That is not adequate right now. So we desperately need this.

My problem with what the President did is that he did it the wrong way. This is a function that rests with Congress and he has made it more difficult to reach a long-term permanent solution by taking this action. That is my issue. So I know there is disagreement at this table. I happen to side with those who believe that the President did go beyond his constitutional authority for basically a categorical approach to those who are here.

I should point out that the steps that we took in the Senate bill, the steps that we have taken with other legislation actually covered more people who are here in the shadows, if you will, than the President's action did. So it is not that he took action for a group that does not need to be dealt with and dealt with in a rational humane way. It is just that in taking this action, he has made it more difficult for Congress to move forward and for that I am truly sorry because I think it will be more difficult.

That is not to say that we should not try and I have said more than once that I think our approach to the President's action is not to try to stick a finger in his eye, but to put legislation on his desk. So that is what I will move forward and try to do.

It is unlikely that there will be a comprehensive bill like the Senate bill now. I think that it will likely be a more piecemeal approach because that is what the President has done. He has made that fashionable, I guess, if you will. To take just one portion and try to address it. I think that that is likely the approach that will be taken now and I hope we take it. I hope the House moves forward. I hope the Senate does as well and that we can get legislation on the President's desk that deals with this issue in a more permanent fashion and in a better way than the President's actions.

I thank you for your testimony. I will not get into the differences here. I think they have been aired and we have heard them, but I just want the folks here to know and my colleagues to know where I am. I hope that we can move meaningful legislation to deal with this issue because it is not going away. We need to deal with it and we should. So thank you.

Chairman HIRONO. Senator Durbin.

Senator DURBIN. Thank you, Madam Chair. We have really come down to some pretty stark choices here. I would like to ask you, Professor Eastman and Professor Ting, while seated at a table with an undocumented person, someone even call illegal person—we have three choices and I would like you to tell me which one you choose.

The choices are, number one, stick with the current way we are doing things. Agree with the House of Representatives. We do not have to do anything. Leave the system as it is. Do not deport people, just leave them where they are.

Then we have the suggestion by Presidential candidate Mitt Romney, self-deportation. Let us tell these people to leave, all 11 million of them. Just leave.

Or the President's approach, create some priorities here. Say to people if you want to stay in this country and you are undocumented, you have got to come forward and register. You have to submit yourself to a criminal background check and you have to

pay taxes for a temporary situation where you can work in this country.

So which of those three do you choose?

Professor TING. Senator, the underlying question is given the fact that we admire and respect immigrants, how many immigrants do we want to come to the United States every year? Does it matter? If it does not matter, we can save \$18 billion a year and just not enforce immigration laws—

Senator DURBIN. Professor? Excuse me. The Executive order does not leave the gates open. The Executive order closed the gates 5 years ago. Five years ago. So this notion of a flood of new immigrants, that is not what the Executive order says.

Professor TING. We need to decide what we want. Once we decide what we want, then we can decide which policies are the best way to get us to where we want. Are we prepared to accept unlimited immigration into the United States or do we want to enforce a limit? That is the question.

Senator DURBIN. Wait a minute, sir. See you have gone to the extreme again.

Professor TING. No. It is about the numbers.

Senator DURBIN. It is not unlimited. The President's Executive order has a limitation as did the comprehensive immigration bill. Mr. Ting, you said in your testimony and I will add as the son of an immigrant, thank God—thank God that this is a nation of immigrants so you and I have a chance to sit here in the United States Senate and debate this issue. Let us never forget that this is a nation of immigrants and they had made it great nation and you and I are damn lucky it is.

Professor TING. I teach immigration law every week. I am well aware of the history of the immigration system in the United States and I am well aware of the role that my parents played in coming to the United States at a time of Chinese exclusion.

Professor EASTMAN. Senator, you said this is a nation of immigrants. That is true. It is also a nation of laws. The underlying assumption to your question is choosing an option that ignores those laws. The Constitution is—

Senator DURBIN. So which option do you choose? You have three.

Professor EASTMAN. The option that you selected of the President's policy is one that ignores the laws that this body—

Senator DURBIN. Now wait a minute. That leaves you two options. Which option? Which one do you choose, the current situation or mass deportation?

Professor EASTMAN. Well, the current situation is not one of non-enforcement. The law says, the law has mandatory Section 252, for example, specifies that people who are not able to demonstrate a lawful presence in the United States shall have removal proceedings initiated against them.

Senator DURBIN. So you would take the Romney approach. Let us deport all of these people.

Professor EASTMAN. Senator, this body is the one that sets the law. If you think that is too draconian then this body ought to change the law, but the notion that the executive can unilaterally suspend the law is not part of the constitutional system we the people agreed to live under when it was adopted.

Senator DURBIN. Your position is the Romney deportation. Enforce the law.

Professor EASTMAN. No. My position is to enforce the law that is on the books and tell the Congress which has the authority to change it, change that law. Otherwise, we live in a lawless society and Professor Ting's claim that if it is lawless, you will be opening the doors to an innumerable amount of people to come here because we have already demonstrated no willingness to enforce the law and we saw that happen on the southern border in Texas.

Senator DURBIN. So you are saying enforce the law, deport the 11 million. That is your position?

Professor EASTMAN. I am saying, enforce the law until Congress changes it, yes, Senator.

Senator DURBIN. Well I can tell you if you think that we can deport 11 million people without dramatic negative impacts on individuals, families and our economy than I do not believe you are in the world of reality.

Professor EASTMAN. Then change the law, Senator. But do not do it by an executive fiat. That is the question.

Senator DURBIN. We did it in the United States Senate. The House refused to act. Now we have three choices.

Professor EASTMAN. The House had a number of bills that it sent up here that you refused to act on.

Senator DURBIN. Give me an example of one on immigration.

Professor EASTMAN. Senator, there was a STEM jobs bill that passed in the House that was sent here and it died even though everyone says they are for STEM jobs.

Senator DURBIN. That certainly does not address all but a part—

Professor EASTMAN. No, but it is a bill that dealt with immigration which is what you asked and they sent it up here. You have a disagreement between this body and the other body.

But the notion that the President can unilaterally change the law at his will is no part of our constitutional system. That is the issue we are dealing with.

Senator DURBIN. So the 11 Presidents who have done this before him over a period of 60 years were all in violation of the law?

Professor EASTMAN. No. They were not, and let me go through that. I am glad you asked because it is significant.

President Eisenhower, President Kennedy, President Reagan all did this in dealing with their Article II powers over foreign affairs that deal with international humanitarian crises. That is not what the President here has done.

Senator DURBIN. What about President Bush's—

Professor EASTMAN. President Bush—you were not here when I read it, but President Bush acted pursuant to a specific statutory authority that gave explicit discretion to the Attorney General. No such statutory authority exists here. Those are dramatically different things if we are going to stick with the law that is on the books.

Senator DURBIN. I think you are being selective in the way you read this.

Professor EASTMAN. I am not being selective.

Senator DURBIN. I would just tell you this, prosecutorial discretion is part of the executive authority. You have come out in favor of mass deportation. I do not think that is reasonable and I do not think it is good for this country.

I also accept your challenge to do something. We did with a vote of 68 in favor, 14 Republicans. We passed comprehensive immigration reform. The House of Representatives refused to call it or any part of it and now you are telling us, well, let us leave the situation as it is or deport everyone who is here. Those are not acceptable alternatives.

Professor EASTMAN. Neither is the President doing it on his own.

Senator DURBIN. What the President has done is to make this a safer nation by putting more resources on the border, putting a limitation on those who are eligible to come forward, register, submit to a criminal background check and pay their taxes in America to work on a temporary basis. That to me is a reasonable response to the House's failure to act when we passed this legislation.

Professor EASTMAN. Senator, you said it is safer. I challenge you to go down to the border States of people who are dealing with the massive influx, the humanitarian crisis that were a direct result of the President's lawlessness on the DACA program. People came here thinking they had a free ticket.

Senator DURBIN. With all due respect, Professor Eastman, read the law. What the President said in DACA, affecting Astrid Silva, had a limitation and deadline on eligibility. Do not blame the President for what happened at the border.

Professor EASTMAN. Well everybody in Central America thought that this was the ticket to salvation.

Chairman HIRONO. I am going to give the last word to the Senator.

Professor EASTMAN. Under DACA—I am coming. It is a humanitarian crisis down there that this thing created.

Senator DURBIN. If you read the law, you know that is not true.

Professor EASTMAN. It did not cause it, but by law—

Chairman HIRONO. Thank you, gentlemen.

Senator Cornyn.

Senator CORNYN. Well, I was kind of enjoying that, myself.

[Laughter.]

President Obama—under his Administration we have seen 2.5 million people deported. No one is suggesting, as my friend from Illinois is, that we support mass deportations. But what we recognize is when we have a conflict between what our heart tells us we would like to do out of a sense of simple human compassion, when we have a conflict between our heart and our head, that it is usually the right choice to let your head prevail. And what it calls for, Professor Ting, is exactly what you said, some reasonable, sensible, predictable policy on who we are going to allow and under what circumstances to come immigrate into our country.

I feel like we need to have a reprise of that old "Schoolhouse Rock" song, "How a Bill Becomes a Law." "Saturday Night Live" had an interesting parody of that recently because the idea from my friends across the aisle is that just because the Senate passed a comprehensive immigration reform bill and the House did not take it up and pass it without changing one word fast enough, that jus-

ties the kind of lawlessness that we have seen from this President. And it is just really unfortunate for many, many reasons.

I think one of the reasons it is so unfortunate is because of the damage that it does to people like Ms. Silva. She may not realize this, but of course, it is a temporary provision. She has no opportunity under the President's deferred action to obtain a green card and become an American citizen. The only way that could possibly happen is for Congress to pass a law allowing that. She came here at 4 years old with her parents. She is not culpable. She committed no offense in my view or in the view of the law, I believe. And we ought to make an accommodation for people like Ms. Silva.

But what the President did is actually make it harder because he poisoned the well creating what is already a very controversial subject, very divisive subject and making it worse and making it harder for us to do what Senator Flake said he wants to do and what I want to do which is to take on a step-by-step basis, try to build consensus on different aspects of our immigration system and to make progress.

So the problem with what the President did, of course, is it defied what common sense tells us is going to be required for sustainability of any change to our immigration system and that is consensus—consensus. That is what the Constitution forces us to do as Members of Congress working together to pass a law and get the President to sign it. But the President did an end run around that and leaving the country divided and leaving no consensus.

And, of course, I think Professor Ting noted this, that by putting 5 million people ahead of the others who are waiting patiently in line trying to play by the rules, I think it would strike people as fundamentally unfair for the millions of people who have been waiting patiently in line and playing by the rules and I think that is not good.

And as far as the disagreement with Senator Durbin, I think what Senator Durbin forgets is what we experienced just last spring when 62,000 unaccompanied minor children from October to springtime coming across our southwestern border to my State where a humanitarian crisis ensued. It is essential in any law enforcement scheme to have some sort of deterrence. We cannot hope, the police cannot hope in every instance to capture everybody who might be inclined to commit a crime.

What we do is to create a system of deterrence so people do not start down that path in the first place. And of course, the horrors, experienced by these children coming up on the back of the beast through Mexico into the United States, subject to the tender mercies of the drug cartels and other people who profit from this business model, those are unspeakably horrific.

So I am really not happy, as you might be able to tell, with what the president has done here. I think he has violated his oath. He has actually harmed the cause of people like Ms. Silva by making it harder for us to do our job.

Let me just close on this. Under President Obama's Executive actions, many people who have committed criminal offenses will be allowed to receive deferred action and employment authorization. Based on my reading of the DHS directive, some people convicted of the following crimes will be eligible for the program.

Are you aware—let me start with Professor Ting and Dr. Eastman—that someone who is guilty of child pornography possession, child abuse, assault, abduction, false imprisonment, voter fraud, larceny, robbery, harassment, theft, reckless driving and distribution of alcohol to minors, all of them would—according to my reading of the President’s deferred action—be eligible for that program. Do you have the same understanding professor Ting?

Professor TING. I am not aware of any authority that would contradict what you have just said, Senator.

Senator CORNYN. I think given the decision that Director of ICE, Morton, made several years ago in his first memo saying they were going to selectively enforce the law to return people who are picked up in our jails who have committed other offenses here and this whole idea that the President can selectively enforce our immigration laws to the tune of millions of people which in essence represents a nullification of the law, I think the President has made our communities much less safe and particularly the communities where many immigrants live who are subject to the violence and the crimes that the people they purport to be helping, that they end up being the victims of those crimes. Thank you.

Chairman HIRONO. Senator Blumenthal.

Senator BLUMENTHAL. Thanks very much Madam Chairwoman. Thank you for having this hearing. I am hopeful that in the new year and in the new session we will put aside some of the differences that we have and come back to the ground that we have in common, the legal ground, moral ground, political ground that was so powerfully expressed in the bipartisan bill that we passed.

I want to thank my colleagues across the aisle for their work and say to them that I look forward to a new session when we will pass a bill, that we will act more than talk, and that we will fulfill the promise of this country which is that we take advantage of the enormous energy and talent that immigrants bring to our land and that we will enable millions of people to emerge from the shadows and more fully participate in the greatest, strongest nation in the history of the world. We are a nation of immigrants and we are strong and great in part because we welcome immigrants.

I have spent most of the past 40 years in law enforcement, so I tend to see this issue through the prism of a law enforcer. I respect the President’s Executive action and support it because of its effect, in part, on law enforcement enabling people to participate and cooperate in law enforcement and to support the need for more information which they are ready willing to give, but sometimes fear doing so because of the retribution that can come to them as a result of the laws that currently are applied. This message has been amplified by a number of letters that the Committee has received for this hearing. I would ask, Madam Chairwoman, that they be entered into the record—from Chief Charlie Black of the Los Angeles Police Department, the chief of the Kansas, Garden City Chief of Police James Hawkins and Richard Beale, Dayton Police Department and a number of his colleagues.

Chairman HIRONO [off microphone]. Without objection with a notation that the Chair has the authority to dispose of—to the extent that they are different, without objection they will be included in the record.

Senator BLUMENTHAL. Thank you.

[The letters appear as submissions for the record.]

Senator BLUMENTHAL. Ms. Shuler, as you know, there has been a lot of criticism of the President's program because of its supposed cutting opportunities of employment for ordinary working people. Now I would think if anyone is aware of the negative impact on work opportunities for working people, your members and you would be aware of them. What do you think of that criticism?

Ms. SHULER. I think it is a lot about fear. We tend to want to paint it in a picture of us versus them and especially as people have struggled in recent years with the recession with employment, it is easy to sort of use a scare tactic to pit us against each other. But what we have seen is that the evidence does not support the notion that this will create some kind of mass unemployment. In fact, we think it actually will create more opportunities for people.

I had said earlier that we are all about work opportunities and making sure that people who work hard are actually rewarded fairly for their work and that they have access to safety protections and benefits. Again, we think this goes a long way. It is a step in the right direction to making sure that the 8 million people that we think out of the 11 million that are working already can actually come out of the shadows and gain access to those kinds of protections.

Senator BLUMENTHAL. And many of them already pay taxes, but the ones that do not will be required to pay taxes?

Ms. SHULER. That is right.

Senator BLUMENTHAL. So, far from driving down wages or working conditions, you would agree, would you not, that it will actually enhance opportunities for average Americans and ordinary working people?

Ms. SHULER. Yes, absolutely. And we have seen evidence even within our unions, the United Food and Commercial Workers, for instance, has cited that they think about 100,000 of their members will actually benefit from this memorandum. We know that in the construction industry, for example, in the State of Texas, I think it is 50 percent of construction is done by undocumented workers, 20 percent overall in the country. So you can imagine what kind of a competitive disadvantage that can place on a contractor who is employing union members. We see it as an opportunity to lift the floor for everyone so that every contractor is competing fairly in the construction industry.

Senator BLUMENTHAL. Great. Thank you so much. I thank you Madam Chairwoman.

Chairman HIRONO. Senator Sessions.

Senator SESSIONS. Thank you, Madam Chair. Thank all of you. This is a very interesting and important hearing.

I do believe that, Professor Ting, you are correct. I remember in 2007 in this room, a professor testifying on immigration said Senators tell me what you want. If you want a policy that serves the interests of poor people around the world, I can tell you what it is, admit them to the United States. If you have a policy that serves a national interest of the United States, then we can work together and I can help you craft one.

So I think that is our first decision. It has to be a lawful system. It has to be one that serves the national interest. That is what our people have demanded and pleaded with Congress for 40 years for and the politicians have refused to give it.

There was a time, Ms. Shuler, when unions did not see it the way you see it today. I think you are incorrect. Professor Borhaus at Harvard, probably the premier student of these issues, in April 2013 concluded—once again, consistent with his previous studies—on net, current immigration policy reduces the wages of U.S. workers in competition with immigrants by an estimated \$400 billion a year while increasing profits of business owners who use immigrant labor by an estimated \$437 billion.

So virtually all of the additional profit that goes to the businesses is paid for by reduced wages. Wages are down since 2000. Adjusted for inflation, they are down over \$3000 since 2007, over \$2300 since 2009. This is a huge thing.

I do not believe we have a shortage of labor when wages are falling. I tell my business friends, you believe in the free market, wages are down, I do not believe we have a shortage. That has not been disputed. I think you owe it to your members to study this issue more carefully as we go forward.

Now, Professor Eastman, you have talked about the prosecutorial discretion issue. As a former Federal prosecutor, I understand that. I think you are correct. But it is a separate issue to give work authorization. Would you not agree?

Professor EASTMAN. I do agree, Senator. And if I could correct something in the record before, this notion that because 30,000 of the DACA applicants did not receive their DACA status and that means it was case-by-case assessment is just wrong. The reason there were 30,000 that were denied is because they did not meet the eligibility. The numbers I have seen on those who applied and met all of the criteria for eligibility is that 99.7 percent of them were given it. That is the categorical exemption that suspends the law that I was talking about.

Senator SESSIONS. Professor Ting you have studied this issue, you have taught it, you were Assistant INS Commissioner, Harvard graduate. If you move from the discretion to prosecute issue, which I believe and Professor Turley has asserted is an overreach by this Administration just as you and Professor Eastman have said, but let us talk about the idea that the President of the United States can provide a photo ID, a Social Security number, the right to participate in Social Security and Medicare, to receive earned income tax credits, and child tax credits which are basically direct checks from the United States.

You have suggested we have gone from not enforcing current law to the President creating by Executive order a new legal system, an alternative that Congress has flatly refused to pass. Would you comment on that?

Professor TING. Yes. Unlike North Korea, this country is not governed by a single great leader who makes policy as he wishes. This country is governed by a constitutional process which specifies a consultative deliberative process in which a check and balance system prevails, and which even the House of Representatives—even the House of Representatives has a role to play in establishing law

in the United States. That is a process that we should all treasure because it is the key to our freedom and our liberty in this country and we have to pay attention to it. We do not have a great leader. We have a constitution and we have a process.

Senator SESSIONS. Well, it is time for somebody to stand up for working Americans. This country cannot absorb—there are limits to the number of workers this country can absorb. We just do not have that many jobs.

When I travel my State, Ms. Shuler, I see robotics everywhere. In the next 20 years, I predict we will have twice as many widgets and no more workers to produce those widgets. I think that is the trend we face. And the idea that certain businesses feel they have a right to demand labor at the wages they would like to pay, I think should not be a position you should support. I know you have questioned the increases in guest workers, but I think the entire matter of the legitimate number of people that we can absorb effectively, having the most generous policy in the world which we want to maintain as best we can, but I think you should consider that.

Well, she should probably be given a chance to respond and I thank you for listening to me. And I do appreciate the opportunity for this hearing.

Chairman HIRONO. Ms. Shuler, would you like to respond?

Ms. SHULER. I guess I just get a couple of minutes. Yes, I would agree with you that wages are down and I think immigration is not to be blamed. I think there are so many other pieces of the economy that are not working.

Workers have less bargaining power, I would argue, in the economy. So I think it is a bigger piece of the puzzle instead of noting that wages are down because you are attributing it to these immigration policies that you think are going to bring in so many more workers.

I think too, in terms of technology, it is something we definitely have our eye on and it is something we think that could also be an opportunity for workers as we have seen in past revolutions. The industrial revolution, it creates new kinds of jobs. So the notion that jobs are going away because of technology that we are not going to have enough jobs because of it for everyone who is here working, I think is false.

Senator SESSIONS. I think the challenge for us today, Madam Chair, is what can we do to help the American worker. They are the ones that have suffered. Professor Borhaus has studied this intensely. He says it does pull down wages. The Federal Reserve in Atlanta has found that wages are pulled down by excessive flows of labor and if you bring in more iron, the price of iron falls. You bring in more labor, the price of labor falls.

Thank you, Madam Chair.

Chairman HIRONO. Senator Coons.

Senator COONS. Thank you, Senator Hirono. I would like to thank you and Chairman Leahy for convening this important hearing.

Looking back on the 113th Congress, it was one of my proudest occasions serving in the Senate, working alongside you, Senator Hirono, and many of our colleagues, both Democrats and Republicans, to advance a comprehensive immigration reform bill that

would have provided relief to millions of families who contribute so much for our country, to dramatically increase protections of our homeland, particularly along the southern border, and to continue to sustain robust economic growth.

While the President cannot accomplish such a broad and vital overhaul of our badly broken immigration system on his own, I believe the President's recent Executive actions take a step in the right direction. Among other benefits, the President's actions will give a measure of peace and comfort to many of our Nation's children who currently go to bed every night worrying that one or both of their parents may be taken away before they wake up in the morning and by prioritizing, by outlining enforcement priorities that focus on removing convicted criminals rather than hard-working parents, the President's actions take a step in aligning our system with our values.

I would like to thank all of the witnesses for their time and their testimony today. In the few minutes that I have, I would like to ask three questions if I might.

First to Ms. Silva, you have spoken eloquently about the contributions of undocumented people to our country, including your parents and their contributions to their communities. Could you elaborate on the experiences you have had with members of your community who are undocumented and the potential to boost their real contributions to our society through the President's recent actions?

Ms. SILVA. Thank you, Senator. There are, again, millions of families that are affected by this. We have had people that have wanted to start a business, but have been unable to because they lack the Social Security number. With this action they will be able to do so. I know that with deferred action we had several of our peers who opened up businesses and created jobs.

The amount of people that are going to be able to go out—I know that we have volunteers that come to us every day and they ride the bus, three, four buses just to get to help us on whatever the issue is. This is dedication that cannot be mirrored in anything else and I look forward to seeing what they can apply that to but they have not had the opportunity to do so. But with this they will be able to come out of the shadows and contribute even more.

Senator COONS. Thank you.

Ms. SILVA. Thank you.

Senator COONS. Ms. Shuler, what has been the AFL-CIO's experience in advocating for workers facing dangerous work conditions when those same workers feared deportation if they raise any concerns or the loss of their jobs or worse? How does the President's Executive action impact the work environment for U.S. citizens currently facing a difficult or dangerous or unsustainable or inappropriate work conditions?

Ms. SHULER. I think this memorandum has a tremendous impact. I had mentioned earlier that as we know, fear that people face when they see something on the job either happening to themselves or coworkers, unsafe condition on the job, the last thing they want to do is raise it if they are an undocumented worker because they know that the employer has no consequence, basically, if they fire them at will for speaking out. So we think that this memo-

randum will actually give them the freedom and the security to raise the issues and feel that they have those protections in place so that they can speak up for themselves.

Senator COONS. Thank you. Professor Schroeder, if you would, the OLC opinion analyzes the immigration laws currently on the books and finds that those laws within themselves contain sufficient delegated authority to the President to take the Executive action he has taken with respect to immigration. The OLC does not take into account, however, the additional positive benefits that the President's Executive actions will have on enforcement and compliance with Federal tax laws, with labor laws, and with the criminal code. Do you believe these additional benefits would buttress the OLC analysis that the President is in compliance with his obligation to take care that the laws are faithfully executed?

Professor SCHROEDER. Senator Coons, I believe that the fundamental question that has to be answered is whether the Department of Homeland Security, within its existing statutory authorities, can balance the competing interests in a situation like this and come up with the conclusion that there ought to be some deferred action initiative. To the extent that there are additional pay-offs beyond those that are taken into account in the memorandum, those I think we count on the favorable side of the balance.

Senator COONS. Let me ask if I might, Madam Chair, just one last question. Professor, if you could just respond to some of the criticism from my colleagues that the President's actions might allow a future President to ignore environmental laws or discrimination laws. Is that correct?

Professor SCHROEDER. Well, Senator Coons, to a certain degree the answer is yes. But it is not because of anything that President Obama is doing. It is because of the nature prosecutorial discretion. We frequently see when the White House changes hands very significant differences in enforcement policies.

One example would be the Civil Rights Division in the Justice Department. Past Republican Presidents have tended to have Attorneys General who give different priorities to the kinds of lawsuits to be brought under the civil rights laws than say President Obama or President Clinton. We have seen the same thing under the environmental statutes where different presidents have different enforcement priorities.

Congress can restrict those priorities by passing legislation and from time to time, indeed, they have. People have talked a lot about our separation of powers system as if this is being torn asunder by what the President here is doing. In fact, enforcement discretion is an integral part of the traditional way our separation of powers system has operated and it does result in substantial changes in policy and priorities from one White House to another. That is entirely within the purview of a proper exercise of the President's authority under the statutes the Congress has enacted.

If Congress wants to be more precise, channel enforcement priorities with more explicit language. Congress knows how to do that. It has done that in the past. And it is perfectly free to do that.

Senator COONS. All right. Thank you. Thank you, Madam Chair. Chairman HIRONO. Senator Cruz.

Senator CRUZ. Thank you, Madam Chairman. Thank you and welcome to each of the witnesses for being here today. I think the topic of this hearing is exceptionally important both as a substantive policy matter, but also more importantly as a matter of constitutional law and the threat we are seeing to our constitutional system.

I want to begin on substance. It is my view that the modern Democratic Party and to a significant extent, union leadership are actively working contrary to the interests of working men and women in this country and union members. Indeed, in January 2013, in a Rasmussen poll 90 percent of union members said that the reduction of illegal immigration was important to them. Likewise, Zogby in 2010, polling union members found 72 percent of union members said Americans can fill open jobs.

My question for you, Ms. Shuler, is the AFL-CIO is here testifying in favor of work authorizations for some 5 million people who are in this country illegally. That testimony is directly contrary to these strong interests and preferences of your millions of members. How does leadership reconcile acting against the interests and preferences of those millions of union members?

Ms. SHULER. I will say that polls are subject to interpretation and we have seen that since this last November. We can find a poll that will support anything essentially. I think the journey that we have been on in the labor movement with regard to union members and the immigration issue has been a long journey and we have had a very diverse debate and diverse set of opinions over time that has evolved and I will say that we have a very robust executive council that represents, as I said earlier, 12.5 million working men and women and we have broad agreement that this policy that we are talking about, the President's memorandum, will benefit workers because of the impact that a low-wage economy of people working in the shadows, people who are afraid to speak out and advocate for themselves, the impact that that has on all working people.

Senator CRUZ. Thank you, Ms. Shuler. I would note that while some opinion polls are open to interpretation, the election we had in November was unambiguous. President Obama rightly said his policies were on the ballot across the country and the American people overwhelmingly rejected amnesty. I feel confident that union members across the country would be astonished to know that union bosses are more interested in loyalty to the Democratic Party than the union bosses are in standing up for the working men and women who have been struggling mightily the last 6 years.

It would like to now turn, Professor Eastman, to the constitutional and legal questions. You and I have known each other a couple of decades now. As troubling as this is on substance, and I think this is very troubling on substance, the broader constitutional issue is even more pernicious in my view.

Now the President, has attempted to justify unilaterally setting aside Federal immigration laws under the aegis of prosecutorial discretion. Prosecutorial discretion has long been part of what a prosecutor does. Prosecutors decide to allocate resources to one crime or another. But what the President has done here is far broader than prosecutorial discretion.

The President has not simply said we are going to focus our prosecutorial resources on the most violent illegal immigrants. What the President has said is something qualitatively different which is that the Administration will issue work authorizations to some 5 million people who are here illegally.

Now there is no authorization in law for these work authorizations. The Administration is, for all intents and purposes, counterfeiting immigration documents because Federal immigration law says quite clearly that individuals who have come to this country illegally are not eligible to work.

My question to you, as a constitutional scholar: Are you aware of any interpretation of prosecutorial discretion that allows the Federal Government to issue essentially get out of jail free cards, work authorizations that purport on their face to authorize 5 million people to violate the express terms of Federal law?

Professor EASTMAN. No, Senator I do not. Let me take the example that Professor Schroeder gave a moment ago about an Administration that chooses to provide less enforcement resources or priority to the environmental law.

Let us make it categorical like this one is. Say if you produce less than 10 million tons of pollutants a year, we are not going to prosecute you. That would be pushing the envelope on prosecutorial discretion, but it still would not have gone as far as this has.

To go as far as what happened here we would be giving a license to continue to pollute. We would give pollution permits, pollution validation licenses for 3 years, renewable infinitely in order to match what the President has done here.

I have never seen anything like it, certainly not under the guise of prosecutorial discretion. No Supreme Court decision has even hinted that the prosecutorial discretion authority can be used so far.

Senator CRUZ. And there is nothing in Federal law or the Constitution that authorizes it?

Professor EASTMAN. Nothing whatsoever here.

Senator CRUZ. Thank you very much.

Chairman HIRONO. Since the Chair has allowed some latitude in terms of the questioning and the time limits, I would like to ask Professor Schroeder if you would like to respond to the questions by Senator Cruz on the extent of limits of prosecutorial discretion.

Professor SCHROEDER. Yes, I quite agree that work authorization cannot be done under enforcement discretion. And if you read the OLC memorandum, they do not think so either.

They think the employment authorization documents can only be issued because of a provision of the statute that allows those documents to be issued if aliens fall into categories acknowledged by law or granted by the Attorney General. You then look to a code of Federal regulations provision that has been on the books for years and you will find that one of the enumerated categories are people who have received deferred action. So that is the legal basis for the work authorization and I quite agree it is not prosecutorial discretion.

Senator CRUZ. Professor Schroeder, if I might follow up on that. You are right. The OLC memo grasps one portion of the statute which is a definitional portion that makes reference to an author-

ization by the Attorney General. And yet under ordinary principles of statutory interpretation, we do not interpret one element of a statute to make the remainder of the statute superfluous.

Does it strike you as a reasonable legal interpretation that the meaning of this one phrase in a definitional section gives the Attorney General the ability to authorize any person on earth illegally in this country or who wants to come to this country to work? And if that is the case, what is the purpose of the entire remainder of the statute if it simply could be rewritten, the Attorney General may grant authorization to anybody to work, notwithstanding any other provision of Federal law?

Professor SCHROEDER. No. I quite agree the Attorney General could not grant that to anyone. I believe that his discretion is limited by the terms of the code of Federal regulation which specifies categories. It does not have a provision in it that says, and anybody the Attorney General cares to grant documents to can also be granted documents.

Senator CRUZ. So let me make sure I understand you. You say because the CFR, in turn the regs, seek to expand on that and say deferred adjudication that the Attorney General could say we are deferring adjudication to 7 billion people, everyone illegally in this country and everyone who might seek to come to this country, we will defer adjudication to all of them?

Professor SCHROEDER. No. He could not do that either. But now you are back in prosecutorial discretion land. That would be an abuse of prosecutorial discretion under the language and analysis of the Office of Legal Counsel opinion.

Senator CRUZ. But how is 5 million not an abuse?

Professor SCHROEDER. Because there is a humanitarian concern that is reflected in Congressional policy embodied in the statute that is reflected in the choice that the Department of Homeland Security has made to grant deferred action to those individuals. Once they are in the deferred action category, they become eligible for work authorization pursuant to the statute and the regs that I have just referenced.

Senator CRUZ. But, Professor Schroeder, I recognize that you agree substantively with the policy of granting amnesty and reasonable minds can disagree on that.

Professor SCHROEDER. Senator, if I may, I agree legally with the policy.

Senator CRUZ. Well, my question was legally. Your answer was as a humanitarian matter you support it.

Professor SCHROEDER. No. Excuse me if I misspoke. I apologize. The analysis of the OLC opinion requires that deferred action decisions be consonant with policies that are reflected in the existing immigration laws. They, therefore, needed to find a justifiable humanitarian concern which they did in the terms of family unification for the classes of individuals that they are talking about, namely people who have one member of the family as a legal citizen or legal permanent resident here and that is the justification.

You may not like it. You may think it is overweighted by other concerns like the kinds that Professor Ting has expressed, but there is nothing in the statute that precludes that action. That action is consonant with the stated policy and under the system of

separation of powers that we have; it is up to the current Administration to make the policy call—with which people can disagree—as to how to implement the statute that gives the President that discretionary flexibility. That is the full dress review of the argument.

Senator CRUZ. Your suggestion is that this——

Chairman HIRONO. Senator Cruz.

Senator CRUZ [continuing]. Executive authority is authorized because it is consistent with the will of Congress? Is that really what you are saying?

Professor SCHROEDER. No. I am saying that executive discretion is authorized——

Chairman HIRONO. Excuse me.

Professor SCHROEDER. Pardon me.

Chairman HIRONO. The Chair believes that she has given wide latitude on this matter and clearly there are differences of legal opinion that are very deeply held and felt. You can certainly submit questions, further questions, to the witnesses and for the record, and make any further statements.

At this point I would like to thank all of our panelists, our testifiers, and to my colleagues for——

Senator LEE. I would inquire of the Chairman, is there an intention for a second round of questioning to address the magnitude of the legal issues here?

Chairman HIRONO. We have been going on for over 3 hours, so I would like to close this hearing.

Senator LEE. So the Chairman does not want a second round of questions. Is that correct?

Chairman HIRONO. The Chair believes that she has given enough latitude for a lot of people to go over time, so at this point, the Chair is going to exercise her discretion and prerogative to close this hearing.

Senator LEE. Madam Chair, before we close, could I introduce two documents into the record?

Chairman HIRONO. Certainly. In fact, in closing I would like to say that the hearing record will remain open for 1 week for the submission of written testimony and for the questions for the record.

This hearing is adjourned.

[Whereupon, at 4:52 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]



# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the  
Senate Committee on the Judiciary

On

“Keeping Families Together: The President’s Executive Action On Immigration And The Need  
To Pass Comprehensive Reform”

Wednesday, December 10, 2014  
Dirksen Senate Office Building, Room 226  
2:30 p.m.

Elizabeth Shuler  
Secretary-Treasurer  
AFL-CIO  
Washington, DC

Chris Schroeder  
Charles S. Murphy Professor of Law and Public Policy Studies  
Co-Director, Program in Public Law  
Duke Law School  
Durham, NC

Dr. John Eastman  
Henry Salvatori Professor of Law & Community Service  
Director, Center for Constitutional Jurisprudence  
Chapman University School of Law  
Orange, CA

Jan Ting  
Professor of Law  
Temple University Beasley School of Law  
Philadelphia, PA

Astrid Silva  
Student  
Nevada State College  
Las Vegas, NV

Testimony of  
Elizabeth H. Shuler  
Secretary-Treasurer  
AFL-CIO

Hearing on the  
"Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform"

Before the  
Senate Judiciary Committee  
December 10, 2014

Chairwoman Hirono, Ranking Member Grassley and members of the committee.

Thank you for the opportunity to testify before the Senate Judiciary Committee.

My name is Liz Shuler and I am the Secretary-Treasurer of the AFL-CIO, a federation of 56 unions that represents 12.5 million working men and women across the country. We strive to ensure that every person who works in this country receives decent pay, good benefits, safe working conditions, and fair treatment on the job.

Our unions have seen first-hand how our broken immigration system permits unscrupulous employers to drive down wages, undercut employers that play by the rules, and chip away at gains made at the bargaining table. Although this fix is limited and temporary, the AFL-CIO supports the President's decision to provide deferred action and work authorization to an estimated 5 million people. His executive actions will keep families together and allow millions of people to live and work without fear.

We have been calling on the administration to take action on immigration for more than a year and a half because we know that the status quo is an invitation for employer manipulation and abuse for which our entire workforce pays the price. While falling short of the scope of relief we had recommended, we believe that the President's announcement is an important step toward rational and humane enforcement of our immigration laws. We see no reason for the executive action to create a barrier to legislative reform. Rather, these measures clarify priorities for the use of limited administrative resources and mitigate the harm done while we wait for legislative action.

I want to state clearly for the record that the deferred action President Obama announced on November 20th is not amnesty or a path to permanence, let alone citizenship. His announcement simply allows parents and immigrant youth who have been in the country for 5 years to come forward and apply for temporary relief from deportation and work authorization.

It is important to understand that an estimated 8 million of the 11 million undocumented immigrants in the U.S. are currently working. Allowing five percent of our national workforce to struggle to support their families without full rights and protections is wrong, and it creates a dangerous environment where wage theft, sexual harassment, and death and injury on the job are all too common. When we turn a blind-eye to exploitation, ALL working families pay the price.

**The President's executive action will help ALL working families.**

The AFL-CIO sees the fight for immigration reform as part of our larger struggle to ensure that all work has dignity, and that hard work leads to opportunities for better and more secure lives for our members, their families and their communities. The Administration is operating within its authority to advance the moral and economic interests of our country. This announcement will increase tax revenues, which will boost the economy, and reduce exploitation, which will help to improve wages and conditions for all working people in our country.

The best way I know to demonstrate the economic benefits of the announcement is to illustrate what currently happens all too often in workplaces around the country. The sad reality is that unethical employers understand that immigrants without legal protections can't complain about working conditions. And when employers can hire undocumented workers with a wink and a nod and then fire them when they seek to organize a union or complain about unpaid wages or unsafe working conditions, it is not just undocumented workers that suffer, but their U.S. citizen coworkers as well.

Just imagine that in our country today there is a meatpacking worker who is reluctant to complain about consumer safety concerns in a plant, a hotel worker who suffers through an injury an injury on the job rather than risk seeking worker's compensation, and a construction worker still trying to muster the courage to report to authorities that his paycheck doesn't include the overtime he worked that week.

The cumulative effect of these abuses has significant implications for our economy. Let's take the example of wage theft. The National Employment Law Project (NELP) estimates that 68% of low wage workers, many of them undocumented, experience pay violations. And we're not talking small violations -- they accumulate annually to a loss of 15% of their income.<sup>1</sup> That means employers steal \$2600 per year from workers who only earn about \$17000 a year.<sup>2</sup>

This gross exploitation certainly doesn't work for workers -- but it also doesn't work for the economy as a whole. NELP estimates wage theft steals \$56.4 million per week from workers' pockets in New York City, Chicago and Los Angeles alone.<sup>3</sup> Workers need status to fight back against injustice on this scale, and we will all benefit when they finally have it.

How much will we all benefit? Experts estimate that this expansion of work authorization will increase payroll tax revenues by \$3 billion in the first year and by \$22.6 billion over 5 years.<sup>4</sup> According to President's Council on Economic Advisers (CEA), executive action will also boost economic input by 0.4 to 0.9 percent over ten years, which would increase GDP by \$90-\$210 billion in 2024.<sup>5</sup>

And the spillover effect of reduced wage theft will benefit everyone. CEA estimates the President's announcement will increase annual wages for U.S. born workers by 0.3 percent or roughly \$170 by 2024.<sup>6</sup>

The AFL-CIO supports the idea of keeping working families together. The individuals who will benefit from the President's announcement are mothers and fathers of U.S. citizens and

<sup>1</sup> Kern, Jen. Testimony before DC Workers Rights Board Hearing. National Employment Law Project (Feb. 18, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Bernhardt, Annette et.al. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment (2009).

<sup>4</sup> Oakford, Patrick and Phillip E. Wolgin. *The Economic and Fiscal Benefits of Deferred Action*. Center for American Progress (Nov. 21, 2014).

<sup>5</sup> Council on Economic Advisors. *The Economic Effects of Administrative Action on Immigration*. White House (Nov. 2014).

<sup>6</sup> *Id.*

lawful permanent residents and children who were brought to the U.S. at a young age. They are longstanding members of our communities and our unions, and -- like all workers in this country -- they deserve the opportunity to work without being exploited.

**The labor movement continues to support comprehensive immigration reform**

While we support the President's executive action, we continue to urge Congress to pass comprehensive, common sense immigration reform. In 2009, we worked with former Secretary of Labor Ray Marshall and a broad coalition of faith-based and immigrants' rights groups to create a framework that embodies our unified belief that immigration reform must prioritize workers' rights and ensure all workers -- immigrant and native-born -- have full access to labor, health and safety protections.

Our framework is based on five fundamental and interconnected principles:

- An independent commission to assess and manage future flows of new workers into our country based on actual labor market needs;
- A secure and effective worker authorization mechanism for employers;
- Rational operational control of the border;
- Improvement, not expansion, of temporary worker programs; and
- A broad and inclusive pathway to citizenship.

Last year, the AFL-CIO reached a historic agreement with the U.S. Chamber of Commerce to create a smarter and fairer way to bring new workers into our country. The new W visa would avoid the failures of current temporary worker programs by allowing workers increased job portability and the right to self-petition for a path to citizenship. The size of the program would also adjust according to labor market needs as determined by an independent team of experts.

The AFL-CIO continues to oppose the expansion of existing temporary worker programs, which suppress wages and conditions by creating a captive workforce without full rights and protections. We must also express concern with work programs disguised as educational programs, like the J-1 work study and Optional Practical Training, which disregard labor standards and lack basic wage protections. Guest worker programs must not be used as a way for employers to bypass or replace U.S. workers with vulnerable temporary workers. We will actively engage in the rulemaking process to ensure that new workers will be hired based on real labor market need and afforded full rights and protections.

**Conclusion**

In conclusion, I urge the committee to allow the administration's deferred action programs to move forward and enable millions of our community members to live and work without fear. For our part, the AFL-CIO will open our union halls across the country and organize events to help eligible workers apply for these programs, just as we will encourage permanent residents to naturalize and become empowered citizens. And, recognizing that millions of workers will still not be eligible for relief, we will continue to stand with all workers, regardless of status, to ensure that their voices are heard and their rights are protected.

Looking forward, I urge the Committee to focus on passing legislation that promotes shared prosperity and respects the hardships and contributions of both the people living here and the people moving here. To do so, our policies must unite communities, keep families together and create a roadmap to citizenship for those who aspire to be Americans.

The bipartisan immigration reform bill passed by this Chamber on June 27, 2013 demonstrated that a comprehensive approach is possible when lawmakers take seriously their obligation to solve problems. While not perfect, the bill pioneered a new model program reimagining how immigrants could join our workforce and contained other important provisions to uplift and protect workers' rights.

The labor movement was proud to play a role in shaping that compromise, which included a set of core worker protections that we believe must be maintained or further strengthened in any future immigration reform policies we adopt as a nation.

We call on you to reject failed models that undermine wages and working conditions and instead enact the type of meaningful immigration reform that will help build a stronger economic future for our nation and support the basic civil and human rights and dignity of all workers.

Thank you again for the opportunity to testify. I look forward to answering any questions.

**Written Statement**

**Christopher H. Schroeder**

**Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Co-Director of the Program in Public Law, Duke University**

**"Keeping Families Together: The President's Executive Action On Immigration And The Need To Pass Comprehensive Reform"**

**Committee on the Judiciary**

**United States House of Senate**

**226 Dirksen Senate Office Building**

**December 10, 2014**

Chairman Leahy, Ranking Member Grassley, and members of the Judiciary Committee, I am Chris Schroeder, a professor of law at Duke Law School. From 2010-2012, I served as Assistant Attorney General for the Office of Legal Policy at the United States Department of Justice. Earlier, I served as deputy assistant attorney general and acting Assistant Attorney General for the Office of Legal Counsel, from 1994-97. In 1992-93, I was chief counsel to the Senate Judiciary Committee. I teach and write in the area of presidential authority and the separation of powers.

I thank you for the invitation to testify here today on the legality of the policies announced on November 20 by Jeh Johnson, Secretary of the Department of Homeland Security. These policies provide the possibility of deferred action and work authorization for an undocumented alien who is otherwise a low priority for removal because he or she poses no threat to national security, public safety or border security, is not otherwise an enforcement priority; has resided here continuously since January 1, 2010; has a child who is a U.S. citizen or legal permanent resident; is physically present both when DHS announces its program and when he or she applies and who presents "no other factors that, in the exercise of discretion make[] the grant of deferred action inappropriate." Memorandum for Leon Rodriguez, Director U.S. Citizenship and Immigration Services, et al. from Jeh Charles

Johnson, Secretary Department of Homeland Security, November 20, 2014, p. 4 ("Johnson Memorandum").

These policies achieve substantial humanitarian gains for the individuals encompassed by them and for the communities in which they live. As the Johnson memorandum states, "[t]he reality is that most individuals [included in these policies] are hard-working people who have become integrated members of American society. ... [They] are extremely unlikely to be deported given this Department's limited resources – which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization ... and be counted." *Id.* at p. 3.

At the same time, many people strongly oppose the policies and claim that the Department of Homeland Security has no lawful authority to implement them.

Although comprehensive immigration reform has been debated throughout the country for years, and various reform proposals have been before the Congress, to date no measure has been enacted and the Congress continues to have the issue before it. The President, furthermore, has throughout expressed interest in working with the Congress to craft acceptable legislation. While it is impossible to predict the content of any legislation that might eventually pass, it is entirely conceivable that such a bill would contain provisions affecting the very individuals covered by these DHS policies, perhaps in ways compatible with the DHS policies, but perhaps not. With Congress considering, but unable to adopt, pertinent legislation, some critics of the DHS policies have described them as an "executive power grab," an end run around the Congress, a violation of the separation of powers, or a breach of the president's Constitutional duty to "take care that the laws be faithfully executed."

In addressing the question of the legality of the Johnson policies, we now have the great advantage of being able to read the legal analysis of the Department of Justice's Office of Legal Counsel, which released a thirty-three page memorandum setting forth that analysis, on the same day that DHS re-

leased the Johnson Memorandum. Memorandum Opinion for the Secretary of the Department of Homeland Security and the Counsel to the President on The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer the Removal of Others from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, November 19, 2014. ("OLC Opinion") The legal memorandum is careful and thorough. It takes some time to absorb all its details, and I do not intend to weigh down this hearing with a recitation of those details. Instead, I want to call attention to several of its central points.

The first thing to notice is how the Office of Legal Counsel approaches the question of legality. It does so by analyzing "the sources and limits of DHS's enforcement discretion under the immigration laws." *Id.* at 2-3. In other words, under OLC's analysis, the legality of the announced policies depends entirely on whether the existing immigration laws have been implemented in a lawful manner. The fact that the Congress is considering new immigration laws does not, as a legal matter, affect the content and meaning of the laws already on the books. This is a point to which I will return.

Furthermore, the OLC Opinion makes no assertion of any unilateral executive authority to establish these programs. The plain and simple legal question is: do the existing immigration laws grant sufficient authority to permit DHS to take these actions? The approach of the OLC analysis is thus entirely consistent with a foundational principle of the separation of powers, namely that it is Congress who enacts the laws and it is the executive branch who implements them.

The question then becomes: How should we evaluate whether an agency has acted within its statutory authorities, thereby remaining within the realm of implementation? Two important separation of powers decisions by the Supreme Court provide some guidance on how to separate lawful implementation of existing laws by administrative agencies from unlawful attempts to intrude on Congress's domain and to rewrite the laws. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), effectively translated the idea that "the Congress enacts the laws and the executive implements them" in the modern administrative state by identifying two key questions: First, does the statute address "the precise question at issue?" If so, the agency must follow it. Second, where the statute does not ad-

dress the question "at the level of specificity" to answer the question, has the agency chosen a course of action that is a "reasonable accommodation" of the interests involved and a "permissible construction" of the statute? *Id.* at 843, 865. If so, the action is legal and is a permissible exercise of discretion that has been granted by the Congress. For this second question, the agency's action receives a fair amount of deference.

Chevron stands for the proposition that whenever the statute itself does not require, allow or prohibit a particular approach -- in other words, does not directly speak to the issue one way or the other -- this means that the Congress has effectively delegated the responsibility for making that choice to the agency, so long as the action taken is a reasonable way to proceed in light of what the statute otherwise does say. What is more, for purposes of deciding whether administrative discretion has been delegated to the agency, the reasons for Congress's delegation are not relevant. As the Court put it:

"Perhaps [the Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred." *Id.* at 865

There can be no doubt that the exercise of delegated authority by an administrative agency can resemble lawmaking. Indeed, from the perspective of people regulated by some statute, it does not much matter whether a fine or sanction is imposed as the result of a requirement that can be found in the words of the statute or as the result of a requirement that has been promulgated by the agency. Nonetheless, from a legal perspective there is a difference. INS v. Chadha, 462 U.S. 919 (1983) is another important separation of powers decision, and it speaks directly to the difference. First, Chadha acknowledges the similarities between statutory law and agency law, saying:

"To be sure, some administrative agency action—rule making, for example—may resemble "lawmaking." See 5 U.S.C. § 551(4), which de-

finer an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...." *Id.* at 953 n. 13 (emphasis in original)

At the same time, the Chadha decision also makes clear that as long as the agency's "administrative activity [does not] reach beyond the limits of the statute that created it," the agency is indeed implementing the statute, and not usurping the Congress's legislative power. *Id.* In such a case -- even when the statute does not provide an answer to the precise question facing the agency -- the statute provides the limits beyond which the agency may not go and remains the legal basis for the agency's action.

The OLC Opinion approaches the question of legality from within this fundamental framework. Accordingly, the opinion must engage in a thorough analysis of what the existing immigration laws say insofar as they bear on the policies that were proposed by DHS and announced in the Johnson Memorandum. This is precisely what the opinion does. Here are the essentials of its conclusions.

First, the kind of discretion involved in the deferred action policies is enforcement discretion, something that the Congress has typically permitted agencies to exercise with wide latitude. A case can be made, in fact, that some degree of enforcement discretion is necessary under our separation of powers system, in the interests of ensuring that liberty-depriving actions by the state are undertaken with the independent participation of each branch of government, whereby the Congress enacts the laws, the executive branch decides to prosecute the laws, and the judiciary decides the case. I do not read the OLC Opinion to be relying on any unilateral executive authority in this case, however. Instead, by focusing on "the sources and limits of DHS's enforcement discretion under the immigration laws," it rests its conclusions on the existing immigration laws, which, as the Supreme Court has recently recognized, include as "a principal feature of the removal system" a grant of "broad discretion to immigration officials," which includes "as an initial matter, [deciding] whether it makes sense to pursue removal at all." Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

One element of the existing statutory structure expressly charges the Department of Homeland Security with responsibility for "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of

2002, Pub. L. No. 107-205, § 402(5) (codified at 6 U.S.C. § 202(5)). Yet another feature of the statutory structure is that over the years the Congress – aware of the use of deferred action by INS (later DHS) in both individual and larger group contexts – has several times enacted legislation making certain classes of aliens eligible for deferred action. “These enactments,” OLC concludes, “strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy rather than embarking on a frolic of its own.” OLC Opinion at 23 (internal quotations omitted).

A consequence of these features of the immigration laws is that specific deferred action decisions do not have to be expressly authorized by those laws in order to be lawful. As the Congressional Research Service recently summarized the matter, “immigration officials would not necessarily be precluded from granting deferred action ... just because federal immigration statutes do not expressly authorize such actions.” CRS, “Prosecutorial Discretion in Immigration Enforcement: Legal Issues,” CRS Rep. 7-5700 (December 27, 2013), p.6.

Of course, it is within the Congress’s purview to authorize, acknowledge or permit a particular type of discretion like deferred action as a general matter while prohibiting a particular instance or application of that discretion. Thus, a second and necessary step in assessing the legality of the deferred action policies in the Johnson Memorandum is to conclude that existing immigration laws do not in fact prevent the implementation of these particular deferred action policies. One reason the some of the critics of these policies may be describing them in terms of grand constitutional violations is that they have been unable to find anything in the existing statutes that instructs the Department of Homeland Security to avoid making deferred action available to a significant number of people at the same time, whether as a general matter or as regards the particular group of individuals covered by these policies.

The OLC Opinion, however, does not simply take the absence of an express statutory prohibition to be sufficient to supply a legal basis for the deferred action policies. Instead, it takes a third step by analyzing whether these policies are “consonant with, rather than contrary to, the congressional poli-

cy underlying the statutes the agency is charged with administering.” OLC Opinion, p. 6

In exploring this issue, the OLC Opinion focuses on the same humanitarian concerns expressed in the Johnson Memorandum and emphasized elsewhere by the administration, namely

“the particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States.” Id. at 26

The Opinion then demonstrates that family unity has been one of the policy considerations animating our immigration laws, finding that “[n]umerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States.” Id.

Notice that the Opinion does not claim that this is the only concern reflected in our laws, as this is obviously not the case. Not only that, such other concerns can be in tension with the concern to keep families united. The amount of public debate over the propriety of the deferred actions decisions amply demonstrates that there is disagreement within the country about how to resolve the tension among the multiple policies reflected in our immigration laws as they apply to the individuals covered by the policies announced in the Johnson Memorandum. There certainly are a number of ways that would be valid under the law to address these tensions other than via the announced deferred action policies, including maintaining the status quo enforcement posture toward these individuals (which, admittedly is producing few removal actions against such individuals). Recall, however, what the legal standard is for judging the legality of a delegated authority: the decision simply needs to be a “reasonable accommodation” of the competing interests involved. The Chevron decision, furthermore, elaborates on this point in the following way:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judg-

ments. ... When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. Chevron at 865-866.

Accordingly, while some may have preferred to embark on a different course here, or simply to stay the course, it ultimately falls to the current administration to pursue a course that conforms with its understanding of wise policy – so long as it stays within the limits of the authorities enacted by the Congress. In my opinion, the OLC Opinion supports the conclusion that the Johnson Memorandum meets that standard.

To this point, I have discussed the general framework established by our system of separated powers for the legal evaluation of exercises of administrative discretion, followed by a discussion of the legality of the deferred action proposals as exercises of that discretion under the existing immigration laws. I will conclude by returning to the topic I flagged toward the beginning of these remarks. In the current debate much has been made of the fact that the administration has on its own initiative promulgated a rather significant change in enforcement policy at a time when (a) proponents of enacting some mechanism for the affected individuals to acquire legal status in the United States have been unable to do so, (b) opposition to these executive actions is significant. By acting under these circumstances, the President has been accused of usurping Congress's exclusive constitutional authority to enact the laws and of improperly running around the Congress.

There are two separate replies to these charges. First, as a legal matter, events currently occurring in the Congress concerning immigration law reform are not relevant to the issue of what discretionary authorities are embodied in the existing immigration laws. As Chadha establishes, Congress can make changes in the laws on the books only by enacting another law. Until it does so, the administration quite rightly must reference existing law in assessing its discretionary options. Congress has been unsuccessful in passing new law that would benefit the individuals covered by DHS's announced policies, and it also has been unsuccessful in enacting legislation restricting DHS's current discretionary authorities. As the Supreme Court has noted, "unsuccessful attempts at legislation are not the best of guides to

legislative intent," one way or the other. Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 382 n.11 (1969)

Of course, the system of separation of powers is more than a set of legal rules. It is also an understanding of how our government ought to operate. People may be intending these critical remarks to reflect their judgment that the approach that would be most consistent with our form of government, our system of shared but separated power, would be for the executive branch to maintain the status quo pending legislative action, and not as an assertion of illegal conduct by the executive branch. As such, that judgment is directed to the political and policy arenas, not to the question of legality. It also ought to be counterbalanced by the real human and social costs that the announced policies seek to ameliorate. While people may reach different conclusions here as a policy matter, these conclusions speak to a different question than the legal one addressed here.

The second response to the accusation that the executive is doing what only the Congress can rightly do is to say that this is simply not the case. Deferred action is not amnesty, it does not confer legal status, it does not remove these individual's eligibility for deportation, it only defers it. The deferral can be revoked. Adjusting the immigration laws to provide legal status for these individuals is indeed something only the Congress can do. This is one of the major reasons that the President continues to call for such legislation. What is more, the discretionary actions DHS is taking are themselves subject to revision by the Congress. The Johnson Memorandum operates within the limits of existing immigration law, but the Congress can in all respects revise those laws as it sees fit; nothing in the deferred action policies runs around or tries to avoid that constitutional truth.

I thank the Committee for its time, and I look forward to responding to any questions that you may have.

“Prosecutorial Discretion” Does Not Allow the President to “Change the Law”

Testimony of

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Hearing on “Keeping Families Together: The President’s Executive Action  
On Immigration And The Need To Pass Comprehensive Reform”

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<sup>1</sup> Institutional affiliations listed for identification purposes only. The views presented by Dr. Eastman are his own, and do not necessarily reflect the views of the Institutions with which he is affiliated.

“Prosecutorial Discretion” Does Not Allow the President to “Change the Law”

By John C. Eastman

Good afternoon, Chairman Leahy, Ranking member Grassley, Senator Hirono and the other members of the Senate Judiciary Committee. In the wake of the President’s announcement on November 20, 2014 that his administration would be unilaterally suspending deportation and granting work authorization to millions of illegal aliens, the critical issue before you is not what the best immigration policy should be—I happen to believe that our current immigration policy is both too restrictive and way too mired in bureaucratic red tape—but to which branch of government “We, the People” have delegated the authority to determine immigration policy. On that question, the Constitution could not be more clear. Absent some extraordinary foreign policy crisis that would trigger the President’s direct Article II powers over foreign affairs, the Constitution assigns plenary power over immigration and naturalization to the Congress, not to the President. *See* U.S. Const., Art. I, Sec. 8, cl. 3-4 (“The Congress shall have Power ... To regulate Commerce with foreign nations ... [and] To establish an uniform Rule of Naturalization”); *see also, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 201 (1993) (“Congress ... has plenary power over immigration matters”); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (“The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question.”); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (“The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens.’”).

There has nevertheless been a lot of talk about prosecutorial discretion in the weeks since President Obama announced on November 20, 2014 that he was unilaterally suspending deportation proceedings against millions of aliens who are unlawfully present in the United

States. Whether or not the concept of prosecutorial discretion can be stretched as far as the President has is itself an issue of first impression, the President's claim that his actions were simply "the kinds of actions taken by every single Republican president and every single Democratic President for the past half century" notwithstanding. But as serious as that issue is, it masks a much more fundamental constitutional question about executive power that needs to be addressed. For the President has not just declined to prosecute (or deport) those who have violated our nation's immigration laws. He has given to millions of illegal aliens a "lawful" permission to remain in the United States as well, and with that the ability to obtain work authorization, driver's licenses, and countless other benefits that are specifically barred to illegal immigrants by U.S. law. In other words, he has taken it upon himself to drastically re-write our immigration policy, the terms of which, by constitutional design, are expressly set by the Congress.

We should be clear, though. What the President announced on November 20, 2014 is simply a difference in degree, not a difference in kind, of the unconstitutional action his administration took back in 2012 when it announced, via a memo, the Deferred Action for Childhood Arrivals ("DACA") program. I intend to highlight in this testimony just what the DACA program (and its November 20 expansion) did, the statutory and constitutional authority the President has claimed for the actions, and the serious constitutional problems with those claims.

First, the DACA program. On June 15, 2012, by way of a memorandum from then-Secretary of Homeland Security Janet Napolitano to the heads of the three immigration agencies (David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection ("CBP"); Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS"); and John

Morton, Director, U.S. Immigration and Customs Enforcement (“ICE”)) (Attachment A), the Obama administration announced, purportedly in the “exercise of prosecutorial discretion,” that it would not investigate or commence removal proceedings, would halt removal proceedings already under way, and would decline to deport those whose removal proceedings had already resulted in a final order of removal for a broad category of individuals who met certain criteria set out in the memorandum. Specifically, the following individuals would, categorically, receive what the Napolitano memo characterized as “deferred action”: Those who 1) came to the United States under the age of sixteen; 2) have continuously resided in the United States for at least five years preceding the date of the memorandum and are currently residing in the United States; 3) are currently in school, have graduated from high school, have obtained a general education development certificate, or are an honorably discharged veteran of the U.S. Coast Guard or Armed Forces; 4) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and 5) are not above the age of thirty. Although the memo repeatedly asserts that these decisions are to be made “on a case by case basis,” it is actually a directive to immigration officials to grant deferred action to anyone meeting the criteria. “With respect to individuals who meet the above criteria” and are not yet in removal proceedings, the memo orders that “ICE and CBP *should* immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.” (emphasis added). And “[w]ith respect to individuals who are in removal proceedings but not yet subject to a final order of removal, and who meet the above criteria,” “ICE *should* exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low

priority individuals from being removed from the United States.” (emphasis added). USCIS and ICE are directed to “establish a clear and efficient process” for implementing the directive, and that process “*shall* also be available to individuals subject to a final order of removal regardless of their age.” (emphasis added).

The notion that this memo allows for a true individualized determination rather than providing a categorical suspension of the law, as has been argued by current and former administration officials and other supporters of the DACA policy, is simply not credible. There is nothing in the memo to suggest that immigration officials can do anything other than grant deferred action to those meeting the defined eligibility criteria. Indeed, the overpowering tone of the memo is one of woe to line immigration officers who do not act as the memo tells them they “should,” a point that has been admitted by Department of Homeland Security officials in testimony before the House of Representatives. *See* Transcript, Hearing on *President Obama’s Executive Overreach on Immigration*, House of Representatives Judiciary Committee (Dec. 2, 2014) (Representative Goodblatt noting: “DHS has admitted to the Judiciary Committee that, if an alien applies and meets the DACA eligibility criteria, they will receive deferred action. In reality, immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria.”).

Nevertheless, by repeatedly regurgitating the phrase, “on a case by case basis,” Secretary Napolitano seemed to recognize the existing norm that prosecutorial discretion cannot be exercised categorically without crossing the line into unconstitutional suspension of the law—without, that is, violating the President’s constitutional obligation to “take care that the laws be faithfully executed.” *See, e.g., Heckler v. Cheney*, 470 U.S. 821, 832-33 n.4 (1985) (finding that judicial review of exercises of enforcement discretion could potentially be obtained in cases

where an agency has adopted a general policy that is an “abdication of its statutory responsibilities”); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible”). The recent opinion of the Office of Legal Counsel at the Department of Justice recognizes the need for individualized determinations for exercises of prosecutorial discretion to be constitutional. “[T]he Executive Branch ordinarily cannot . . . consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities,” the memo notes. Karl R. Thompson, Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014), at p. 7 (quoting *Heckler*, 470 U.S. at 833 n.4, internal quotation marks omitted). “[A] general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses ‘special risks’ that the agency has exceeded the bounds of its enforcement discretion.” *Id.* (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994)). Indeed, among the charges leveled against King George III in the Declaration of Independence was that he had suspended the laws and had declared himself “invested with power to legislate for us in all cases whatsoever.” Moreover, the only federal court to have considered the issue in light of the DACA program held that the word “shall” in the relevant statutes mandated the initiation of removal for all unauthorized aliens, thus statutorily removing whatever prosecutorial discretion might otherwise exist. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 740-41 (N.D. Tex. 2013);<sup>2</sup> see 8 U.S.C. §1225(b)(2)(A) (“if

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<sup>2</sup> The Court subsequently ruled, however, that the claims in the case were within the exclusive jurisdiction of the Merit Systems Protection Board. *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013), available at [http://www.crs.gov/analysis/legalsidebar/Documents/Crane\\_DenialofMotionforReconsideration.pdf](http://www.crs.gov/analysis/legalsidebar/Documents/Crane_DenialofMotionforReconsideration.pdf).

the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding” (emphasis added)).

Even President Obama's Department of Homeland Security Secretary Jeh Johnson has admitted in testimony before the House of Representatives that there are limits to the power of prosecutorial discretion and that there comes a point when something amounts to a wholesale abandonment to enforce a dually enacted constitutional law that is beyond simple prosecutorial discretion.

Neither are the Administration's actions—either the adoption of the DACA program in June 2012 or the massive recent expansion of it announced last month—simply an exercise of the kind of prosecutorial discretion that has been exercised by previous administrations. Much has been made of the Family Fairness Program implemented by President George H.W. Bush's administration in February, 1990. But that program, which dealt with delayed voluntary departure rather than the current program's deferred action, was specifically authorized by statute. Section 242(b) of the Immigration and National Act at the time provided, in pertinent part:

*In the discretion of the Attorney General and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title is such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4) to (7), (11), (12), (14) to (17), (18), or (19) of section 1251(a) of this title.*

8 U.S.C. § 1252(b), *cited in Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990)

(emphasis added). That specific statutory authority was largely superseded by the Temporary

Protected Status program established by the Immigration Act of 1990, which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions, 8 U.S.C. § 1254a, and subsequently limited to 120 days by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), *see* 8 U.S.C. § 1229c. In contrast, as even the OLC opinion acknowledges, “deferred action,” which is the asserted basis for the President’s recent actions, “developed without statutory authorization.” OLC Memo, at 13; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting that deferred action “developed without express statutory authorization,” apparently in the exercise of discretionary response to international humanitarian crises that trigger the President’s separate foreign affairs authority of the sort now covered by the Temporary Protected Status Program). There are now specific statutes that authorize its use. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are “eligible for deferred action”); USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (providing that certain immediate family members of Lawful Permanent Residents who were killed on 9/11 should be made “eligible for deferred action.”); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694, and other statutes that delegate to the Attorney General discretion to waive other provisions of the INA in specific circumstances, *see, e.g.*, 8 U.S.C. § 1182(a)(6)(E)(iii), (d)(11) (authorizing discretionary waiver of smuggler ineligibility for admission rule for smugglers who only assisted their own spouses, parents, or children); 8 U.S.C. § 1182(d)(13), (14) (authorizing, in certain specified circumstances, discretionary waiver of inadmissibility rules for recipients of “T” and “U” visas); *cf.* 8 U.S.C. § 1229b (authorizing the Attorney General to “cancel removal” and “adjust status” for up to four thousand aliens annually who are admitted for lawful permanent residence and

who meet certain specific statutory criteria). But none of these statutes authorize the broad use of deferred action for domestic purposes asserted by the June 2012 DACA program or its current expansion, and the fact that Congress deemed it necessary to include such statutory authorization for these specific domestic uses of deferred action is pretty compelling evidence that the Executive does not have unfettered discretion to give out deferred action whenever it chooses, and certainly not to deem such individuals as “lawfully present in the country for a period of time,” as Secretary Johnson claimed in his November 20, 2014 memo. Jeh Charles Johnson, Memorandum for Leon Rodriguez, *et al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, p. 2 (Nov. 20, 2014) (“Johnson Prosecutorial Discretion Memo”).

But even if that part of former Secretary Napolitano’s directive (and the expanded directive recently issued by Secretary Johnson) can properly be viewed as an exercise of prosecutorial discretion, Secretary Napolitano then went a significant step further. “For individuals who are granted deferred action by either ICE or USCIS,” she ordered that “USCIS *shall* accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.” Just how that determination should be made, Napolitano did not say, but the notion that prosecutorial discretion can be used not just to decline to prosecute (or deport), but to confer a lawful presence and work authorization as well, requires a distortion of the doctrine beyond recognition. The memo cites no legal authority whatsoever for this extraordinary claim, and it is directly contradicted by legal advice given by the INS’s general counsel during the Clinton Administration. *See* Bo Cooper, General Counsel, INS, *INS Exercise of Prosecutorial Discretion* (July 11, 2000) at 4, available at <http://niwaplibrary.wcl.american>.

edu/reference/additional-materials/immigration/enforcement-detention-and-criminaljustice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf (“The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, the grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.”).

Following the issuance of the Napolitano memo, legal experts and academics tried to find a hook for the President’s asserted authority. Speculations centered on a particular federal regulation, 8 C.F.R. § 274a.12, which allows for work authorization for designated classes of aliens. Subsection (c)(14) allows for an application for work authorization by “An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.” But as any first year law student knows, and as the regulation itself acknowledges, those provisions allowing for work authorization must be grounded in statutory authority, and none of the statutes cited in support of the regulation provide the necessary authority.

The regulation cites four statutory provisions: 8 U.S.C. §§ 1101, 1103, and 1324a, and 48 U.S.C. § 1806. I think we can safely dispense with the latter, as it deals exclusively with a transition immigration program for the Northern Mariana Islands. Section 1103 of Title 8 sets out the general authority of the Secretary of Homeland Security to administer and enforce the immigration laws; nothing in that provision gives the Secretary the discretion to ignore those laws.

Section 1101 is the “definition” section of immigration law, but through it, many of the authorizations for legal status are made by way of definitional exemptions from the general rule. The term “alien,” for example, is defined in subsection (a)(3) as any person not a citizen or national of the United States. The term “immigrant” is, in turn, defined in subsection (a)(15) as every alien except an alien described in one of 22 separate statutory exemptions. This is where the “T” visa authority resides, so named because it is found in subsection (a)(15)(T). That provision very carefully delineates the authority to give a visa for lawful residence to victims of human trafficking who are cooperating with law enforcement’s investigation or prosecuting of the trafficking crimes. Beyond these carefully delineated exceptions, there is no authority in this statute for the Attorney General, the Secretary of Homeland Security, the President, or any other executive official to grant authorization for legal status.

Section 1324a, which deals with employment of illegal immigrants, is the final authority cited in the regulation. Like Section 1101, it provides for certain authorizations by way of exemption from the general rule that employing an unauthorized alien is illegal. Section (a)(1) specifically makes it unlawful to hire “an unauthorized alien (as defined in subsection (h)(3) of this section).” Subsection (h)(3) in turn defines “unauthorized alien” as any alien who is not “lawfully admitted for permanent residence” (that would be all those carefully wrought exemptions in Section 1101(a)(15), such as the “T” visa) or an alien “authorized to be so employed by this chapter *or by the Attorney General.*” (emphasis added).

That last phrase, “or by the Attorney General” (and by extension the Secretary of Homeland Security, because of another statute transferring immigration duties from the Attorney General to the Secretary), is the only statutory hook anyone defending the President’s actions in numerous debates I have had since the Napolitano memo was issued could point to. That’s a

pretty slim reed for all of the heavy lifting necessary to accept the President's assertion of complete discretion not only to decline to prosecute and/or deport illegal immigrants, but to grant them a lawful residence status and work authorization as well. Never mind that with such absolute discretion, none of the pages and pages of carefully circumscribed statutory entitlements to exemption, and none of the carefully circumscribed statutory grants of discretion to the Attorney General [now Secretary] to issue exemptions in other circumstances, would be necessary. And never mind that the much more likely interpretation of that phrase is that it refers back to other specific exemptions in Section 1101 or Section 1324a that specify when the Attorney General might grant a visa for temporary lawful status, such as Section 1101(a)(15)(V), which allows the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a nonimmigrant visa while an application for an immigrant visa is pending, or to specific statutory provisions that require or give discretion to the secretary to grant work authorization in specific circumstances, such as 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum); *id.* § 1226(a)(3) (otherwise work-eligible alien arrested and detained pending a removal decision); *id.* § 1231(a)(7) (permitting the Secretary to grant work authorization under certain narrow circumstances to aliens who have received final orders of removal).<sup>3</sup> Here, then, is some text in

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<sup>3</sup> That view was implicitly espoused by a plurality of the Supreme Court when, in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1981 (2011), it summarized Section 1324a(h)(3) as defining an "unauthorized alien" to be "an alien not 'lawfully admitted for permanent residence' or not otherwise authorized by federal law to be employed." See also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (federal immigration law denies "employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States," citing Section 1324a(h)(3)); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-19 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011), and *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

the statute that, taken out of context and ignoring all the elaborate web of requirements for eligibility for lawful status and employment authorization that had been carefully constructed by Congress over decades, purports to give the President, through his Attorney General, absolute discretion to ignore the lion's share of the nation's immigration laws.

And yet it is that slim reed, and that slim reed alone, which has now been confirmed as the only asserted source of authority. The same day (November 20, 2014) the President announced his expansion of the DACA program to cover millions of additional illegal immigrants, the current Secretary of Homeland Security issued a memo of his own, stating: "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, *pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act.*" Johnson *Prosecutorial Discretion* Memo at 4-5 (emphasis added). As the U.S. Customs and Immigration Service explains on its website, "An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period of deferred action is in effect." That's why hundreds of thousands of DACA applicants were deemed to have a "lawful presence," obtain work authorization, and also obtain driver's licenses (which were undoubtedly then used to open the door to a host of other benefits available only to citizens and those with lawful permanent residence). The new program will expand that number to millions, perhaps tens of millions. And it is a far cry from the exercise of "prosecutorial discretion" claimed by the President and his two Secretaries of Homeland Security.

The section of the immigration law that includes the brief phrase on which this entire edifice has been erected was added in 1986 as part of the Immigration Reform and Control Act.

The legislative record leading to the adoption of that monumental piece of legislation is extensive, but I have located no discussion whatsoever of the clause, much less any claim that by including that clause, Congress was conferring unfettered discretion on the Attorney General to issue lawful status and work authorization to anyone illegally present in the United States he chose, contrary to the finely wrought (and hotly contested) provisions providing for such lawful status only upon meeting very strict criteria.

Moreover, if the clause does provide the Attorney General (now Homeland Security Secretary) with such unfettered discretion, Congress has been wasting its time trying to put just such an authority into law. For more than a decade illegal immigration advocates have been pushing for Congress to enact the DREAM Act, the acronym for the Development, Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orin Hatch as Senate Bill 1291 back in 2001. The bill would give lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived). The bill or some version of it has been reintroduced in each Congress since, but has usually kicked up such a firestorm of opposition by those who view its principal provisions as an “amnesty” for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted.

But no matter. The President (or more accurately in this case, his Secretary of Homeland Security) has a pen, and in 2012 he unilaterally gave effect to the DREAM Act as if it were law, and now has extended that “lawful” authorization to millions more. Who knew? If the President already had the power unilaterally to impose the DREAM Act and beyond, why all the angst in

Congress for over a decade of trying to get the bill passed? Heck, why did the President himself claim in 2011 that he had no such authority, when just a year later he claimed to have it?

This is not how our system of government is designed. Article I, Section 1 of the Constitution makes patently clear that “All legislative powers” granted to the federal government “shall be vested in” Congress, not the executive branch. And Article I, Section 8, Clause 4 makes clear that plenary power over naturalization is vested in Congress, not the President. Congress cannot give that lawmaking power away.

The Court has allowed Congress to delegate a lot of regulatory authority to the executive to fill in the details of its law, but it can only do so if it provides an “intelligible principle” that directs the exercise of the executive’s rulemaking. An authorization to the Attorney General to give out work permits to illegal aliens whenever he chooses, as the President has claimed both with the 2012 DACA program and now its massive expansion, has no intelligible principle whatsoever.

Although this important non-delegation principal has been weakened to near death by the courts over the last three-quarters of a century, the absolute and unfettered discretion that results from the President’s interpretation of Section 1324a(h)(3) runs afoul of the non-delegation doctrine even in its moribund state. That cannot be the right answer in a Constitution devoted to the Rule of Law and not the raw exercise of power by men. The President’s constitutional duty is to “take Care that the Laws be faithfully executed,” U.S. Const. Art. II, § 3, not to rewrite them as he wishes, enforce them only when he wants, and otherwise render superfluous the great legislative body of the Congress, the immediate representatives of the ultimate sovereign authority in this country, “We the People.”

President Obama was right about one thing when, in his November 20, 2014 speech, he stated: “Only Congress can do that.” Indeed, there are few areas of constitutional authority that are more clearly vested in the Congress than determinations of immigration and naturalization policy. The Supreme Court has routinely described Congress’s power in this area as “plenary,” that is, an unqualified and absolute power. But the President went ahead and did it anyway, contradicting even his own express statements over the past four years that he did not have the constitutional authority to do this.

In sum, the 2012 DACA program and its recent expansion is a usurpation by the President of the lawmaking power that the Constitution vests in Congress, and it will set a dangerous precedent if left unanswered. The only question now is whether those currently serving in Congress, the other political branch of our Founders’ brilliant structural design where “ambition [was] made to counteract ambition” in order to preserve the very idea of limited government, will find it in themselves to do something about it. And as I said at the outset, that issue is a profoundly important one quite apart from the significant issues surrounding the debate about what our appropriate immigration policy should be. But one thing is clear: The competing sides in Congress simply cannot be expected to negotiate to a policy compromise when whatever law is adopted will, like the current ones, be subject to unilateral suspension by the President.

Testimony of Jan C. Ting

Professor of Law, Temple University Beasley School of Law, Philadelphia

United States Senate Committee on the Judiciary

December 10, 2014, Dirksen 226, 2:30 p.m.

“Keeping Families Together: The President’s Executive Action On Immigration  
And The Need To Pass Comprehensive Reform”

**I. Introduction**

I first want to thank Chairman Leahy, Ranking Member Grassley, and all members of the Senate Judiciary Committee for the invitation and opportunity to testify on President Obama’s recent executive action on immigration. I also want to tell Presiding Senator Hirono that my wife and I are both graduates of the University of Hawaii where we met as graduate students. Hawaii will always be our favorite place in the world to vacation and visit.

Like Senator Hirono, both my parents were immigrants. And I grew up in a working class suburb of Detroit where every family seemed to include at least one parent or grandparent who was an immigrant, from places all over the world including Mexico, Syria, and Iraq. So of course I admire and respect immigrants, as we all should because every American is either an immigrant or the descendent of ancestors who came here from somewhere else. And we’re told that includes Native Americans.

Whether we should admire and respect immigrants is not what the immigration controversy is really about. Given that we should admire and respect immigrants, the question at the heart of the controversy is, how many should we take? And specifically, should we accept everyone in the world who wants to come to the United States to live and work? Or alternatively, should we try to enforce a numerical limit on how many immigrants we accept every year?

That's a binary choice, either no limits, or an enforced limit. And it's a hard choice, especially for our elected officials, because advocating no limits does not sound like a path to election or re-election. But trying to enforce a numerical limit presents numerous administrative challenges, and requires a willingness to turn away people who are neither criminals nor national security threats, who just want to work hard for a better life for themselves and their families, and who remind us of our own ancestors. And if they come anyway in violation of our numerical limit, we have to try to remove them to defend the numerical limit. Can we do that?

Many lawyers like to think they can argue both sides of any controversy, and I'm no exception. I can make the historical, philosophical, libertarian, economic, and religious arguments for open borders. But I can also, and do, defend the decision of Congress to enforce a numerical limit on immigration.

Although it's become a cliché to say that everyone agrees that our immigration system is broken, I don't agree with that. I believe that what's broken is our willingness to make the hard choice between simply allowing unlimited immigration, as we did for the first century of the republic, or alternatively enforcing a numerical limit on immigration, with all the attendant difficulty, complexity and expense that entails.

It is perhaps understandable that many citizens including elected officials keep looking for a third, easier choice. Not open borders and no limits, but not turning away and removing would-be immigrants who remind us of our own ancestors either, just to enforce a numerical limit on immigration.

How about this for a third choice? We can pretend we have a numerical limit, keep it on the books, but not enforce it. And whenever that policy choice produces a large number of illegal immigrants, we can just enact a big amnesty or legalization. How does that sound?

If we do nothing at all to reform our immigration system, we are left with the most generous legal immigration system in the world, admitting every year more legal permanent residents with a clear path to full citizenship than all the rest of the nations of the world combined. When I last gave testimony to this

committee in 2013, I described that immigration system as worthy of our nation of immigrants. But it needs to be defended and enforced to deter excess, illegal immigration, unless we prefer the alternative of unlimited immigration. And Congress can adjust the numerical limit to be enforced at any time as long as we are committed to enforcing it.

## **II. President Obama's Deferred Action Plan is Unwise and Bad Policy**

Ever since Congress began to limit the number of immigrants into the United States, the Supreme Court has repeatedly held that protecting American workers was one of Congress's "great" or "primary" purposes. In 1929, the Court in *Karmuth v. United States* found that, "The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor."<sup>1</sup> A half century later, in *Sure-Tan v. United States*, the Court held that a "primary purpose in restricting immigration is preservation of jobs for American workers."<sup>2</sup>

What is the impact of an executive order that adds 5 million illegal immigrant workers to the labor market in America? How does that affect the job prospects of the 9.1 million unemployed Americans (of whom 2.8 million are long-term unemployed) and the 7 million involuntary part-time American workers who want but can't find full-time work, and the 700,000 discouraged workers who have stopped looking for work? How does the addition of 5 million illegal immigrant workers to the American labor market affect the future prospects for the 46 million Americans, almost one in six, who are receiving food stamps? And how will giving 5 million illegal immigrants work authorization affect the groups with the highest unemployment rates? The official unemployment rate is still 5.8 percent, five years after the official end of the Great Recession, but it's 11.1 percent for African

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<sup>1</sup> 279 U.S. 231, 244 (1929).

<sup>2</sup> 467 U.S. 883, 893 (1984).

Americans, 17.6 percent for American teenagers, and 28.1 percent for African-American teenagers.<sup>3</sup> Should Congress be concerned?

Wages remain stagnant, and even employed Americans feel job insecurity. President Obama says that rising income inequality is tearing at the social fabric of America. Indeed, even while wages stagnate, corporate profits are up and the stock market is hitting new record highs seemingly every week. Does adding five million illegal immigrant workers to the legal work force increase or decrease economic inequality in America?

Let's consider the millions of people abroad who might be considering illegal immigration to the U.S. How does President Obama's granting of work authorization to 5 million illegal immigrants affect them? The poor people of the world may be poor, but they are not stupid. They are as capable as anyone else of using cost-benefit analysis to determine what is in their self-interest. If we want to deter them from illegally immigrating to the U.S., we should raise the costs of doing so — through more enforcement — and we should reduce the benefits. Conversely, if we want to encourage more illegal immigration, we should lower the costs through less enforcement and increase the benefits by providing work authorization — exactly as President Obama has just done in his executive order.

Finally, what is the impact of President Obama's executive order on qualified legal immigrants to the U.S.? Many recently arrived legal immigrants will have to compete for jobs with the newly work-authorized 5 million illegal immigrants. And what of the millions of qualified immigrants still waiting outside the U.S. for their chance to immigrate legally? Because the number of immigrant visas available each year is limited, some immigrants eager to come here legally have been waiting outside the U.S. for a visa for more than 20 years. How do they feel when they see that those who entered illegally as recently as five years ago are now going to be rewarded with work authorization and deferred action? Does the executive order make them feel like fools for respecting American law instead of violating it?

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<sup>3</sup> Employment statistics from the Bureau of Labor Statistics monthly economic situation report for November 2014, released December 5, 2014. <http://www.bls.gov/news.release/empstat.nr0.htm>

**III. Instead of Paying Taxes, Illegal Immigrants Receiving Work Authorization Under President Obama's Executive Order May Receive Refundable Earned Income Tax Credits, Even for Prior Years When Working Illegally**

The earned income tax credit (EITC) is a refundable tax credit for qualifying low-income taxpayers, in effect a transfer of wealth to them from higher income taxpayers, an anti-poverty program built into the Internal Revenue Code. The EITC was originally enacted in 1975, and has been expanded several times since so that some qualifying low-income taxpayers with children can today get EITC benefits in the form of tax refunds exceeding \$5,000.<sup>4</sup>

To qualify for the EITC, taxpayers must provide valid Social Security numbers for themselves and their children. This requirement disqualifies non-citizens who are working in the U.S. in violation of U.S. immigration law. Undocumented aliens cannot obtain valid Social Security numbers.

Supporters of amnesty for illegal immigrants and President Obama's deferred action plan have argued that illegal immigrants need employment authorization so they can pay taxes like everyone else. In fact many beneficiaries of deferred action may not have to pay taxes, and may in fact qualify for a large payment from the U.S. Treasury in the form of a refundable earned income tax credit.

Furthermore, a little-known ruling, by obscure officials of the Internal Revenue Service (IRS) in the last year of the Clinton administration, opened the door to illegal aliens claiming and receiving EITC benefits even for years when they are undocumented.

On June 9, 2000, a "Chief Counsel Advice" was published in the name of "Mary Oppenheimer, Acting Assistant Chief Counsel (Employee Benefits)", though it was signed by "Mark Schwimmer, Senior Technician Reviewer". This document advises IRS employees that illegal aliens who are disqualified from receiving the EITC can retroactively receive EITC benefits for years worked

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<sup>4</sup> See generally Internal Revenue Code Section 32.

without a valid Social Security number if, after receiving a valid Social Security number, they file an amended return for the previous years worked. This document is still available through the official IRS website.<sup>5</sup>

Thus, illegal aliens who obtain work authorization, either by qualifying for a legal visa or by executive order from the President, and who then obtain a valid Social Security number, can apparently claim the EITC for previous years worked without a Social Security number as long as such claims are not barred by a statute of limitations, generally within three years.

The document does state that, "Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent." But for an advisor to taxpayers described in this document, who previously worked illegally but now have work authorization, a published IRS document like this constitutes sufficient authority for filing an amended or new tax return to claim the EITC for previous years not barred by statute of limitations, even if this ruling appears to be in conflict with both the language and the intent of the Internal Revenue Code that the EITC should not be paid to anyone working without a Social Security number.

Here is the document last accessed on December 7, 2014:

<http://www.irs.gov/pub/irs-wd/0028034.pdf> .

I encourage members of Congress to determine the net impact on the U.S. Treasury of allowing five million illegal immigrants to qualify for refundable tax credits including the EITC and the Child Tax Credit (Internal Revenue Code. Sec. 24).

**IV. President Obama's Executive Order for Deferred Action for Illegal Aliens Announced November 19, 2014, is both Unconstitutional and Without Legal Authority.**

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<sup>5</sup> <http://www.irs.gov/pub/irs-wd/0028034.pdf> (last accessed on December 7, 2014)

President Obama has repeatedly and publicly stated that he as president does not have the constitutional power or legal authority to issue an executive order deferring the removal of illegal aliens. Representative Robert Goodlatte, Chairman of the Committee on the Judiciary, U.S. House of Representatives, played a video compilation of President Obama's denials of his legal and constitutional authority to issue such an executive order at that committee's December 2, 2014, hearing on "President Obama's Executive Overreach on Immigration."<sup>6</sup>

President Obama is a lawyer and former teacher of constitutional law at the University of Chicago Law School, and so understands the meaning and significance of the words he uses. He deserves to be believed when he states that he lacks legal and constitutional authority to defer the removal of illegal aliens by executive order.

The basic reason why President Obama's unilateral executive immigration order is illegal and unconstitutional is that it violates the fundamental concept of the U.S. Constitution, that we the people govern ourselves through our elected representatives through a deliberative process of checks and balances, not through the unilateral pronouncements of one "great leader" as in North Korea.

The Supreme Court is the ultimate judge of how the Constitution divides the power of government between the legislative, executive, and judicial branches. Article I, Section 8, of the Constitution empowers Congress "to establish an Uniform Rule of Naturalization." Concerning Article I, Section 8 and U.S. immigration policy, the Court has held that:

- "Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,"<sup>7</sup>
- the "formulation" of policies "pertaining to the entry of aliens and their right to remain here" is "exclusively entrusted to Congress,"<sup>8</sup>

<sup>6</sup> Transcript: <http://fednews.com/homeland.php?item=557529&op=hg> . I also quoted five of President Obama's public statements from 2011 to 2013 in commentary published in the Philadelphia Inquirer on November 18, 2014: [http://www.philly.com/philly/opinion/20141118\\_Ready\\_to\\_ignore\\_the\\_people.html](http://www.philly.com/philly/opinion/20141118_Ready_to_ignore_the_people.html) .

<sup>7</sup> *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

- "over no conceivable subject is the legislative power of Congress more complete,"<sup>9</sup>
- "Congress supplies the conditions of the privilege of entry into the United States" unless that power has been "lawfully placed with the President" by Congress,<sup>10</sup>
- the exclusive authority of Congress to formulate immigration policy "has become about as firmly embedded in the legislative and judicial tissue of our body politic as any aspect of our government."<sup>11</sup>

President Obama relies upon a November 19, 2014, 33-page opinion from the Office of Legal Counsel at the U.S. Department of Justice for its conclusion that the deferred action program he has announced "would constitute a permissible exercise of DHS's enforcement discretion under the INA." In reaching that conclusion, the Office of Legal Counsel relied on the Supreme Court decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), a case involving the Food and Drug Administration, for the proposition that an agency's decision not to take enforcement action should be presumed immune from judicial review under the Administrative Procedures Act.

But the Supreme Court in *Heckler* also said this: "In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting

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<sup>8</sup> *Galvan v. Press*, 347 U.S. 522, 531 (1954).

<sup>9</sup> *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

<sup>10</sup> *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

<sup>11</sup> *Galvan v. Press*, 347 U.S. 522, 531 (1954).

substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.”<sup>12</sup>

I believe that each component of the immigration executive order announced on November 19, 2014, violates substantive priorities of Congress as expressed by statute.

**A. The Deferred Action Exceeds the Statutory Bounds of Prosecutorial Discretion**

Section 115 of the Immigration Reform and Control Act of 1986, enacted by Congress and signed into law by President Reagan, declared it to be the “sense of Congress” that “the immigration laws of the United States should be enforced vigorously and uniformly.”<sup>13</sup>

Ten years later, out of concern that those laws were not being enforced “vigorously” enough, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Among the reforms ordered by Congress in IIRIRA were new limits on the discretion of the Executive Branch to defer initiation of removal proceedings against aliens who are present without having ever been legally admitted.

Specifically, Congress declared in new Section 235(a)(1) of the INA (codified as 8 U.S.C. Section 1225(a)(1)) that every alien present in the United States without having been admitted “shall be deemed for purposes of this Act an applicant for admission.” And Congress also specified in Section 235(b)(2) that “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a (removal) proceeding under section 240.”

In March of 2013, ten ICE officers and agents filed a lawsuit against the Secretary of Homeland Security in the U.S. district court for the Northern District

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<sup>12</sup> 470 U.S. 821, 832-833 (1985).

<sup>13</sup> <http://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-15.html>.

of Texas.<sup>14</sup> The officers and agents claimed that they had been threatened with disciplinary action if, in compliance with 8 U.S.C. § 1225 (INA Section 235), they detained or attempted to remove any illegal alien who claimed to be eligible for DACA. In other words, the Secretary had decreed that immigration officers “shall not” do what a statute recently enacted by Congress plainly stated that they “shall” do.

In August of 2013, the federal court held that 8 U.S.C. § 1225 (INA Section 235) “mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien ‘who is not clearly and beyond a doubt entitled to be admitted.’”<sup>15</sup> Concerning the ICE officers’ lawsuit, the judge found that the officers “were likely to succeed on the merits of their claim that the Department of Homeland Security has implemented a program contrary to congressional mandate.”<sup>16</sup> Unfortunately for these officers, the court then dismissed the complaint on the technical grounds that the officers must first seek relief under the mandatory collective bargaining process for federal employees. The bargaining process is now underway, and the procedural dismissal has been appealed, but while the process and appeal are pending, it remains the case that the only federal court that has reviewed the legality of the President’s deferred-action policies found that they were “likely” to be illegal.

A large part of the OLC Opinion (pages 14-20) is devoted to reciting instances of deferrals of immigration enforcement action by former Presidents, which the Opinion treats as precedents for President Obama’s own deferred-action program. In fact none of the alleged precedents, which were short-term and involved limited numbers of very specific categories of aliens, was ever subject to judicial review, so their value as constitutional precedent cannot be assumed. In any event, even if these prior actions were lawful, they are readily distinguished

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<sup>14</sup> Crane v. Napolitano, Civil Action No. 3:12-CV-03247.

<sup>15</sup> Memorandum Opinion and Order of Judge Reed O’Connor, Crane v. Napolitano, Civil Action No. 3:12-CV-03247-O, page 10 (April 23, 2013).

<sup>16</sup> *Id.* at page 1.

from the President's proposal to defer the detention and removal of nearly 5,000,000 illegal aliens.

Many instances of Presidential discretion in the expulsion of alien groups are no longer relevant because Congress reacted to them by expressly limiting or removing that discretion. For example, prior to the Immigration Act of 1990, the Attorney General, at the request of the Secretary of State, would on occasion extend the enforced departure date for certain nationals from a particular country ("extended voluntary departure" or "EVD"). The 1990 Act sought to circumscribe that practice by establishing a statutory Temporary Protected Status (TPS) program that it defined as the "exclusive authority" of the Attorney General (now the Secretary of Homeland Security) to permit deportable aliens to remain in the United States on account of their nationality.<sup>17</sup>

Subsequent to passage of the 1990 Act, neither the Attorney General nor the Secretary of Homeland Security has granted EVD to aliens based upon their nationality. However, Presidents since then have still on occasion ordered a deferral of enforced departure ("deferred enforced departure" or "DED") for certain nationality groups. The post-1990 DEDs ordered by President Obama and his predecessors arguably contradict the 1990 Act's "exclusive authority" provision. However, these extraordinary deferrals of removal and grants of employment authorization have been explicitly justified as an exercise of the President's constitutional authority to conduct the nation's foreign affairs.

The field of foreign affairs is an area in which Congress may "accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>18</sup> Concerning immigration in particular, the Court has recognized that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and for that reason "Congress may in broad terms authorize the executive to exercise the power."<sup>19</sup>

<sup>17</sup> INA Sec. 244(g) (8 U.S.C. Sec. 1254a(g)).

<sup>18</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>19</sup> *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

Whether any or all of the post-1990 DEDs fall within that “degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved” may be an important legal question, but the post-1990 DEDs and their constitutionality are irrelevant to the legality of President Obama’s deferred action program, since he has not justified the program as compelled by “foreign policy reasons,” but instead as an exercise of “prosecutorial discretion” in response to an imbalance between the number of immigration law-breakers and the amount of immigration law-enforcement resources.

A review of the deferral actions cited in the OLC Opinion indicates that they applied to limited classes of people, mostly those whose departure was impeded by events outside their control or who had been entitled by Congress to remain in the United States but needed more time to complete the application process. The example seemingly most helpful to the Administration’s case is the 1990 “Family Fairness” program implemented under President George H.W. Bush to grant “voluntary departure” (“VD”) to some of the spouses and children of illegal aliens who had been authorized by IRCA in 1986 to apply for and receive permanent residence (cited on page 14 of the OLC opinion).

President Bush regarded these individuals as victims of an oversight in the drafting of IRCA and worked with Congress to fix it, achieving the fix as part of the Immigration Act of 1990, which provided legal immigrant visas to such spouses and children. The enactment by Congress of this legislation within months of the announcement of the “Family Fairness” initiative demonstrates the close consultation between the Bush administration and Congress, and the concurrence of Congress in efforts to fix the particular problem.

As Justice Jackson famously said in *Youngstown Sheet and Tube v. Sawyer*, “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” but, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”<sup>20</sup>

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<sup>20</sup> 343 U.S. 579, 635-636 (1952).

The OLC Opinion itself (at page 6) acknowledges that “the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.” . My conclusion is that the precedents cited in the OLC opinion are distinguishable, and that President Obama, “under the guise of exercising enforcement discretion,” is engaged in an “attempt to effectively rewrite the laws to match its policy preferences.”

**B. Grants of “Advance Parole” to Deferred Action Beneficiaries, like those to DACA Beneficiaries, Exceed the President’s Authority.**

Although the Administration has not formally announced whether beneficiaries of the President’s expanded deferred-action program will also be eligible for “advance parole,” that is likely to be the case given that the beneficiaries of the expanded program have otherwise been treated the same as DACA beneficiaries.<sup>21</sup>

The President’s “parole” authority originated as an exception to the limits on the number and categories of aliens who could be admitted to the United States on a temporary or permanent basis under the INA. The parole authority, now codified at Section 212(d)(5) (8 U.S.C. § 1182(d)(5)), authorizes the President to “parole” into the United States an otherwise inadmissible alien “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”

According to the House Judiciary Committee in 1996 when that restrictive language was added to the statute: “Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. It should not be used to

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<sup>21</sup> See Q. and A. 57 of USCIS’s “Frequently Asked Questions”, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#travel> .

circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.”<sup>22</sup>

Could any federal court hold that DACA parole or parole granted to deferred action beneficiaries is not being used “to admit aliens who do not qualify for admission under established legal immigration categories”?

**C. The Issuance of Employment Authorization Documents to Deferred Action Beneficiaries Exceeds the President’s Authority**

The OLC Opinion (at page 20) identifies three features of President Obama’s initiative that even it concedes are “somewhat unusual among exercises of enforcement discretion”: open toleration of an undocumented alien’s continued presence in the United States for a fixed period of time, the ability to seek employment authorization and suspend unlawful presence for purposes of Section 212(a)(9)(B) and (C) of the INA, and the invitation to individuals who satisfy specified criteria to apply for deferred action status.

Regarding the ability to seek employment authorization, the OLC Opinion (at page 21) argues that Congress itself bestowed upon the Executive Branch unlimited authority to issue Employment Authorization Documents to illegal alien workers when it enacted the Immigration Reform and Control Act of 1986.

New Section 274A(a) of the INA, added by IRCA in 1986 makes it unlawful “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”<sup>23</sup> The term “unauthorized aliens” was defined at Section 274A(h)(3) as all aliens other than aliens authorized to work “under this Act or by the Attorney General.”<sup>24</sup> A federal regulation, 8 C.F.R. § 274a.12, contains a list of the categories of alien who are not “unauthorized aliens” and who may therefore qualify for Employment Authorization.

<sup>22</sup> Section 523, House REPT. 104–469, on HR 2202 (March 4, 2996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

<sup>23</sup> Codified as 8 U.S.C. Section 1324a(a).

<sup>24</sup> 8 U.S.C. Section 1324a(h)(3).

According to the OLC Opinion (page 21, fn. 11), the Attorney General has interpreted the clause “by the Attorney General” as conferring unlimited discretion to use “the regulatory process” to except any class of alien from the definition of “unauthorized alien.” According to the OLC Opinion (page 1), the exception applicable to illegal aliens awarded deferred action under the President’s new program is found at 8 C.F.R. § 274a.12(c)(14), which refers to aliens who have been granted “deferred action, defined as an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.”

A 2007 memorandum from the USCIS Ombudsman says that section 274a.12(c)(14) had a more modest scope: “There is no statutory basis for deferred action . . . . According to informal USCIS estimates, the vast majority of cases in which deferred action is granted involve medical grounds.” So narrowly based a regulation, having no basis in the statute, cannot serve as authority for the indiscriminate issuance of millions of Employment Authorization Documents contemplated by the President’s new deferred-action program. While the courts must normally defer to a Secretary’s interpretation of his own regulations, this does not apply when an “alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.”<sup>25</sup>

Whether or not that regulation was ever intended to have the colossal scope attributed to it by the OLC Opinion, the more important question is whether a regulation of that scope is in fact authorized by 8 U.S.C. § 1324a (h)(3) (INA Sec. 274A(h)(3)). In other words, when Congress wrote and passed the IRCA in 1986, were the four words “by the Attorney General” inserted into the statute to empower the President to grant EADs to unlimited numbers of aliens, including millions of the very illegal alien workers whose employment IRCA was intended to prevent?

According to Chapman University law professor John C. Eastman, ascribing any such intention to Congress would be illogical. Had Congress intended the

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<sup>25</sup> Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)).

phrase “or by the Attorney General” to confer such broad and potentially limitless discretion on the Executive Branch, then “none of the carefully circumscribed exemptions would be necessary. . . . [T]he more likely interpretation of that phrase is that it refers back to other specific exemptions in Sections 1101 or 1324a that specify when the Attorney General [or Secretary of Homeland Security] might grant a visa for temporary lawful status.”<sup>26</sup>

In other words, Section 274A(h)(3)’s reference to aliens authorized to work “by the Attorney General” has a more obvious and rational explanation than a *carte blanche* to invite the whole world to work here. As noted above, the INA provides for the issuance of specified numbers and categories of immigrant and nonimmigrant visas and prescribes which of those visas entitles the alien to work in the United States. At the same time the INA authorizes the entry and residence of various categories of aliens without visas, including refugees, asylum applicants, and aliens eligible for TPS: in those cases the INA separately authorizes or requires the Attorney General to provide the aliens with EADs.<sup>27</sup> As Professor Eastman reasons, “by the Attorney General” surely refers to those statutory authorizations and not to wholesale surrender to the President of the Congress’s otherwise exclusive authority to determine whether an alien may enter, remain, or work in the United States.

Post-IRCA legislation is consistent with Professor Eastman’s analysis. On at least three occasions in the two decades after IRCA became law, Congress has enacted immigration legislation providing that the Attorney General (or the Secretary of Homeland Security) “may authorize” a class of aliens “to engage in employment in the United States.”<sup>28</sup> The aliens that might be authorized to work included “battered spouses,” as well as certain nationals of Cuba, Haiti, and Nicaragua. Why would Congress pass bills granting the Executive Branch

<sup>26</sup> John C. Eastman, *President Obama’s ‘Flexible’ View of the Law: The DREAM Act as Case Study*, ROLL CALL, Aug. 28, 2014, <http://www.rollcall.com/news/Obamas-Flexible-View-of-the-Law-The-DREAM-Act-as-Case-Study-235892-1.html?pg=2&dczone=opinion> .

<sup>27</sup> E.g., INA Sec. 208(c)(1)(B) (asylum), 244(a)(1)(B) (temporary protected status), 8 U.S.C. Sec. 1738 (refugees).

<sup>28</sup> Pub. L. No. 105-100, Title II, § 202 (1997) (Cuban and Nicaraguan nationals); Pub. L. No. 105-277, div. A, § 101(h) (1998)(Haitians); Pub. L. No. 109-62, Title VIII, 814(c) (2006) (battered spouses).

discretionary authority to issue EADs to such narrowly defined categories of aliens if Congress had already empowered the Executive Branch in 1986 with discretion to issue EADs to anyone in the world?

To summarize, the question presented by 8 U.S.C. § 1324(h)(3) is whether the more reasonable interpretation of IRCA's reference to "by the Attorney General" was that (1) Congress intended to exclude from the definition of "unauthorized alien" those aliens for whom the Attorney General was permitted or required by IRCA and numerous other provisions of the INA to issue EADs or (2) Congress intended to empower the President to nullify IRCA with the stroke of his pen by granting EADs to the very aliens whose employment IRCA was enacted to prevent? The question answers itself. To quote the D.C. Circuit Court of Appeals, an Executive Branch procedure that exposes American workers to substandard wages and working conditions "cannot be the result Congress intended."<sup>29</sup>

The federal courts have repeatedly and consistently held that the Executive Branch may not through administrative action circumvent the INA's qualitative or numerical limits on employment visas, following Supreme Court pronouncements in *Karnuth*<sup>30</sup> and *Sure-Tan*<sup>31</sup> that the policy and purpose of immigration law is preservation of jobs for American workers against the influx of foreign labor.

In 2002, in *Hoffman Plastics v. N.L.R.B.*, the Supreme Court itself invalidated a federal agency's award of back pay to an illegal alien. The Court held that the IRCA amendments to the INA were a "comprehensive scheme that made combatting the employment of illegal aliens in the United States central to the policy of immigration law," that awarding back pay to an illegal alien was "contravening explicit congressional policies" to deny employment to illegal immigrants, and that such an award would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy" and "would encourage the

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<sup>29</sup> *Mendoza v. Peres*, 754 F.3d 1002, 1017 (2014).

<sup>30</sup> See footnote 1.

<sup>31</sup> See footnote 2.

successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”<sup>32</sup>

Other federal circuit and district courts have invalidated executive branch agency decisions that enabled employers to avoid their collective bargaining contracts by hiring unauthorized alien workers. In May of 1985, the D.C. Circuit found in *International Union of Bricklayers and Allied Craftsmen v. Meese* that labor unions had standing to challenge the issuance of temporary worker visas to aliens who plainly did not qualify for those visa categories. The court reasoned that, in construing the immigration laws, the courts “must look to the congressional objective behind the Act,” which was “concern for and a desire to protect the interests of the American workforce.”<sup>33</sup> In 1985, citing the Supreme Court’s decision in *Karnuth* and the D.C. Circuit’s decision in *Bricklayers*, the U.S. District Court for the Northern District of California declared that an “INS Operations Instruction” that expanded the category of aliens eligible for temporary work visas beyond those specified in the statute was “unlawful” and that its enforcement was “permanently enjoined.”<sup>34</sup>

Four years later, in *Longshoreman v. Meese*, the Ninth Circuit found that the INS’s overbroad definition of “alien crewman” (who did not require labor certification in order to work near the docks) failed to promote “Congress’ purpose of protecting American laborers from an influx of skilled and unskilled labor.”<sup>35</sup>

Earlier this year, in *Mendoza v. Perez*, the D.C. Circuit ruled that the Department of Labor had used improper procedures to create special rules for issuing temporary visas in the goat and sheepherding industry. The court held that the “clear intent” of the temporary worker provisions enacted by Congress was “to protect American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working conditions” and that an

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<sup>32</sup> 535 U.S. 137, 138, 140-141, 148 (2002).

<sup>33</sup> 761 F.2d 798, 804 (D.C. Cir. 1985).

<sup>34</sup> *Int’l Union of Bricklayers v. Meese*, 616 F.Supp. 1387 (1985).

<sup>35</sup> 891 F.2d 1374, 1384 (9<sup>th</sup> Cir. 1989).

Executive Branch procedure that exposed American workers to substandard wages and working conditions “cannot be the result Congress intended.”<sup>36</sup>

A very recent case that may provide a precedent for standing in any challenge to the issuance of EADs to illegal aliens under the President’s deferred-action program is *Washington Alliance of Technology Workers v. USDHS*,<sup>37</sup> a case in which American technology workers are challenging the legality of the Department of Homeland Security’s 18-month extension of a program that permits foreign students to work in the United States after completing their studies. In a decision dated November 21, 2014, the U.S. District Court for the District of Columbia denied the government’s motion to dismiss that claim, holding that the plaintiffs enjoyed “competitor standing,” a doctrine which recognizes that a party suffers a cognizable injury when “agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.”<sup>38</sup>

The competitive advantage enjoyed by the alien students in that case was exemption from employment taxes, which made them less expensive to hire. The illegal alien beneficiaries of the President’s deferred-action program may also enjoy a competitive advantage by virtue of their exemption from the employer mandates of the Affordable Care Act.

Based on the statutes, legislative history, case law, and analysis presented above, I conclude that each of the three assertions of legal authority needed to implement President Obama’s “deferred action” program for five million illegal aliens violates our statutory immigration laws. The deferral of removal is based on dubious claims, exceeds the bounds of prosecutorial discretion, and violates Section 235(a)(1) and (b)(2) of the INA; grants of advance parole also directly violate Section 212(d)(5) of the INA as amended in 1996; and granting employment authorization to millions of illegal aliens directly contradicts numerous court decisions holding that the Executive Branch may not under color of its power to administer the immigration laws circumvent the statutory limits on

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<sup>36</sup> 754 F.2d 1002, 1017 (2014).

<sup>37</sup> Civil Action No. 14-529, U.S. District Court for the District of Columbia.

<sup>38</sup> [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2014cv0529-17](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0529-17).

the number of aliens allowed to compete in the U.S. labor market. Taken together, the three illegal steps amount to a usurpation of Congress's exclusive constitutional authority to formulate immigration policy.

**Testimony of Astrid Silva****“Keeping Families Together: The President’s Executive Action On Immigration And The Need To Pass Comprehensive Reform”****Senate Judiciary Committee****December 10, 2014**

Madam Chairwoman, distinguished members of the Committee, good afternoon. Thank you for the invitation to appear before you today to discuss an issue of great importance to my family and to so many families in the United States. My personal story is not unique, and is typical of millions of immigrants here today. That is why I also want to thank this Committee for working so hard on a comprehensive immigration reform bill last year. I watched from the gallery as the Senate voted on that historic bill and believed that we were one step closer to real change.

Like many before them, my parents—one of whom is here with me today – came to this country and chose to leave everything behind in search of a better life for their children. When I was just four years old, my parents brought me across the Rio Grande in a homemade tire raft. I still have a vague memory of that day. I was holding onto my doll so tight, because I was so afraid of what was going on. I remember looking down knowing I would be in trouble because I had gotten mud on my new patent leather shoes. Moving to the United States provided many wonderful things for my family, including my little brother who was born in California in 1993. For me, the only home I know is Las Vegas.

I grew up believing that I was just like everyone else. The only difference was that when I was little, kids made fun of me because I didn’t speak English. I learned English three months after starting school because of the dedication of my parents and their desire for me to do better. When I was in middle school I received many prestigious honors at my school, but still my parents were afraid to let me sign up for a magnet school that I had my heart set on. They believed that the school might ask me for my social security number and that might alert immigration officials that I was here without documentation. But a teacher who believed in me encouraged me to apply, and with her help I did, and was accepted. That school, Atech, was everything that a nerd like me could dream of. I excelled and thought I was just like my classmates, until the time came to apply for colleges. I knew that my status meant I couldn’t drive because I couldn’t get a license without a social security card. But I hadn’t understood that being undocumented would hurt my future. I graduated high school in 2006 when immigration reform failed and immigration raids were taking place all over the country. My guidance counselors told me it was the end of the road for my academic career. I had worked so hard. I had good grades and all kinds of extracurricular activities. At my high school graduation, when my friends were called on stage and the school they were going to was read out loud, along with which scholarships they had received, I was devastated. I knew I could not have any of that because I didn’t have a social security number.

In 2013, when I received my DACA, my life changed completely. Some things were simple. I could get my driver's license. I could get a job. Most importantly, I could go to school and live without fear of my own deportation for the first time in my life. I could focus on my future and contributing to the only country I have ever called home.

By my fear didn't end completely. I am still afraid that my mom and dad will be deported. Even though we have lived for more than 22 years in the same house, in the same neighborhood, and in the same community, I am afraid that one day I will come home and they will be gone. That our lives will be turned upside down. That we will be torn apart and separated. No matter how many degrees I am able to get, what will happen if I have to walk across a stage to no family members? My parents are hard-working. They are good people who want nothing more than the opportunity to work hard and watch their children grow up and be happy. My dad works long hours in the Las Vegas heat where it can get upwards of 120 degrees and he doesn't complain. In his free time he collects pop can tops to raise money for Ronald McDonald House. My mother has become the community mom and volunteers at a number of local non-profit organizations.

My family knows firsthand the value of the President's new executive action. Several years ago, my father was detained by immigration enforcement officers. It was the most traumatic experience of my life. In an effort to get right with the law, my dad had paid a *notario*, someone he thought was a lawyer, to file an immigration application. Unfortunately, like so many other people, we were taken advantage of. She took advantage of my dad's lack of immigration knowledge and never told us that his application was denied. She dragged us along telling us that immigration just takes a long time in the United States, while draining our life savings. As a result of that experience, my dad was issued a deportation order and picked up for detention. He is just one of thousands of parents who have been separated from their children. My family spent one week without my dad, and it was the longest week of my life. We didn't know what would happen to him or to us. When we were told he would be deported and that I could give him a 10 pound bag with toiletries I wondered, how can the country we love so much be brought down to a 10 pound bag? My brother who is a United States citizen felt like his country betrayed him. "Astrid," he asked me, "how can they do this to my dad?" I understood that I may not have rights because I am undocumented, but my brother was born here, he has lived here his entire life. He is as American as any of the Senators in this room. He couldn't believe they could take his dad.

The latest efforts by President Obama will keep my family together. It will keep millions of families together. Of course there are many, many more that it will not help. I have many friends whose parents will not qualify, I have many friends who do not have children and therefore don't qualify. I feel tremendously lucky that first I, and now my parents, fall into categories of people that can be legally protected if we meet certain qualifications. But so many of those countless others who aren't so lucky, are really just like us. They are people that like my family are only making our country a better place. They volunteer in our communities, go to church with us, go to school with us. They have jobs and take their responsibilities seriously. We must continue to work with Congress to pass a permanent legislative fix to our country's broken immigration system so all mothers and fathers can be with their children.

The bi-partisan Comprehensive Immigration Reform package that passed the Senate in 2013 was certainly not perfect, but it was a fair—and permanent—fix to this problem. I, and many of my peers, will continue the fight to pass a bill. But in the meantime, we will also fight to protect and defend the President's action. When people attack the President for this action or challenge his legal authority, they are attacking me. They are attacking my mother. They are attacking the hundreds of thousands of children who need their parents to care for them and tell them that there are no monsters under the bed. They are attacking workers who are contributing to our economy. They are attacking me with every word that they say. They are not attacking a stranger, they are attacking the girl who sits next to your grandson in Chemistry class; they are attacking the man who spends his days making sure your roses are beautiful every spring; and they are attacking everything that has made our country strong.

Every one of you on this committee has a great responsibility bestowed upon you by the citizens of our country. I hope that you will see that this action not only helps make our country a stronger nation, it also demonstrates what the United States stands for, the American Dream, the belief that if you work hard you will be able to provide for your family and live without fear of persecution.

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Hearing on “Keeping Families Together: The President’s Executive Action On  
Immigration And The Need To Pass Comprehensive Reform”  
December 10, 2014**

Today the Senate Judiciary Committee again turns its attention to the need to fix our broken immigration system, a system that too often tears families apart. This hearing is in many ways a sequel to our hearing last year entitled “How Comprehensive Immigration Reform Should Address the Needs of Women and Families.” Senator Hirono, herself an immigrant from Japan, presided over that hearing last year and I am happy that she will lead today’s continuation of that discussion.

Our first hearing looked at this poignant issue at a time of great optimism. We had tremendous bipartisan momentum building as we worked to draft and debate a comprehensive immigration reform bill that would bring stability and peace to so many families living in fear of losing a mother, father, sister or brother to deportation.

We accomplished a great deal in that bipartisan effort. Both Democrats and Republicans praised the fair and thorough process we gave that bill here in the Judiciary Committee. We had 6 hearings featuring 42 witnesses. We debated bipartisan legislation a total of 37 hours over a 3-week period. We considered 212 amendments, and we adopted 136 of them – all but 3 on a bipartisan basis. The full Senate then considered our bill and approved it by an overwhelming bipartisan majority.

House Republican leadership, however, disregarded the extensive transparent process as well as the legislation’s bipartisan support and refused to take the bill up for consideration. They blocked similar efforts by their own members to address this growing crisis, ignoring the strain it imposes on our economy, our communities, and our families.

In the wake of the House’s refusal to engage on comprehensive immigration reform, and after years of delay and broken promises by opponents, the President acted. His executive action is a measured and legal response to what we all acknowledge is a broken system. But it is temporary. It is not a substitute for Congressional action and we must keep working to find a permanent answer.

It is against this backdrop that we hold today’s hearing to return to the heart of the immigration debate – the impact our broken immigration system has on our families.

I look forward to hearing from Astrid Silva. Hers is an American story. It is similar in many ways to that of our parents and grandparents. It is a story of a family looking to find a better life. A story of hard work and persistence. Astrid is a beneficiary of the President’s Deferred Action for Childhood Arrivals (DACA) program. And her parents will be eligible for the new Deferred Action for Parental Accountability (DAPA) program because her younger brother is a U.S. citizen. For more than 20 years, Astrid’s family has been working hard and contributing to their local community. They are exactly the kind of family we want to have as our neighbors and coworkers. In just one example of her dedication and hard work, Astrid, arranged to take her

final examinations days early – on very short notice- so that she could join us here today. Astrid we look forward to hearing from you.

I also look forward to hearing from Elizabeth Shuler, the Secretary Treasurer of the AFL-CIO, about why the President's actions are not just good for families, but good for American workers, and the U.S. economy overall. And I look forward to the debate among the legal scholars who will share their thoughts on the legal authority of the President's actions, especially Professor Schroeder who is no stranger to the Committee.

I applaud the President's action to keep families together. The American people are with him and his actions were an important step in fixing some of the greatest injustices in our immigration system. But alone they are not enough. Congress must still act. I urge Republican leaders of both chambers to join us in this effort. Their obstruction must end. I will continue to work until we have achieved comprehensive immigration reform that secures our families, spurs our economy and upholds our American values. I thank Senator Hirono for chairing today's important hearing.

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Senate Judiciary Committee

*Hearing on "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform"*

**Questions for the Record**

**Submitted by Senator Al Franken for**

Christopher Schroeder, Professor, Duke University School of Law

Mr. Schroeder, I am very concerned about the welfare of children and other vulnerable populations in the immigration system. Often, in immigration proceedings, children are left to represent themselves in court, without access to counsel. They are detained in poor conditions for far longer than necessary, because our courtrooms are saddled with a record backlog. According to immigration lawyers in my state, a candidate for asylum will not be able to get a hearing until fall of 2016, given the current backlog.

When these children finally do receive a hearing, Immigration Judges are so overworked that they don't have enough time to carefully consider cases. This leads to the unfortunate reality that Judges likely miss out on potential candidates for asylum, and may be sending children back to danger in their own countries.

These problems in our Immigration Courts are inexcusable. The bipartisan Senate immigration bill would address this issue head-on, by providing children with access to counsel, keeping them out of solitary confinement, and allowing judges to have time to hear their cases.

1. Given your background in the Department of Justice, what are the challenges facing our Immigration Courts, both for children and the general population?
2. How does executive action address this issue?
3. What further steps are needed through comprehensive legislative reform?

Senate Judiciary Committee

*Hearing on "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform"*

**Questions for the Record**

**Submitted by Senator Al Franken for**

Elizabeth Shuler, Secretary-Treasurer of the AFL-CIO

Ms. Shuler, in your testimony, you cite studies finding that the President's immigration action will boost our Gross Domestic Product by \$90 to \$210 billion over the next ten years and increase payroll tax revenues by \$22.6 billion over five years. Nonetheless, some people argue that adding approximately 5 million undocumented immigrants to our country's workforce would hurt the labor market in America.

1. Are not a lot of the undocumented immigrants who will be affected by the President's immigration action working in the United States already, and doing so without paying taxes or passing criminal background checks?
2. Why would American workers benefit from these people coming out of the shadows and applying for deferred action?
3. How would comprehensive legislative reform, such as the bill passed by the Senate last year, further help American workers?

Senate Committee on the Judiciary  
Questions for the Record from Senator Grassley  
To Professor John C. Eastman

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1. The OLC opinion claims that Congress gave the Executive Branch the authority to issue Employment Authorization Documents (or EADs) to undocumented workers when it enacted the Immigration Reform and Control Act of 1986. It argues that the Act confers unlimited discretion upon the Attorney General to use “the regulatory process” to except any class of alien from the Act’s definition of an “unauthorized alien,” thereby paving the way to issue EADs to deferred action recipients.
  - a. Do you believe that the President has the authority, based on current immigration statutes and regulations, to unilaterally grant work permits to essentially anybody and everybody?
  - b. Is the OLC’s interpretation of current immigration statutes and regulations consistent with traditional principles of statutory interpretation?
2. I have some questions regarding the scope and nature of President Obama’s executive action on immigration.
  - a. Ms. Shuler testified that the President’s executive action was merely a prioritization of “limited administrative resources.” Do you agree that the President’s actions are nothing more than the administration prioritizing its actions and resources?
  - b. I am concerned about the precedent that the President’s executive action will have for future executive overreach. Senator Coons asked Professor Schroeder whether fears were warranted about future presidents being able to simply ignore particular federal laws, such as environmental or anti-discrimination laws, in the name of prosecutorial discretion. He replied, “To a degree, the answer is yes,” arguing that this is not because of anything President Obama has done, but simply because of the nature of prosecutorial discretion.
    - i. Is this interpretation consistent with the concept of prosecutorial discretion?
    - ii. Does any President have the authority under prosecutorial discretion to simply ignore, on a broad scale, the enforcement of a law?
  - c. When President Obama addressed the nation to unveil his planned executive actions, he declared that “Congress has failed.” Does inaction by Congress on a policy matter provide a President with the constitutional authority to act unilaterally on that issue? And if so, what are the limits to what a President can do under the Constitution?
3. I appreciate your testimony on the President’s plan to extend deferred action. I agree that this is an abuse of prosecutorial discretion, and I agree that current law does not grant the President such wide authority to give legal status to millions of persons here illegally, and to

go even further to provide such persons with benefits like a social security number or work authorization. I just have a few more questions on deferred action that I would like to have you clarify.

- a. Professor Schroeder supported the OLC memo's conclusion that the DHS was acting consistently with congressional policy in granting deferred action. This argument is based on the fact that Congress has made certain classes of aliens eligible for deferred action in past statutory enactments. Do you agree that because Congress has granted deferred action eligibility to certain classes of aliens in the past that DHS may now do so as well to other classes of aliens?
  - b. Some have argued that the President's action doesn't constitute a blanket approval of a large group of people because he articulated a series of factors which, if satisfied, would entitle an individual to the deferral of a deportation action. They argue that this determination, based on an analysis of the factors, would constitute a case-by-case inquiry, rather than a blanket exemption from the law. Do you agree?
4. In May 2013, the president of the National Citizenship & Immigration Services Council, the union representing at least 12,000 United States Citizenship and Immigration Services (USCIS) adjudications officers and staff, publicly declared that DACA – the model for the President's new deferred-action program – was reporting a 99.5% approval rating for all undocumented alien applications for legal status. He further warned that "DHS and USCIS leadership have intentionally established an application process for DACA applicants that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers...to stop proper screening and enforcement, and guarantee that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."
- a. How can we be sure that that the President's new and much larger deferred action program will be implemented on a case-by-case basis?
  - b. How can we trust that deferred action will not harm national security – when the President's prior unilateral action on immigration has been characterized by such blanket approval, fraud, and lax procedures?
5. Since the President's announcement, many commentators have stressed the dangerous new precedent that the President is setting for future executive overreach. For example, David Rivkin and Elizabeth Price Foley have said, "The OLC's memo endorses a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future presidents can unilaterally gut tax, environmental, labor obscurities laws by enforcing only those portion with which they agree." Also, the Heritage Foundation has said that President Obama is "establishing a dangerous precedent that violates fundamental principles of separation of powers—principles that protect our liberties and maintain a government of laws and not of men."
- a. Do you agree with these statements on the President's actions?

- b. What precedential consequences can you foresee this executive action having on executive actions by future administrations?
  - c. In light of the President's action, what sort of deterrent effect – if any – will our existing immigration laws have on individuals seeking to enter the United States unlawfully? What impact does his action have on the rule of law?
6. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

Senate Committee on the Judiciary  
Questions for the Record from Senator Grassley  
To Ms. Elizabeth H. Shuler

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1. Ms. Shuler, the AFL CIO and other union groups have long opposed the H-1B program because of the impact it has on American workers. You and I would agree that all employers should have to recruit and hire Americans before they hire from abroad. I've argued, along with the AFL-CIO, that some companies are abusing this visa program in order to bring in lower skilled and cheaper labor. The Optional Practical Training program is an extension of the H-1B visa program. However, it doesn't have wage requirements or worker protections, making it worse for U.S. workers who must compete with foreign workers. Despite our concerns, however, President Obama decided to expand the OPT program. And, despite a GAO report saying that the program lacks oversight and students are abusing it, the President's executive actions make things worse. The administration's actions will incentivize more employers to use OPT to go around programs like the H-1B visa to hire cheaper labor. The longer foreign students are allowed to remain in the country, working under no rules, low wages and sub-par conditions, the less likely that legal visa programs will be used. Ms. Shuler, do you agree that the President's actions to extend the OPT program will hurt American workers?

Senate Committee on the Judiciary  
Questions for the Record from Senator Grassley  
To Professor Jan C. Ting

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1. It was argued in the hearing that the President's executive action shifts the burden that is currently applied under federal immigration law – where an undocumented immigrant must demonstrate to the government that they are entitled to stay – to a burden where the *government* now has to demonstrate that an undocumented immigrant should be deported. Can you explain in more detail whether you view this as a mere change in executive priorities, or if this is in fact a clear change by the President of a duly-enacted law?
2. Professor Schroeder insisted that the approximately 32,000 individuals denied “deferred action” under the DACA program evidences the case-by-case implementation of that program, such that it is consistent with the nature of prosecutorial discretion. Do you agree or disagree with this observation, and why?
3. Professor Schroeder supported the OLC memo's conclusion that the DHS was acting consistently with congressional policy in granting deferred action. This argument is based on the fact that Congress has made certain classes of aliens eligible for deferred action in past statutory enactments. Do you agree that because Congress has granted deferred action eligibility to certain classes of aliens in the past that DHS may now do so as well to other classes of aliens?
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5. In May 2013, the president of the National Citizenship & Immigration Services Council, the union representing at least 12,000 United States Citizenship and Immigration Services (USCIS) adjudications officers and staff, publicly declared that DACA – the model for the President's new deferred-action program – was reporting a 99.5% approval rating for all undocumented alien applications for legal status. He further warned that “DHS and USCIS leadership have intentionally established an application process for DACA applicants that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers...to stop proper screening and enforcement, and guarantee that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk.”
  - a. How can we be sure that that the President's new and much larger deferred action program will be implemented on a case-by-case basis?
  - b. How can we trust that deferred action will not harm national security – when the President's prior unilateral action on immigration has been characterized by such blanket approval, fraud, and lax procedures?

6. Ms. Shuler testified that the President's executive action was merely a prioritization of "limited administrative resources." Do you agree that the President's actions are nothing more than the administration prioritizing its actions and resources?
7. When President Obama addressed the nation to unveil his planned executive actions, he declared that "Congress has failed." Does inaction by Congress on a policy matter provide a President with the constitutional authority to act unilaterally on that issue? And if so, what are the limits to what a President can do under the Constitution?
8. Since the President's announcement, many commentators have stressed the dangerous new precedent that the President is setting for future executive overreach. For example, David Rivkin and Elizabeth Price Foley have said, "The OLC's memo endorses a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future presidents can unilaterally gut tax, environmental, labor obscurities laws by enforcing only those portion with which they agree." Also, the Heritage Foundation has said that President Obama is "establishing a dangerous precedent that violates fundamental principles of separation of powers—principles that protect our liberties and maintain a government of laws and not of men."
  - a. Do you agree with these statements on the President's actions?
  - b. What precedential consequences can you foresee this executive action having on executive actions by future administrations?
  - c. In light of the President's action, what sort of deterrent effect – if any – will our existing immigration laws have on individuals seeking to enter the United States unlawfully? What impact does his action have on the rule of law?
9. The President has promised the American people that the persons who enter the deferred action program will be required to pay back taxes, and to pay future taxes. You testified that under the President's executive action, persons under the deferred action program may be eligible to receive the earned income tax credit (EITC), which means that many will receive tax credits, rather than actually pay taxes. Further, an article in *USA Today* on December 12, 2014, titled "Fact Check: No Back Taxes in Immigration Action," says that the Johnson memos have no provision requiring back taxes, and many immigrants fall into such a low income bracket that they won't actually owe any taxes now or in the future. Under your reading of the President's executive action, will persons seeking and obtaining deferred action be required to pay back taxes?
10. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

Senate Judiciary Committee

*Hearing on "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform"*

**Responses to Senator Franken's Questions for the Record**

Christopher Schroeder, Professor, Duke University School of Law

Mr. Schroeder, I am very concerned about the welfare of children and other vulnerable populations in the immigration system. Often, in immigration proceedings, children are left to represent themselves in court, without access to counsel. They are detained in poor conditions for far longer than necessary, because our courtrooms are saddled with a record backlog. According to immigration lawyers in my state, a candidate for asylum will not be able to get a hearing until fall of 2016, given the current backlog.

When these children finally do receive a hearing, Immigration Judges are so overworked that they don't have enough time to carefully consider cases. This leads to the unfortunate reality that Judges likely miss out on potential candidates for asylum, and may be sending children back to danger in their own countries.

These problems in our Immigration Courts are inexcusable. The bipartisan Senate immigration bill would address this issue head-on, by providing children with access to counsel, keeping them out of solitary confinement, and allowing judges to have time to hear their cases.

1. Given your background in the Department of Justice, what are the challenges facing our Immigration Courts, both for children and the general population?

Schroeder Response: The system for adjudicating immigration cases and appeals has been overworked for years. This past summer, pending cases reached an all time high. Over 40,000 of the 375,000 pending cases were children's cases, including many who had been picked up at the border during the summer. These backlogs work hardships on everyone who is caught up in the slow moving pipeline. At the same time, measures to reduce the backlog need to recognize and provide for due process protections for all, and to avoid sacrificing these protections in the name of expediency.

2. How does executive action address this issue?

Schroeder Response: Secretary Johnson's November 20, 2014 Memorandum instructs ICE and CBP to examine the situations of both persons in custody and persons involved in pending removal cases to identify individuals that meet the memorandum's criteria for deferred action. To the extent that such individuals can be removed from the system during their period of deferred action, these steps will relieve some of the backlog pressure on the immigration judges, and should be a positive step in improving the processing of those cases that remain.

3. What further steps are needed through comprehensive legislative reform?

Schroeder Response: The steps taken in the bipartisan Senate immigration bill will definitely be steps in the right direction to improve the situation. Beyond this, I have not studied the details of the current immigration system to provide fine-grained suggestions for improvement. I will defer to my former colleagues at the Department of Justice who have been working on this and other immigration issues for years, and who I know are eager to collaborate with the Congress in constructing common sense measures in this area of immigration reform, as well as others.

Senate Judiciary Committee

*Hearing on "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform"*

**Questions for the Record**  
**Submitted by Senator Al Franken for**  
Elizabeth Shuler, Secretary-Treasurer of the AFL-CIO

**Ms. Shuler, in your testimony, you cite studies finding that the President's immigration action will boost our Gross Domestic Product by \$90 to \$210 billion over the next ten years and increase payroll tax revenues by \$22.6 billion over five years. Nonetheless, some people argue that adding approximately 5 million undocumented immigrants to our country's workforce would hurt the labor market in America.**

- 1. Are not a lot of the undocumented immigrants who will be affected by the President's immigration action working in the United States already, and doing so without paying taxes or passing criminal background checks?**

An estimated 8 million of the 11 million undocumented immigrants in the U.S. are currently working. A number of these workers will likely overlap with the estimated almost 5 million that will qualify for the new Deferred Action for Parental Accountability (DAPA) or expanded Deferred Action for Childhood Arrivals (DACA) programs. The DAPA and DACA programs will allow these individuals to come forward, pay a fee and submit to background checks in order to receive work authorization.

The Social Security Administration estimates about 3 million undocumented workers and their employers paid payroll taxes in 2010.<sup>1</sup> The DAPA and DACA programs will increase the number of workers and employers paying taxes and increase overall tax revenue by allowing qualifying individuals to obtain social security numbers.

- 2. Why would American workers benefit from these people coming out of the shadows and applying for deferred action?**

American workers will benefit from the new DAPA and expanded DACA program because it will allow millions of people to live and work without fear. When an employer can hire an undocumented worker with a wink and a nod and then fire them when they object to unpaid wages or unsafe working conditions, all workers suffer. DAPA and DACA work authorization will give workers a voice on the job and an opportunity to stand up to injustice without fear of deportation or being separated from their families.

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<sup>1</sup> Oakford, Patrick. *Administrative Action on Immigration Reform: The Fiscal Benefits of Temporary Work Permits*. Center for American Progress (Sept. 2014), 4.

**3. How would comprehensive legislative reform, such as the bill passed by the Senate last year, further help American workers?**

While DAPA and DACA is an important step, it is important to note that it only provides relief to a fraction of the undocumented population in three year increments. The programs will not eliminate the underground economy, nor cure the addiction of unscrupulous employers to cheap, exploitable labor.

Congress must still pass comprehensive immigration reform, like S. 744, and provide a permanent solution. While not perfect, the Senate bill included a roadmap to citizenship and key provisions that lift up and protect workers' rights. Our broken immigration system is an invitation for employer abuse, and it will continue to lower wages and working conditions for all workers until we finally pass meaningful immigration reform in this country.

Senate Committee on the Judiciary  
 Questions for the Record from Senator Grassley  
 To Ms. Elizabeth H. Shuler

1. Ms. Shuler, the AFL-CIO and other union groups have long opposed the H-1B program because of the impact it has on American workers. You and I would agree that all employers should have to recruit and hire Americans before they hire from abroad. I've argued, along with the AFL-CIO, that some companies are abusing this visa program in order to bring in lower skilled and cheaper labor. The Optional Practical Training program is an extension of the H-1B visa program. However, it doesn't have wage requirements or worker protections, making it worse for U.S. workers who must compete with foreign workers. Despite our concerns, however, President Obama decided to expand the OPT program. And, despite a GAO report saying that the program lacks oversight and students are abusing it, the President's executive actions make things worse. The administration's actions will incentivize more employers to use OPT to go around programs like the H-1B visa to hire cheaper labor. The longer foreign students are allowed to remain in the country, working under no rules, low wages and sub-par conditions, the less likely that legal visa programs will be used. Ms. Shuler, do you agree that the President's actions to extend the OPT program will hurt American workers?

First off Senator Grassley, I would like to thank you for continuing to champion H-1B and L-1 legislation with Senator Durbin over the years. H-1B and L-1 are in dire need of reform, not expansion. And employer claims that there is a STEM labor shortage are not supported by data<sup>1</sup>.

While the AFL-CIO strongly supports deferred action and efforts to bring portability into the H-1B program, I share your concerns with this aspect of the President's announcement and agree that the Optional Practical Training (OPT) program should not be expanded without at least requiring that employers meet prevailing or market wages.

As currently structured, the OPT program is a guest worker program disguised as a student program. We understand that employers would like to be able to hire STEM grads for as long as four years through this proposed expansion, stretching the duration well beyond reasonable boundaries for a training program. Since no data is collected and shared about this program, we have no clear picture of the wages and working conditions for OPT recipients, but there have been numerous reports of abuses. Exploitation is a foreseeable outcome of a program that lacks basic wage protections, includes absolutely no testing of the labor market, and even fails to require federal employment and income tax payments.

Employers should not be allowed to use guest worker programs to suppress wages by bypassing, displacing or undercutting US workers. The AFL-CIO would like to work with you to ensure that new workers will be hired based on real labor market need and afforded full rights and protections, and also that proposed changes respect the needs and interests of American workers.

<sup>1</sup> See Department of Professional Employees, AFL-CIO Fact Sheet- The STEM Workforce: An Occupational Overview (2014), available at <http://dpeaflcio.org/wp-content/uploads/STEM-Workforce-2014.pdf>.

Senate Committee on the Judiciary  
 Questions for the Record from Senator Grassley  
 Answers from Professor Jan C. Ting

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1. It was argued in the hearing that the President's executive action shifts the burden that is currently applied under federal immigration law – where an undocumented immigrant must demonstrate to the government that they are entitled to stay – to a burden where the government now has to demonstrate that an undocumented immigrant should be deported. Can you explain in more detail whether you view this as a mere change in executive priorities, or if this is in fact a clear change by the President of a duly-enacted law?

*Answer:* Most of the beneficiaries of the President's executive order probably entered without inspection (EWI) rather than overstaying the expiration of temporary visas after a legal admission. Those entering without inspection are deemed applicants for admission (INA Sec. 235(a)), and therefore have the burden of establishing they are "clearly and beyond doubt entitled to be admitted" to overcome a charge of inadmissibility (INA Sec. 240(c)(2)). If the President's executive order was interpreted as affording these aliens an "admission", then the burden of proof would shift to the government to establish that the admitted aliens are deportable (INA Sec. 240(c)(3)).

*It could be argued that the executive order beneficiaries will receive an "admission" defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." (INA Sec. 101(a)(13)). I would argue, however, that the statutory definition should not be interpreted as covering executive order beneficiaries, because the statute specifies that even aliens receiving formal parole under section 212(d)(5) "shall not be considered to have been admitted." Because the executive order, unlike parole, is not authorized by statute, and I would argue is in fact contrary to statute specifying that such aliens "shall be detained for a (removal) proceeding" (INA Sec. 235(b)(2)(A)), it should not be interpreted as affording an admission which even a formal parole would not provide.*

2. Professor Schroeder insisted that the approximately 32,000 individuals denied "deferred action" under the DACA program evidences the case-by-case implementation of that program, such that it is consistent with the nature of prosecutorial discretion. Do you agree or disagree with this observation, and why?

*Answer:* I consider any claim of case-by-case implementation of the DACA program, like the Office of Legal Counsel's claim that the latest executive action will also be "case-by-case", to be legal window dressing designed to disguise what amounts to legislative action as mere prosecutorial discretion. The claim that DACA is being implemented case-by-case rather than as a quasi-legislative category is disproven by the high approval rate for DACA applicants and the minimal rejection rate.

3. Professor Schroeder supported the OLC memo's conclusion that the DHS was acting consistently with congressional policy in granting deferred action. This argument is based on the fact that Congress has made certain classes of aliens eligible for deferred action in past statutory enactments. Do you agree that because Congress has granted deferred action

eligibility to certain classes of aliens in the past that DHS may now do so as well to other classes of aliens?

*Answer: No, I do not agree. If anything, specific Congressional grants of deferred action should preclude any exercise of deferred action without Congressional action. In the Immigration Act of 1990, Congress established Temporary Protective Status as the "exclusive authority" of the executive branch to permit deportable aliens to remain in the U.S. on account of their nationality, rendering any prior deferred actions on account of nationality moot and irrelevant as precedent going forward.*

4. Some have argued that the President's action doesn't constitute a blanket approval of a large group of people because he articulated a series of factors which, if satisfied, would entitle an individual to the deferral of a deportation action. They argue that this determination, based on an analysis of the factors, would constitute a case-by-case inquiry, rather than a blanket exemption from the law. Do you agree?

*Answer: No, I do not agree. Articulating a series of factors which entitle an alien to specific immigration benefits is a legislative function and beyond the scope of executive action. Checking off the factors in each case cannot transform an improper and unconstitutional executive action into a mere exercise of prosecutorial discretion on a case-by-case basis.*

5. In May 2013, the president of the National Citizenship & Immigration Services Council, the union representing at least 12,000 United States Citizenship and Immigration Services (USCIS) adjudications officers and staff, publicly declared that DACA – the model for the President's new deferred-action program – was reporting a 99.5% approval rating for all undocumented alien applications for legal status. He further warned that "DHS and USCIS leadership have intentionally established an application process for DACA applicants that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers...to stop proper screening and enforcement, and guarantee that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."

- a. How can we be sure that that the President's new and much larger deferred action program will be implemented on a case-by-case basis?

*Answer: We certainly cannot be sure that the new and larger deferred action will be actually implemented on a case-by-case basis. Based on the DACA precedent, it would be reasonable to assume that the new program will also be implemented categorically, and not case-by-case. Merely asserting case-by-case implementation cannot transform improper and unconstitutional legislative action by the executive branch into mere prosecutorial discretion.*

- b. How can we trust that deferred action will not harm national security – when the President's prior unilateral action on immigration has been characterized by such blanket approval, fraud, and lax procedures?

*Answer: The remarkably high approval rate for the DACA deferred action raises serious concerns over whether national security concerns are being properly considered in that program, and whether such concerns would be and could be addressed in the much larger deferred action most recently announced by the President.*

6. Ms. Shuler testified that the President's executive action was merely a prioritization of "limited administrative resources." Do you agree that the President's actions are nothing more than the administration prioritizing its actions and resources?

*Answer: I believe that Ms. Shuler was merely echoing the claim of the administration in support of its characterizing its large-scale deferred actions as mere case-by-case prosecutorial discretion. The administration is not merely prioritizing. It is in fact legislating by specifying categories of aliens who will qualify for immigration benefits regardless of the availability of resources which might be applied in individual cases.*

7. When President Obama addressed the nation to unveil his planned executive actions, he declared that "Congress has failed." Does inaction by Congress on a policy matter provide a President with the constitutional authority to act unilaterally on that issue? And if so, what are the limits to what a President can do under the Constitution?

*Answer: Under our Constitution, the President does not acquire legislative powers upon his own finding of Congressional inaction on a presidential priority. Congress is entitled to disagree with the President on the substance or priority of any matter without yielding its constitutional powers to the President. But if the President is not restrained in his use of sweeping executive orders in these circumstances, then the constitutional role of Congress and the system of checks and balances is endangered. It would then be difficult to define limits on what a President could do under the Constitution without congressional action.*

8. Since the President's announcement, many commentators have stressed the dangerous new precedent that the President is setting for future executive overreach. For example, David Rivkin and Elizabeth Price Foley have said, "The OLC's memo endorses a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future presidents can unilaterally gut tax, environmental, labor obscurities laws by enforcing only those portion with which they agree." Also, the Heritage Foundation has said that President Obama is "establishing a dangerous precedent that violates fundamental principles of separation of powers—principles that protect our liberties and maintain a government of laws and not of men."

- a. Do you agree with these statements on the President's actions?

*Answer: Yes, I agree with and share the concerns expressed in the quoted statements.*

- b. What precedential consequences can you foresee this executive action having on executive actions by future administrations?

*Answer: If no way can be found to restrain these executive actions, I foresee a dramatic shift in power and importance from the Congress to the President. Why do we even need a Congress if the President can exercise legislative power when the Congress fails to comply with his requests?*

- c. In light of the President's action, what sort of deterrent effect – if any – will our existing immigration laws have on individuals seeking to enter the United States unlawfully? What impact does his action have on the rule of law?

*Answer: Those contemplating illegal immigration to the U.S. in violation of our laws may be poor, but they are not stupid. They do cost-benefit analysis to determine what's in their best interest just like everyone else. So if we want less illegal immigration, we have to raise the costs, through more enforcement, and reduce the benefits of illegal immigration. But if we want more illegal immigration, we should lower the costs and increase the benefits, exactly as the President has announced he will do through his executive actions.*

*Immigration laws can only be enforced by deterring attempts at illegal entry. Mere border enforcement alone is not enough, no matter how much money is appropriated and spend. The numbers of potential illegal immigrants can overcome any amount of border security alone. Without deterrence through interior enforcement, the increased benefits of illegal immigration through deferred actions such as announced by the President insures that the numbers of illegal immigrants will increase in the future, and that our immigration system will be in permanent dysfunction.*

9. The President has promised the American people that the persons who enter the deferred action program will be required to pay back taxes, and to pay future taxes. You testified that under the President's executive action, persons under the deferred action program may be eligible to receive the earned income tax credit (EITC), which means that many will receive tax credits, rather than actually pay taxes. Further, an article in *USA Today* on December 12, 2014, titled "Fact Check: No Back Taxes in Immigration Action," says that the Johnson memos have no provision requiring back taxes, and many immigrants fall into such a low income bracket that they won't actually owe any taxes now or in the future. Under your reading of the President's executive action, will persons seeking and obtaining deferred action be required to pay back taxes?

*Answer: Everyone who earns income in the U.S. is subject to U.S. income tax law. But that law does not require everyone to pay taxes. Low income individuals may not have enough taxable income to owe income taxes. And they may qualify for refundable tax credits like the earned income tax credit (IRC Sec. 32) and the child tax credit (IRC Sec. 24), the main beneficiaries of which are low-income parents with children. As I testified, the IRS has ruled that when individuals acquire a social security number for the first time, they may apply retroactively for the earned income tax credit for prior years when these individuals were working illegally without a social security number.*

*Let's estimate that half the 5 million illegal alien beneficiaries of the President's latest executive action may qualify for refundable tax credits. And let's estimate that the average*

*tax refund for each of these individuals will be \$4,000 for the first year they work with social security numbers, including refunds for prior years. That would amount to tax refunds to illegal aliens totaling \$10 billion in the first year. I've been informed that certain policy analysts view this amount as economic stimulus from the U.S. Treasury and expect positive economic impacts for their clients from this increased government spending.*

10. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

*Answer: I wish to add the following to my written testimony on the issue of advance parole, and how the administration plans to use it to provide a pathway to citizenship for the beneficiaries of the most recent executive order:*

*The reason the Administration wants to and will abuse the parole statute for the newly deferred 5 million illegal aliens is to provide them with a pathway to a green card and citizenship, contrary to the ardent representations that the deferred action is not a pathway to citizenship. Here is how that's going to work:*

*First, unlike most of the DACA beneficiaries, most of the new deferred action beneficiaries will eventually qualify as immediate relatives of US citizens, since most qualify for deferred action because they are parents of US citizens or permanent residents who will become US citizens.*

*Since immediate relative visas are not limited numerically, there's no waiting list, and they are immediately available. Any alien who qualifies for an immigrant visa which is currently available can apply for and claim it at a US consulate abroad. But if the deferred action beneficiaries try to do that, most would be barred from re-entering the U.S. because their illegal presence in the U.S. for more than one year makes them inadmissible for ten years upon their departure from the U.S. (INA Sec. 212(a)(9)(B)(i)(II)).*

*There is a statute that allows some aliens who are in the U.S. already to claim available immigrant visas in the U.S., without departing from the U.S. or triggering the statutory 10-year inadmissibility bar. But that statute providing "adjustment of status" is only available to aliens "admitted or paroled" into the U.S., and those who have entered illicitly without inspection do not qualify. (INA Sec. 245(a)).*

*Here's why advance parole is the magic bullet which clears the pathway to citizenship for most deferred action beneficiaries when they qualify as immediate relatives:*

*The Board of Immigration Appeals, a branch of the U.S. Department of Justice, ruled in 2012 in Matter of Arrabelly, that despite prior illegal presence in the U.S., an alien departing from the U.S. with an advance parole allowing re-entry is not a departure under INA Sec. 212(a)(9)(B)(i)(II) which would trigger the 10-year inadmissibility bar.*

*And, upon returning to the U.S. with an advance parole, the alien having been "paroled" now magically satisfies the threshold requirement of Section 245 and qualifies for adjustment*

*of status, and can claim the immediate relative visa or any other immediately available visa without leaving the U.S.*

*So the representations of the Administration that the deferred action initiative does not provide a pathway to citizenship will likely be false for many if not most of the beneficiaries of the latest deferred action through use of advance parole.*

**The Alpha and the Obama: The legal memo backing his immigration order is a political rush job.**

24 November 2014

The Wall Street Journal

ABC's George Stephanopoulos asked President Obama on Sunday to respond to his own critique of his unilateral immigration order, playing back a 2013 clip in which he declared that "I'm not the emperor of the United States. My job is to execute laws that are passed." He simply talked past the question.

Perhaps Mr. Obama didn't cite the official legal justification for his U-turn because it's too embarrassing. Now that we've studied the legal memo his government issued to support his order, his abuse of power looks even worse. Rather than honest analysis, his attorneys have conjured an opinion more political than legal that lets him pretend that creating de facto legal status and work permits for millions of undocumented immigrants is legitimate "prosecutorial discretion."

The executive branch inevitably makes case-by-case judgments about how and which laws to enforce, or life would be intolerable in so legalistic a society. Resources are also limited, so everyone who crosses the border illegally or overstays a visa can't be deported.

The problem, as the Justice Department's Office of Legal Counsel (OLC) concedes in the 33-page document, is that "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite laws to match its policy preferences" or apply "set formulas or bright-line rules." Yet Mr. Obama is making precisely such a rewrite, by exempting whole categories of people and extending federal benefits that they aren't entitled to by statute.

By recognizing that there is no categorical exemption, the OLC is implicitly admitting that Mr. Obama is stretching prosecutorial discretion beyond legal norms. Its evidence for saying the policy is proper is that immigration officials will still be able to deport someone if they want to, and Mr. Obama's formulas are really "open-ended" to merely inform their decision-making. As a practical matter, which low-level immigration officials will defy the White House? Great career move.

Nor does the White House offer any criteria for rejecting a deferral application. The truth is that declining to deport individuals is not the same as a blanket suspension of all enforcement to effectively decriminalize—a policy choice that belongs to Congress through normal legislation.

David Rivkin and Elizabeth Foley describe other OLC contradictions nearby, but other details suggest the opinion's political nature. The OLC, for example, gestures toward

immigration laws but quotes no specific statutory language. The opinion also fails to cite an OLC precedent.

This is highly unusual because OLC is historically incrementalist, building on its jurisprudence across Administrations of both parties. The office is charged with interpreting the law for the executive branch and often explores the outer boundaries of presidential power. In this case OLC simply blesses Mr. Obama's general nonenforcement policy as "not per se impermissible."

The OLC also observes that enforcement discretion, like a prosecutor's decision not to indict, "is presumptively immune from judicial review" under Supreme Court precedents. The memo notes that because the deportation-waiver review is funded through user fees, Congress can't stop it through the power of the purse. Both claims are false, but they are also irrelevant to the legal merits. The OLC is simply informing Mr. Obama that no one can stop him, as in an advocacy brief. We'll see.

These are the kind of errors that normally scrupulous lawyers make under deadlines or political pressure. The OLC memo reveals that the White House did not submit formal legal questions until Wednesday, Nov. 19, and the OLC drafted the opinion the same day. The details of the new program weren't complete and submitted to the Justice Department until Monday. The OLC published the memo on Thursday, Nov. 20.

We wouldn't be surprised if some West Wing minion read our editorial last Monday "The Missing Immigration Memo," panicked, and rushed one out. Mr. Obama's political calculation—in keeping with his lawlessness on health care, drug policy and the rest—seems to be that he'll dispense with laws or parts of laws that displease him and dare Congress to challenge him. Republicans can and should take the dare.

Meantime, where are the Imperial Presidency scolds of the George W. Bush era hiding? Mr. Obama's conception of executive power borrows the famous adage of the gilded-age railroad baron: "Whatever is not nailed down is mine. What I can pry loose is not nailed down." This President's damage to democratic order and the rule of law will take a long time to repair.



**Statement for the Record**

**U.S. Senate Committee on the Judiciary**

**"Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform"**

**December 10, 2014**

Founded in 1982, the National Immigration Forum (Forum) works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

**Introduction**

The National Immigration Forum (the Forum) thanks the Committee for holding this important hearing on the President's executive action and the need for broad common sense immigration reform. To the extent members may distrust the President or otherwise disagree with various executive actions taken by the Administration as they relate to immigration, we urge those members to remember immigration is about people not politics. While the President's executive action will help to keep many families together, allow more people to naturalize, assist employers by expanding the pool of workers, and make our communities safer, we urge the members of the Committee not to lose focus on the on-going need to fix our broken immigration system through broad reform that includes an earned path to citizenship.

**Executive Action Keeps Families Together**

Too often with our current broken immigration system, families are torn apart or must wait a long time, sometimes decades, to reunite. For fiscal year 2013, Immigration and Customs Enforcement reported that it had removed nearly 368,000 persons, and is now well over 2 million for President Obama's presidency. ICE is also now funded to hold 34,000 individuals in detention at any given time. Over the course of fiscal year 2013, ICE reported that it detained more than 441,000 individuals -- an all-time high. The President's executive action will have the important effect of keeping families together.

For example, one man whose family will benefit from executive action is a 30-year old, evangelical Christian and DACA recipient, who lives in Colorado. He and his sister were brought to the U.S. from Mexico in 1990 when he was five years old and she was only six months. He was offered a full scholarship to attend college but the scholarship was taken away because he was undocumented. He was able to attend college with the support of a Christian leadership and

development scholarship and eventually graduated from college. He is currently working full time and recently bought a home.

His mother has been working in housekeeping and cleaning for the last 24 years, and she and his step-father have three U.S. citizen daughters, all under the age of 18. They will be eligible for the new Deferred Action for Parental Accountability (DAPA) program. Once receiving DAPA, they will no longer live in fear that they will be separated from their children, will have additional stability because they will no longer need to move their family every few years, and will be able to obtain a driver's licenses.

Also, Maria, a mother of four U.S. citizen children ranging in age from 6 to 15 years old, will be eligible for DAPA. Seeking work, she immigrated to the United States without papers when she was 15 years old, traveling with her boyfriend. They were soon married, and Maria gave birth to her first child. Years later, her husband grew violent and physically abusive. She never reported him to the police because she was afraid she would be deported away from her children, instead she put up with the abuse for years. When it became too terrible to bear, she took her four children and ran away, trying to get as far away from her husband as possible. She ended up in Spartanburg, South Carolina where a woman's shelter helped her hide, and then start a new life.

Over the next few years, Spartanburg became their home. They joined a multi-ethnic church community where Maria excelled in her English. They made community with people from all walks of life. Maria provided for her family by cleaning houses, and the four children grew up and thrived in the public school system where they picked up many friends and even acquired southern accents. Although they were free from the fear of abuse at home, the entire family remained in constant fear that Maria would be deported away from the family. This fear hit the youngest children especially hard. They complained of constant nightmares that after everything they had been through to get to a safe life, their mother would be taken away and they would be "given away to strangers." Maria battled constant fear and anxiety as she drove to work and school every day, knowing that any routine traffic stop could leave her children orphaned. Aware of their situation, fellow church-members prayed constantly for them and even talked about who in the church could take in some or all of the children in the event that Maria was deported.

Maria has been in the U.S. for 17 years so longer than she lived in Mexico, speaks English, pays taxes, and contributes in many ways to her community, but has no option to change her status. Executive action will allow Maria and her children to live without fear for the first time in so many years. Maria will be able to establish and grow her business in ways she was not able to, she will be able to volunteer in her children's schools and be more present as a mother, and she will be able to drive without anxiety. Everyone around Maria and her children are relieved knowing that this family can stay together and participate more fully in the community.

These are just two representative stories of families who stand to benefit from executive action but who still need Congress to pass immigration reform to obtain a permanent solution to their problem.

#### **Executive Action Allows More Immigrants to Naturalize**

Today, there are approximately 8.8 million people eligible to apply for naturalization, but many do not because they are unable to afford the high \$680 fee. However, now as part of the President's executive action, individuals will be able to pay for their naturalization application with a credit card, making the fee more accessible.

For example, Maria is an employee at a hotel in San Diego that works with the Forum's New American Workforce program which works with businesses to assist their eligible immigrant employees with the citizenship process. Maria has been a legal permanent resident since 2001 but has not applied for citizenship due to the high \$680 application fee. She has all her paper work filled out and is ready to apply. She currently does not have a credit card, but plans to obtain one in order to apply for naturalization once the USCIS implements the ability to pay the fee by credit card.

In addition, Eileen McKee, the Welcome Center Director at Westchester Community College, believes this change will help the students they serve. Westchester Community College is located in Westchester, New York and enrolls approximately 13,000 full and part-time college students and an additional 11,000 continuing education students.

Westchester Community College provides accessible, high quality and affordable education to meet the needs of its diverse community. Westchester Community College is committed to student success, academic excellence, workforce development, economic development and lifelong learning.

One of the college's most notable investments in diversity is its Gateway Center, which opened in 2010. The Gateway Center provides targeted programs for motivated immigrant and international students, who study side-by-side with U.S. born students, gaining the education they need for meaningful careers while building intercultural understanding. It houses the college's business programs, Professional Development Center, modern language programs, International Student Services, English Language Institute, Community College Consortium for Immigrant Education Volunteer Center, and Gateway to Entrepreneurship programs. Each year, about 5,000 students from over 90 countries take classes in the College's English Language Institute.

Since 2010 when Eileen became the Director of the Welcome Center, she has seen 250 people go through citizenship preparation classes with individuals being approved for citizenship at a 96% rate. She knows some do not apply because they cannot afford the \$680 application fee. Eileen believes the new option to pay with a credit card will open up additional avenues for people to pay and encourage people to enroll in their citizenship preparation classes. She also expects that executive action will result in more people enrolling in their English as a second language classes once they obtain work authorization.

The Forum supports efforts like these that will help to increase the number of people naturalizing because it will produce citizens who are fully invested and able to participate in and contribute to all aspects of life in the U.S.

#### **Executive Action Will Help Employers**

Executive action will allow some businesses to hire the workers they need and ensure they are not undermined by unscrupulous competitors who exploit undocumented workers. The rights of American workers are undermined when there are so many unauthorized workers in the workforce fearful of deportation; unscrupulous employers are able to use this fear to limit the rights and undercut the wages of all workers. We hear regularly from business executives that they have jobs that go unfulfilled or are jobs that only immigrants apply for.

One of these business executives is Marty Bailey, the President of Manufacturing at American Apparel, an American clothing manufacturer, distributor and retailer based in California with 6,000 employees in the Los Angeles area. In 2009 as the result of an ICE audit, American Apparel

was forced to let 1,800 workers go. Many of American Apparel's immigrant labor force see apparel work as a career, and their skills are therefore, invaluable and hard to find. Marty believes the President's executive action will open up doors for American Apparel to fill some difficult positions. Marty Bailey and American Apparel hope that Congress will act to put in place the permanent reforms our broken immigration system so desperately needs.

In addition, a human resources director at a hotel in San Diego believes that executive action will help the hotel with finding employees for hard-to-fill vacant positions particularly in housekeeping. The director noted that they had three to six vacancies for over a year for room attendants whose responsibilities are to clean hotel rooms. They need more eligible workers for those jobs and have had undocumented immigrants apply for those positions who have had to withdraw their applications.

While executive action provides some assistance to businesses in filling their jobs, it does not address persistent labor shortages in agricultural, service and other industries. America's economy and demographic shifts demand more workers, while our economic ties to other countries provide the economy with reserves of willing workers desiring nothing more than honest work and honest pay. However, there are very few visas available for immigrants to come here and work if they don't have specific skills. Meanwhile, our economy has been absorbing millions of undocumented workers. Only Congress can enact commonsense immigration reform that will fully and permanently address our nation's economic and workforce needs.

#### **Executive Action Will Make Our Communities Safer**

Executive action will make our communities safer, fostering trust between law enforcement and immigrant communities and helping law enforcement focus on true threats. Recently, \_\_\_\_\_ police chiefs and sheriffs submitted a letter to the members of this Committee making the points outlined below.

Executive action will aid effective community policing efforts. All too often, immigrants resist calling authorities or otherwise cooperating with law enforcement out of fear that their cooperation may lead to being caught and removed from the country. Undocumented immigrants may be afraid to call authorities when criminal activity is happening in their neighborhoods, when they are victims or witnesses of crime, or when someone is sick or injured and needs an ambulance. For law enforcement officers charged with public safety, this situation creates a breeding ground for criminal enterprises and undermines safe communities. By bringing otherwise law-abiding immigrants out of the shadows and reassuring them that their cooperation with law enforcement will not separate them from lives and families in the United States, executive action builds trust, roots out crime, and improves public safety within our communities.

Executive action will allow law enforcement agencies to redirect their efforts away from otherwise law-abiding undocumented members of the community and towards truly dangerous criminals. By further prioritizing the removal of dangerous criminals over those with longstanding ties to the community who do not threaten national security or public safety, executive action allows law enforcement to focus on confronting the real threats to our communities, including criminal organizations and gangs. While executive action provides some benefits, it does not replace the need to pass legislation with permanent reforms to our immigration system.

The letter is attached as Attachment A.

#### **Congress Needs to Pass Broad Immigration Reform**

The current conversation around immigration reform is different. In the past two years, an alliance of conservative faith, law enforcement and business leadership has come together to forge a new consensus on immigrants and America. In 2013, the National Immigration Forum launched the Bibles, Badges and Business for Immigration Reform Network (BBB) to achieve the goal of broad immigration reform. In the past two years, targeting key states through a combination of field events, media coverage and direct advocacy BBB and its partners have had more than 700 meetings with Members of Congress and their staffs and held more than 500 events in key congressional districts across 40 states in the past year.

The American people want – and deserve – better immigration policy. Dozens of national polls over the last year show overwhelming support for solutions that include, in addition to smart enforcement, functioning legal channels for future immigrant workers and families. The polls also show broad support for tough but fair rules allowing undocumented immigrants to remain in the U.S. to live and work and – provided they get right with the law – eventually have an opportunity to apply for earned U.S. citizenship.

Any look at the nation's immigration policy reveals a system greatly in need of reform. Outdated policies keep American families separated from loved ones in other countries. Employers, faced with an insufficient pool of legal workers, increasingly rely on hard-working but unauthorized workers. Immigrants trekking through remote desert territory to gain entry to the U.S. die from the heat and lack of water. Our enforcement personnel, who should be focused on security threats and criminals, instead are chasing farmworkers, nannies, mothers and fathers. The frustration of the American people grows as politicians remain unable to solve the problem.

Reform should meet the following principles:

- **It Must Restore the Rule of Law and Enhance Security:** Enforcement only works when the law is realistic and enforceable. A comprehensive overhaul will make our immigration laws more realistic, permitting an intelligent enforcement regime that should include smart inspections and screening practices aimed to keep out those who intend to harm us, fair proceedings, efficient processing, and strategies that focus on detecting and deterring terrorists and cracking down on criminal smugglers and law breaking employers. Such a system will better enable the nation to know who is already here and who is coming in the future, and will bring our system back into line with our tradition as a nation of immigrants and a nation of laws.
- **It Must Give Undocumented Workers a Chance to Get Right by the Law:** It does not make sense to try to arrest, jail, and deport 12 million people who have integrated into our workplaces and communities. If we let these immigrants get on the right side of the law, they will. When they do, we will be able to run background and security checks on them. If no problems are uncovered, those with clean records should be allowed to continue working and living here.
- **It Must Reunite Families:** Immigration reform will not succeed if public policy does not recognize one of the main factors driving migration: family unity. Outdated laws and bureaucratic delays have undermined this cornerstone of our legal immigration system. Those waiting in line should have their admission expedited, and those admitted on work visas should be able to keep their nuclear families intact. Reform should also ensure that in the future, more legal opportunities are provided for the immigration of close family

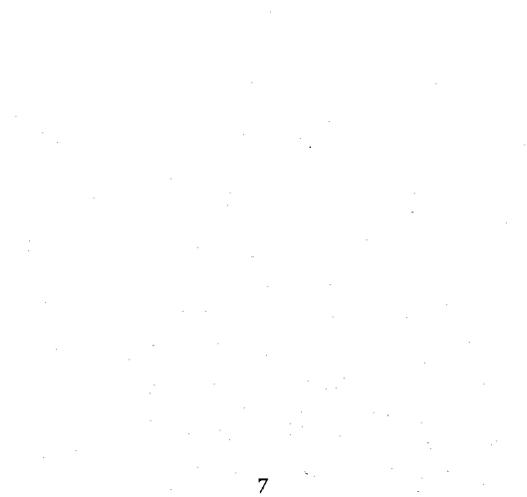
members, so they are not forced to wait years and even decades to reunite with loved ones living in the U.S.

- **It Must Promote Citizenship and Civic Participation and Help Local Communities:** Immigration to America works because newcomers are encouraged to become new Americans. It is time to renew our nation's commitment to the full integration of newcomers by providing adult immigrants with quality English instruction, promoting and preparing them for citizenship, and providing them with opportunities to move up the economic ladder. The system should also offer support to local communities working to welcome newcomers.

### **Conclusion**

There is no doubt that the President's executive action will help some immigrants and employers, albeit only temporarily for most. While there is disagreement on whether the President should have acted, there should be no disagreement that the actions taken are no substitute for Congress passing broad immigration reform legislation. We urge this Committee, and all members of Congress to pass the necessary reforms to make our immigration system functional, workable and humane. Our immigration problem is a national problem deserving of a national, comprehensive solution.

# Attachment A



December 9, 2014

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We, the undersigned law enforcement officers and police department, recognize the need for commonsense reforms to remedy deficiencies in our broken immigration system. Although not a permanent fix, the recent executive reforms on immigration will make it easier for law enforcement to carry out our duties – encouraging immigrants to come out of the shadows and supporting community policing efforts. While no substitute for legislative action, the package of executive reforms is an important first step in improving the security of our borders, keeping families together, supporting businesses and workers, and promoting the safety of our communities.

By further prioritizing the removal of dangerous criminals over those with longstanding ties to the community who do not threaten national security or public safety, the executive reforms allow law enforcement to focus on confronting the real threats to our communities, including criminal organizations and gangs. Additionally, in ending the Secure Communities program and replacing it with the Priority Enforcement Program, the executive reforms will improve our relationship with our communities so that we are not being asked to hold people who the Department of Homeland Security does not have probable cause to remove.

The executive reforms also ease the burden on otherwise law-abiding immigrants and mixed families residing in the United States, extending deferred action to qualifying parents of U.S. citizens and legal permanent residents, as well as additional people brought to the U.S. as children. These changes will promote family unity while aiding community policing.

The current immigration system separates families and undermines trust and cooperation between police agencies and immigrant communities that is essential to community-oriented policing. All too often, immigrants resist calling authorities or otherwise cooperating with law enforcement out of fear that their cooperation may lead to being caught and removed from the country. Undocumented immigrants may be afraid to call authorities when criminal activity is happening in their neighborhoods, when they are victims or witnesses of crime, or when someone is sick or injured and needs an ambulance. For law enforcement officers charged with public safety, this situation creates the conditions for criminal enterprises which grow and undermine safe communities. By bringing otherwise law-abiding immigrants out of the shadows and reassuring them that their cooperation with law enforcement will not separate them from their lives and families in the United States, the executive reforms build trust, root out crime, and improve public safety within our communities.

While the executive reforms improve a broken immigration system, they can achieve only a fraction of what can be accomplished by broad congressional action. We continue to recognize

that what our broken system truly needs is a permanent legislative solution and urge Congress to enact comprehensive immigration reform legislation.

Sincerely,

Chief Richard Biehl  
Dayton Police Department  
Dayton, Ohio

Chief Chris Burbank  
Salt Lake City Police Department  
Salt Lake City, Utah

Sheriff Paul H. Fitzgerald  
Story County Sheriff's Office  
Nevada, IA

Sheriff William McCarthy  
Polk County Sheriff's Office  
Polk County, Iowa

Chief Ron Teachman  
City of South Bend Police Department  
South Bend, Indiana

Chief Michael Tupper  
Marshalltown Police Department  
Marshalltown, Iowa

City of Madison Police Department  
Madison, Wisconsin

December 9, 2014

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Nevada, Iowa

Chief J. Thomas Manger  
Montgomery County Police Department  
Gaithersburg, Maryland

Sheriff William McCarthy  
Polk County Sheriff's Office  
Polk County, Iowa

Chief Ron Teachman  
City of South Bend Police Department  
South Bend, Indiana

Chief Michael Tupper  
Marshalltown Police Department  
Marshalltown, Iowa

City of Madison Police Department  
Madison, Wisconsin

\*signatories updated 12/10/2014



WRITTEN STATEMENT OF  
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

**“Keeping Families Together: The President’s Executive Action On Immigration And The  
Need To Pass Comprehensive Reform”**

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

**ACLU Washington Legislative Office**  
Laura W. Murphy, Director  
Joanne Lin, Legislative Counsel  
Christopher Rickerd, Policy Counsel

## I. Introduction

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The ACLU submits this statement to the U.S. Senate's Committee on the Judiciary for its hearing: "Keeping Families Together: The President's Executive Action On Immigration And The Need To Pass Comprehensive Reform." This statement aims to provide the Committee with an appraisal of President Barack Obama's executive actions on immigration, which were announced on November 20, 2014. The immigration laws contain broad discretion for the executive to refrain from enforcement. The Supreme Court has repeatedly recognized this authority, most recently in *Arizona v. United States*.<sup>1</sup> The immigration laws contain broad discretion for the executive to make specific enforcement decisions.<sup>2</sup>

This statement highlights the stories of specific individuals who will benefit from the President's announcement to expand the Deferred Action for Childhood Arrivals ("DACA") program and to extend deferred action to the parents of U.S. citizens or lawful permanent residents through the Deferred Action for Parent Accountability ("DAPA") program.

In 2012 the Obama administration implemented DACA<sup>3</sup> which has resulted in over 700,000 individuals coming forward, obtaining work permits, and gaining temporary protection from removal. Under the DAPA initiative and new DACA improvements, an estimated 4.4 million

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<sup>1</sup> 567 U.S. \_\_\_, 132 S. Ct. 2492 (2012). The Court noted that: "A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." See also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) ("at each stage" of the "initiation or prosecution of . . . the deportation process," "the Executive has discretion to abandon the endeavor"; referring to deferred action as one aspect of that discretion).

<sup>2</sup> Congress has codified certain forms of administrative relief, such as parole, INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), and has acknowledged the existence of others, such as deferred action, see, e.g., INA § 204(a)(1)(D)(i)(II), 8 U.S.C. § 1154(a)(1)(D)(i)(II).

<sup>3</sup> Memorandum from then-Department of Homeland Security Secretary Janet Napolitano, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Jun. 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

undocumented immigrants<sup>4</sup> will have the opportunity to come out of the shadows, pay taxes, support their families, and contribute to their communities without fear of immediate deportation.

Under DAPA, undocumented parents of U.S. citizens or lawful permanent residents, who have lived in the U.S. since January 1, 2010, will be able to apply for a work permit after undergoing a criminal background check, and live free from deportation on a temporary basis.<sup>5</sup> As DHS has made clear, the deferred action protection will be temporary—granted in three-year intervals—and “does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.”<sup>6</sup> In addition, the President announced expansions of the DACA program, which will benefit about 270,000 individuals.<sup>7</sup>

Although the President’s actions are not a complete solution to the problems plaguing our immigration system, the ACLU supports the President for taking necessary action to restore some fairness to our broken immigration system, and to place limits on the devastating deportation machine that has torn apart countless families for decades. Now, millions of people who have lived under the daily threat of deportation for years can finally breathe a sigh of relief.

## II. Stories of DAPA Recipients

In the immediate aftermath of the President’s announcement on November 20, 2014, ACLU affiliates around the country documented the following cases of individuals who plan to come forward and seek deferred action in 2015. The cases include the stories of immigrants from Latin America and Asia. Here are some of their stories:

### Estela

- Estela arrived in the U.S. from Mexico in 1988 – 26 years ago. She has two daughters: one who is a U.S. citizen and is attending college, and another who was granted DACA and now works at the ACLU. Her family had lived in a rural part of Oaxaca, Mexico. Her father was verbally and physically abusive to both her mother and her siblings. It was understood that women had to be subservient to the men in the family. When Estela became pregnant, her family turned their back on her and her child. Fearing that her life would never improve and that her daughter would face the same obstacles, Estela decided

<sup>4</sup> The White House estimated that “nearly 5 million undocumented immigrants” would be impacted. See White House Fact Sheet, “Immigration Accountability Executive Action” (Nov. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

<sup>5</sup> Memorandum from Department of Homeland Security Secretary Jeh Johnson, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” p. 4 (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

<sup>6</sup> *Supra* note 3, p. 2.

<sup>7</sup> Elise Foley, *Obama Moves To Protect Millions From Deportation*, Huffington Post (Nov. 20, 2014), available at [http://www.huffingtonpost.com/2014/11/20/obama-immigration-plan\\_n\\_6178774.html](http://www.huffingtonpost.com/2014/11/20/obama-immigration-plan_n_6178774.html).

to run away to California. Since arriving to the U.S., Estela has volunteered at her daughters' schools despite working long hours. She has learned English and wants to become a professional tailor now that she can apply for a work permit. She feels happy to be able to step out of the shadows and to finally live without fear of being deported.

**Bibiana**

- Bibiana left Mexico and entered the U.S. 10 years ago. She is married with two U.S. citizen children. Her family owns property in Texas, and she and her husband pay their taxes. Bibiana has worked in hotels and restaurants and has been self-employed selling beauty products. Bibiana is a neighborhood activist and a member of the Parent-Teachers Association. She is also an ACLU volunteer and a member of the Rio Grande Valley Equal Voice Network.

**Magaly**

- Magaly has lived in the U.S. for 10 years. She has 3 U.S. citizen children and a teenage daughter who is a DREAMer. The family lives in Texas. Magaly has worked cleaning houses and has worked in hotels and restaurants; at times she has had to work two jobs to support her children. She has paid her income taxes. Magaly is an active member and volunteer of the ACLU, Texas Rio Grande Legal Aid, and Community Development Corporation of Brownsville.

**Maria**

- Maria is the mother of a legal permanent resident. She arrived to the U.S. from Argentina in 2001 with her 9-year-old son and husband after a big economic crisis in their country. The family moved first to New Jersey and then eventually settled down in North Miami Beach, where they currently reside. Since moving to the U.S., Maria's son has gone to college and, after marrying his high school girl friend, became a legal permanent resident. For the past 11 years, Maria has worked as a housecleaner and babysitter of one family. Maria is also an activist for immigrants' rights, who now runs her own organization, "United Families." When movement around the DREAM Act began, Maria joined in as part of DREAMers' MOMS and then also worked to stop an Arizona-type anti-immigrant law in Florida. Maria has met with the staff of at least five different Members of Congress and has participated in numerous protests.

**Anita**

- "My name is Anita, and I have resided in the United States for the past 25 years. At the age of 3, I arrived from Pakistan in Los Angeles in 1989 and eventually settled down Broward County, Florida. My family who reside in the United States includes my mother, my brother, my sister, my daughter, uncles, aunts and cousins. My entire family including myself have paid taxes and worked here. All of my family members are legal residents or citizens, except for my mother who is also eligible for DAPA. I currently am a DACA

recipient. However, DAPA also applies to me as well since I have a two-year-old child who is a US citizen.”

**Bertha**

- Bertha arrived from Nicaragua when she was 14 years old and currently resides in Florida. After coming to the U.S., Bertha had a child, who is now a college student. Since residing in the U.S., Bertha has been paying taxes and working to repair air conditioners and to clean houses. She has worked in the same house for the past 5 years.

**Andrea**

- Andrea arrived from Argentina in 2000 and currently lives in Florida. She has lived in the U.S. for 14 years. Andrea has two DACA-recipient daughters as well as 9-year-old U.S. citizen daughter. Until recently, Andrea was working in the real estate business supervising 10 people, but the company closed. As a result, she lost her job and is currently a stay-at-home mother and is involved in immigrants’ rights activism. Her husband supports the family with his small business, a demolition and furniture delivery company with 3 employees, and the family pays taxes. Andrea has stated that her daughters feel like Americans, not Argentines.

**III. Conclusion**

The ACLU continues to urge Congress to pass legislation that provides a permanent path to citizenship for all aspiring citizens who contribute to our communities. In the absence of such congressional action – and in light of stories such as these and thousands more like them – the executive action of the Obama administration that enhances fairness in the existing deportation system is a welcome improvement.



Statement for the Hearing Record

Before the

Senate Committee on the Judiciary

“Keeping Families Together: The President’s Executive Action On Immigration and The Need to Pass Comprehensive Reform”

December 10, 2014

Chairman Leahy, Ranking Member Grassley, members of the Committee, on behalf of the National Council of Asian Pacific Americans (NCAPA) and our thirty-three national Asian Pacific American organizations, we thank you for holding this hearing highlighting the importance of family unification as we move forward with immigration reform.

We commend the President on his leadership to provide nearly 5 million immigrants and their families – including more than 400,000 Asian American Pacific Islanders (AAPIs) – with temporary relief from deportation. Many of these AAPIs immigrated to the United States to escape war and economic turmoil, find better opportunities, and reunite with their families. Now, with the expansion of Deferred Action of Childhood Arrivals and the creation of Deferred Action for Parent Accountability, hundreds of thousands AAPIs who lack status will not be sent back to a country where they have little or no family connection.

Despite these accomplishments, we are concerned about undocumented individuals with ties to the U.S., but who don’t have children who are U.S. citizens or lawful permanent residents (LPR) and are therefore ineligible for deferred action under DAPA. Our hope is that all young people and their parents may stay together without the fear of being separated.

Although we look forward to working with the White House Task Force on New Americans by providing input on modernizing our country’s current visa system, we are concerned that family visas will be less of a priority than employment visas. The current visa system has led to tremendous family visa backlogs. Asian Americans are disproportionately impacted by family visa backlogs. Over 1.8 million people in Asian countries have been waiting decades for a family sponsored visa. We hope that by modernizing the current system, millions of Asian immigrants will reunite with family members more quickly.

We are also concerned about how the enforcement priorities and prosecutorial discretion will impact Southeast Asian Americans and other communities. We would like to highlight the President's Executive Action was silent on updating detention practices. We also have concerns about the new Priority Enforcement Program, replacing Secure Communities, particularly in light of the newly revised Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The Guidance continues to have significant loopholes for discrimination at the border and in airports, and it does not apply to state and local law enforcement. We fully expect that efforts to improve border and interior enforcement will be handled with strong oversight and accountability to protect civil and human rights.

We are committed to working with the administration on the critical next steps of outreach and implementation, and it is now up to Congress to pass legislation that will permanently protect immigrants, reunite families, and return fairness and due process to our immigration system.



**Written Statement of Mee Moua  
President and Executive Director  
Asian Americans Advancing Justice | AAJC**

**Senate Committee on the Judiciary  
Hearing on: “Keeping Families Together: The President’s Executive Action On  
Immigration And The Need To Pass Comprehensive Reform”  
December 10, 2014**

Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”) is a national non-profit, non-partisan organization that works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Founded in 1991, Advancing Justice | AAJC is one of the nation’s leading experts on civil rights issues of importance to the Asian American and Pacific Islander (“AAPI”) community including: immigration and immigrants’ rights, affirmative action, anti-Asian violence prevention/race relations, census, language access, television diversity and voting rights. We appreciate this opportunity to submit a statement concerning today’s hearing on immigration.

Asian Americans are the fastest growing racial group in the U.S., currently making up about six percent of the U.S. population. Over sixty percent of Asian Americans are foreign born.<sup>1</sup> Our community members come to the U.S. in various ways – as students, family members, workers, or refugees and asylees. Dating back to exclusionary immigration laws of the late 1800s, the Asian American community has been and continues to be uniquely shaped by U.S. immigration laws. The Department of Homeland Security estimates that 1.3 million Asian Americans are undocumented. And nearly 1.8 million of the family members waiting in the backlog for family-based visas are in Asian countries.

The AAPI community stands to benefit significantly from President Obama’s executive action on immigration and AAJC applauds his leadership to help immigrants and our families. Nearly 500,000 AAPIs will benefit from relief through Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parental Accountability. These discretionary programs will allow some immigrants to live without fear of deportation and separation from their loved ones. With work authorization, they will be able to more fully contribute and suffer less workplace abuse and exploitation. With an expanded DACA program, many more immigrants brought here during their childhood will be able to continue their educations or enter the workforce.

<sup>1</sup> Asian American Center for Advancing Justice, *A Community of Contrasts Asian Americans in the United States: 2011* (citing the 2007-2009 American Community Survey) at 17. Available at: <http://www.advancingjustice.org/publication/community-contrasts-asian-americans-us-2011>.

Legal authority for the administration's actions is ample and it is grounded in the executive branch's power to enforce laws generally. Under the Immigration and Nationality Act, Section 103, 8 U.S.C. § 1103, Congress explicitly delegates authority to the Department of Homeland Security ("DHS") to determine how it will allocate enforcement resources and who it will prioritize for enforcement purposes. Since 1987, the DHS regulations have also recognized deferred action, describing it as "an act of administrative convenience to the government which gives some cases lower priority." 8 CFR § 274a.12(c)(14), added by 52 Fed. Reg. 16221 (May 1, 1987).

Moreover, courts have long expressly recognized the use of prosecutorial discretion or "non-priority status." See, e.g. *Reno v. American Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999); *Mada-Luna v Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987); *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976). This was reaffirmed most recently in *Arizona v. United States*, wherein the Supreme Court observed that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). In recent decades, both Republican and Democratic presidents have taken courageous actions to keep families together and to permit certain classes of immigrants to enter and/or remain in the United States. President Obama's recent actions simply follow earlier precedent.

Yet, even as we applaud the administration's recent policy changes, Advancing Justice | AAJC recognizes that many immigrants are still left without relief. Individuals with deep ties to our country but who do not have U.S. citizen or legal permanent resident children were not included in the deferred action programs. And too many Asian Americans will continue to wait years and decades to be reunited with close family members who are stuck in visa backlogs. We urge the administration to use its power to provide relief for these families.

The changes to enforcement priorities and prosecutorial discretion still leave many community members, including many Southeast Asian Americans who came as refugees, at risk for deportation and separation from their loved ones. We are also deeply concerned that the Department of Justice's new Guidance Regarding the Use of Race by Federal Law Enforcement Agencies still contains significant loopholes that permit discrimination at the border and in airports, and it does not apply to state and local law enforcement agencies.

Ultimately, the power to permanently improve and strengthen our entire immigration system rests with Congress. Executive action is necessarily limited in scope. Advancing Justice | AAJC strongly urges all members of Congress to focus their energy on passing fair and humane immigration legislation. We need immigration legislation now that will allow undocumented immigrants to obtain citizenship, reunite families quickly, and protect the civil and human rights of all immigrants. We reject enforcement-focused policies that terrorize border communities, encourage profiling by state and local



authorities, and incentivize detention and deportation without due process. Advancing Justice | AAJC pledges to work with all members of Congress who want to make positive changes to our immigration laws.





### **Stepping Out of the Shadows**

By Deisy Hernandez, Outreach Coordinator at ACLU of Nevada

My mother, Estela, and I arrived in the United States in 1988. I was two years old as she carried me in her arms across the Mexico-U.S. border. I was too young to understand what was happening, but my mom has told me many times why we left.

Before immigrating here, we lived on a small farm in a rural part of Oaxaca, Mexico. Her father, my grandfather, was a farmer, and we didn't always have enough to eat. She was 20 years old back then, and her family and my own father had abandoned her. She grew up in a home where my grandfather was abusive to her and her siblings. The women in her family were expected to become mothers and care takers, nothing more. She feared for herself and for me. She was afraid that we'd both be relegated to a life of poverty with little to no education. My mother dreamed of so much more for me and herself, and she knew that Oaxaca had very little to offer.

So we made the long journey to California, where I attended school and eventually graduated from a university. My mother also gave birth to my sister here, a U.S. citizen who is now in her third year of college. I became an immigrants' rights organizer in order to help other brave mothers, fathers, and children who came to this country to pursue something better. My mother has worked tirelessly since coming to the U.S. – volunteering at my school and learning English despite holding multiple jobs – and has been my driving force and inspiration.

In 2012, my life shifted, and I was finally able to work due to the Deferred Action for Childhood Arrivals program (DACA). Thanks to this temporary measure, I was able to pursue my dream job at the American Civil Liberties Union of Nevada. Although I was excited for this new chapter in my life, I felt like I was leaving my mother behind by moving from California to Nevada. However, after President Obama's executive action announcement, I can finally breathe easier, knowing my mother is safe from deportation due to the Deferred Action for Parental Accountability (DAPA) program.

Now it's my mother's time to step out of the shadows. My mother will benefit from DAPA in so many ways. Everyday things that others take for granted, like driving to the grocery store, will no longer scare her. She'll be able to travel the country to come visit me. She'll be able to work and safely demand a fair wage without fear of deportation.

DAPA is certainly not enough, but it's a stepping stone for many, like my mother, who deserve to have their humanity recognized and live a life free of fear.



**Statement of  
The Advocates for Human Rights**

**Submitted to the United States Senate  
Committee on the Judiciary**

**Hearing on Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform**

**December 10, 2014**

**Contact:**

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The Advocates for Human Rights is a nongovernmental, nonprofit organization dedicated to the promotion and protection of internationally recognized human rights in our home community and around the world. The Advocates for Human Rights has provided free legal representation to asylum seekers, investigated and reported on human rights violations, and engaged volunteers in building respect for human rights since 1983.

The United States is a nation of values, founded on the idea that all people are equal in rights and dignity, no matter what they look like or where they came from. These values are echoed in our obligation to respect the fundamental rights of all persons without discrimination, regardless of national origin, citizenship, or immigration status.<sup>1</sup>

International law recognizes that while the United States has the right to control immigration that right is tempered by its obligations to respect the fundamental human rights of all persons. With few exceptions, the United States may not discriminate on the basis of national origin, race, or other status. In designing and enforcing its immigration laws, fundamental human rights, including the right to family unity,<sup>2</sup> must be protected.

The United States' immigration system, while generous in many ways, is riddled with systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice. The United States, through the federal executive branch, has the authority and the obligation to address human rights violations, including through the issuance or updating of administrative guidance, policies, procedures, or regulations to ensure that they strengthen compliance with international human

rights standards. At the same time, the United States Congress must take steps to amend laws which violate human rights standards.

United States immigration policy fails, at nearly every turn, to respect the right to protection of the family and other fundamental human rights. For example, every year tens of thousands of parents of U.S. citizen children<sup>3</sup> are deported from the United States because U.S. law does not allow the consideration of family ties in most deportation cases. Individuals frequently are detained without regard to family ties. Thousands of family members languish in line for visas or with little hope of reunification following deportation.

Congress must take action on immigration to bring our laws into conformance both with our values and our human rights obligations. This includes restoring judicial discretion to immigration judges; providing a meaningful opportunity for parents facing deportation to make care-giving decisions and participate in child custody proceedings; allowing waivers for family reunification for people following deportation; sensibly revising the family-based immigration system to reduce long backlogs; and creating a legalization program that allows families now living in the United States to stay together.

While Congress must act to ensure U.S. law meets human rights standards, so to must the Administration. The President's November announcement that certain undocumented persons who have U.S. citizen or lawful permanent resident alien children will be a low deportation priority is a meaningful, if limited, step toward this compliance.

While the Administration's move to protect family unity is welcome, its decision to continue the detention of families fleeing to the United States in search of asylum is of grave concern. Just days before the announcement of administrative relief for undocumented Americans, the Administration reiterated its commitment to the imprisonment of families seeking asylum by confirming it plans to open the massive Dilley, Texas family detention center before the end of the year. This action not only violates the obligation to protect the family, but raises serious concerns about the rights to freedom from arbitrary detention and due process of law. The Administration's detention of families, deliberately designed to deter asylum seekers from seeking protection, also violates our obligations under the Convention and Protocol relating to the Status of Refugees.

Our immigration laws, policies, and practices must reflect our most deeply held values: that each of us is inherently worthy of dignity, fair treatment, and respect for human rights. Both Congress and the President must act to protect these values.

<sup>1</sup> International Covenant on Civil and Political Rights, art. 2(1).

<sup>2</sup> International Covenant on Civil and Political Rights, arts. 17 and 23, articulate the right to freedom from arbitrary or unlawful interference with the family and recognition that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

<sup>3</sup> See, e.g., Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, June 2013, available at <http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>, which estimates that over 152,000 U.S. children are impacted by deportations each year using 2012 deportation numbers.

Statement of the American Federation of Teachers  
President Randi Weingarten  
Keeping Families Together:  
The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform  
Senate Judiciary Committee  
Wednesday, December 10, 2014

On behalf of the 1.6 million members of the American Federation of Teachers (AFT), I want to thank you for holding this hearing on the need for comprehensive immigration reform. The AFT, along with our allies, has been pressing for congressional action since the Senate passed its bipartisan legislation. The AFT also supports the president's executive action, as it begins to fix our broken immigration system, which has hurt millions of students and families. President Obama—as he did with the Deferred Action for Childhood Arrivals (DACA) program and as many of his predecessors have done—acted because Congress did not. He is rightfully using his legal authority to secure our nation's borders, to help keep families together and to expand our economy. The AFT wholeheartedly supports this effort but also believes it would be a stronger course of action for both houses of Congress to pass a comprehensive immigration reform bill that could be sent to the president for signing.

AFT members understand the importance of keeping families together, protecting workers from exploitation, and ensuring that students who work hard and play by the rules have the opportunity to attend college. The executive action will accomplish this by increasing academic opportunity and stability by keeping families together. The president's actions will end the separation of families where the children are U.S. citizens or lawful permanent residents but their parents are still waiting for lawful permanent resident status, and will expand provisional waivers to limit the time families must be separated while they attend visa interviews. This will create greater stability for children, who will no longer have to fear that their families will be ripped apart. That kind of stability leads to better academic performance and opportunity.

In addition, the executive action will provide alternatives for educators and school employees, and help rebuild trust between communities and local law enforcement agencies. The new Deferred Action for Parental Accountability (DAPA) program will help ensure families are kept together by allowing the parents of children who were born in the United States or are lawful permanent residents to apply for and obtain temporary lawful status and a three-year renewable work permit. The AFT believes that interagency guidance should be issued to clarify that DAPA will apply equally to lesbian, gay, bisexual and transgender families (parents) of U.S. citizens or lawful permanent residents.

The executive action will also expand the DACA program and opportunities for DREAMers. Established in 2012, the DACA temporary relief program allows immigrants under 30 years old who arrived as children to apply for temporary protective status. Under the expanded DACA program (DACA-plus), the age restrictions of DACA have been eliminated, provided the individual arrived in the United States before his or her 16th birthday and has continuously lived here since Jan. 1, 2010. Among other benefits, the expansion of DACA will increase opportunities for immigrant youth to go to school, obtain a three-year renewable work permit, and contribute fully to their communities without the threat of deportation.

Finally, in response to the president's call for the United States Citizenship and Immigration Services to establish policy and guidance to support U.S. high-skill businesses and workers, the AFT requests that the agency use its prosecutorial discretion to grant deferred action to certain international teachers. These teachers have been beneficiaries of an H-1B visa and have been employed in U.S. public schools since the passage of the No Child Left Behind Act. Although their employers have filed permanent labor certification applications (ETA Form 9089), the teachers either (1) are not beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140), or (2) have not been granted an extension of their authorized period of admission in the United States. This should be remedied.

Any comprehensive immigration reform package must guarantee the uniform enforcement of workplace standards, including ensuring real and enforceable remedies for labor and employment law violations for all workers, regardless of their immigration status. In addition, the proposal should both reduce incentives for employers to hire undocumented workers and guarantee that all workers (foreign born and native) have full workplace rights, including the right to organize.

As a union that represents tens of thousands of highly skilled immigrants, the AFT is pleased the executive action will also expand the Optional Practical Training program for science, technology, engineering and mathematics graduates of U.S. universities. This has the potential to benefit many graduate employees and their families.

The AFT looks forward to working with this committee in the new Congress on comprehensive immigration reform.



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**STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL**

**SUBMITTED TO THE UNITED STATES SENATE COMMITTEE ON THE  
JUDICIARY**

**HEARING ON KEEPING FAMILIES TOGETHER: THE PRESIDENT'S EXECUTIVE  
ACTION ON IMMIGRATION AND THE NEED TO PASS COMPREHENSIVE  
REFORM**

**DECEMBER 10, 2014**

Statement of Benjamin Johnson, Executive Director of the American Immigration Council:

The American Immigration Council is a non-profit educational foundation which for over 25 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We thank the Judiciary Committee for the opportunity to comment on the recent Immigration Accountability Executive Action initiatives, particularly the impact of the expansion of the Deferred Action for Childhood Arrivals (DACA) and the new Deferred Action for Parental Accountability (DAPA) programs.

At their core, these programs, which defer temporarily the removal of certain undocumented immigrants, serve to keep families together and recognize the deep ties that many undocumented immigrants have to this country. We note in particular that this is not the first time a President has acted to keep families together in the face of Congressional inaction. We attach for submission into the record our report, *Reagan-Bush Family Fairness: A Chronological History*, which documents similar actions taken by Presidents Ronald Reagan and George H.W. Bush to defer deportations of family members following the enactment of the 1986 legalization program.

In revisiting the Family Fairness program, we learn not only that there is ample precedent for DACA and DAPA, but we also see that the use of executive branch authority in immigration does not cause a constitutional crisis. Moreover, it demonstrates that temporary deferral programs may serve as “breathing room” for Congress to further debate and decide on a more lasting solution for undocumented immigrants. The actions taken by President Obama and his administration do not supersede Congress, but instead attempt to enforce immigration law and prioritize threats in a way that displays common sense and compassion.



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December 2014

### REAGAN-BUSH FAMILY FAIRNESS: A Chronological History

From 1987 to 1990, Presidents Ronald Reagan and George Bush, Sr. used their executive authority to protect from deportation a group that Congress left out of its 1986 immigration reform legislation—the spouses and children of individuals who were in the process of legalizing. These “Family Fairness” actions were taken to avoid separating families in which one spouse or parent was eligible for legalization, but the other spouse or children living in the United States were not—and thus could be deported, even though they would one day be eligible for legal status when the spouse or parent legalized. Publicly available estimates at the time were that “Family Fairness” could cover as many as 1.5 million family members, which was approximately 40 percent of the then-unauthorized population.<sup>1</sup> After Reagan and Bush acted, Congress later protected the family members. This fact sheet provides a chronological history of the executive actions and legislative debate surrounding Family Fairness.

**November 6, 1986:** President Reagan signs the Simpson-Mazzoli Immigration Reform and Control Act (IRCA).<sup>2</sup> The legislation makes certain immigrants eligible for temporary legal status and eventually green cards, primarily (1) those “continuously” present in the U.S. since January 1, 1982 (the general legalization provisions),<sup>3</sup> and (2) special agricultural workers (SAW).<sup>4</sup> At the time, roughly 3 million people are thought to be eligible to legalize, although that number will rise by 1990, due to an unexpectedly large number of SAW applicants, and litigation by several hundred thousand persons who claimed eligibility for the general legalization provisions.<sup>5</sup>

IRCA does not contain language regarding spouses and children who don’t independently qualify for legalization. As a Senate Judiciary Committee report accompanying the legislation stated, “the families of legalized aliens will obtain no special petitioning right by virtue of the legalization. They will be required to ‘wait in line’.”<sup>6</sup>

When the Senate-passed bill moved to the House, IRCA’s legalization provisions survived an amendment to strike them by seven votes.<sup>7</sup>

**1987:** The plight of “split-eligibility” families immediately becomes a key issue post-IRCA.<sup>8</sup> For example, the National Conference of Catholic Bishops criticizes the separation of families, and urges Reagan’s intervention.<sup>9</sup>

[www.americanimmigrationcouncil.org](http://www.americanimmigrationcouncil.org)

The Los Angeles Catholic archdiocese reports that up to 30 percent of the legalization applications it was assisting involved “split-eligibility” families.<sup>10</sup>

- October 7, 1987:** In an effort to address “split-eligibility” families, Sen. John Chafee (R-RI) offers an amendment to an unrelated bill that would give spouses and children excluded from IRCA a path to legalization.<sup>11</sup> The Senate defeats the amendment by a 55-45 vote.<sup>12</sup>
- Among others, IRCA’s lead Senate sponsor, Sen. Alan K. Simpson (R-WY), opposes Chafee’s amendment as a “second amnesty” that “destroys the delicate balance of the recently passed immigration reform legislation.” Citing the Senate Judiciary Committee’s report, Simpson stated “[t]here is no question about what the legislative intent is or was.”<sup>13</sup>
- October 21, 1987:** Two weeks later, Reagan’s INS Commissioner Alan C. Nelson announces INS’ “Family Fairness” executive action.<sup>14</sup> The INS’ memo explains the “clear” Congressional intent in 1986 to exclude family members from the legalization program.<sup>15</sup> Nevertheless, the INS defers deportation for children living in a two-parent household with both parents legalizing, or living with a single parent who was legalizing. As to spouses, though, the INS directs that similar relief “generally not be granted”—only if “compelling or humanitarian factors” exist on top of marriage alone.<sup>16</sup>
- October 27, 1987:** The *Washington Post* editorial board, among other news outlets, applauds INS’ policy. Citing IRCA’s Congressional history and the recent Senate defeat of Chafee’s amendment, the Post argues that “If Congress will not be moved, the INS should have a heart.”<sup>17</sup>
- October 27, 1987:** Sen. Chafee and eight other Senators criticize INS’ policy for not going far enough to cover spouses and ineligible children.<sup>18</sup>
- October 29, 1987:** The House Appropriations Committee reports a continuing resolution (CR) on appropriations to the House floor.<sup>19</sup> The CR includes an amendment by Rep. Edward Roybal (D-CA)—narrower than Chafee’s, but broader than INS’ Family Fairness policy—to block funding for deportation of *both* spouses and children of legalizing families.<sup>20</sup>
- December 3, 1987:** IRCA’s lead House sponsor, Rep. Romano Mazzoli (D-KY), among others, criticizes Roybal’s amendment during the House floor’s CR debate because it “reverses the whole idea of the Immigration Reform and Control Act of 1986.”<sup>21</sup> Rep. Hal Rogers (R-KY) also states, “[I]f my colleagues were concerned last year... about the amnesty portion of that bill, and it only carried by six votes... this continuing resolution violates completely the amnesty provisions delicately worked out last year.”<sup>22</sup> Rep. Bill McCollum (R-FL) argues the amendment “means another 50 percent

or better expansion of the number of illegals who are immediately going to come into this country.”<sup>23</sup> Nevertheless, the CR passes the House with Roybal’s amendment included.

**December 22, 1987:** The Senate appropriations bill does not include Roybal’s amendment, and the amendment does not survive House-Senate conference negotiations.<sup>24</sup>

**August 23, 1988:** House Judiciary Committee testimony details the still-large problem of “split-eligibility” families. Vanna Slaughter of Catholic Charities in Texas testifies that about one-third of Catholic Charities’ applicants had ineligible family members.<sup>25</sup> Another witness testifies that Slaughter’s numbers are “going to be the tip of the iceberg,” since many applying have no lawyer and might not know family could qualify for Family Fairness.<sup>26</sup>

**January 20, 1989:** President George H.W. Bush takes office.

**June 16, 1989:** INS Commissioner Alan C. Nelson leaves office.

**July 13, 1989:** The Senate passes immigration legislation.<sup>27</sup> The legislation includes an amendment by Sen. Chafee to protect both ineligible spouses and children from deportation—scaled back from his prior amendment that provided a path to legalization.<sup>28</sup>

Despite Chafee scaling back the amendment, Sen. Simpson repeats his objections based on the Congressional intent behind IRCA.<sup>29</sup> He states that Chafee’s amendment “is not quite the same but yet it is,” and calls it “a *de facto* second amnesty.”<sup>30</sup>

However, Sen. Pete Wilson (R-CA) switches his vote and speaks for Chafee’s amendment. Echoing the current debate, Wilson argues that “this country was built on certain values” like the “value of the family unit,” and in any event, “we simply do not have the manpower” to enforce the law as written.<sup>31</sup> Chafee’s amendment passes 61-38.<sup>32</sup>

Sen. Chafee’s office publicly estimates that about 1.5 million family members would be affected, based on several recent immigration reports made available to senators.<sup>33</sup>

**August 1989:** The INS releases its *Statistical Yearbook 1988*, which provides demographic information on the legalizing individuals whose family members are under debate.<sup>34</sup>

The *Yearbook* reports that INS had received nearly 3.1 million legalization applications.<sup>35</sup> Of those that had applied for legalization by 1988, about 41.5 percent of those seeking general legalization were married, with another 9.8 percent separated, divorced, widowed or unknown. Of those

applying for SAW legalization, 42.5 percent were married. Combined, this created a large pool of potential applicants for Family Fairness. The INS did not report data on children of individuals who were legalizing.<sup>36</sup> Combined, these categories indicate that a large pool of potential Family Fairness applicants exists (i.e. spouses and children of legalizing individuals, whom themselves are ineligible for IRCA).

**August 1989:** Additionally, a California study which surveyed a sample of the legalizing population finds that 68 percent of those applying for general legalization, and 43 percent of SAW applicants, were married. Only 30 percent of those applying for general legalization, and 63 percent of SAW applicants, reported no children living with them.<sup>37</sup>

**October 26, 1989:** New INS Commissioner Gene McNary is sworn into office.

**November 9, 1989:** The House Judiciary Committee's immigration subcommittee holds a hearing on Rep. Bruce Morrison's (D-CT) H.R. 3374, which includes a provision echoing Chafee's amendment to protect both ineligible spouses and children from deportation.<sup>38</sup>

The INS (among others) strongly opposes the provision as creating a "second legalization program contrary to the intent of Congress," and "outside the carefully crafted balance" of IRCA.<sup>39</sup> Other groups support the provision,<sup>40</sup> arguing that individuals are afraid to apply for Family Fairness because the INS would put applicants into deportation proceedings.<sup>41</sup>

The INS' counsel testifies it is "correct" that potentially eligible spouses and children constituted a "lot of people," although he didn't "have the numbers."<sup>42</sup> Now-former INS Commissioner Nelson states "the potential number is obviously enormous."<sup>43</sup> The Director of the Center for Immigration Studies also cites "immense demographic consequences," and that Chafee's provision "would grant de facto residence status to some 1.5 million."<sup>44</sup>

H.R. 3374 does not move forward.

**February 2, 1990:** President Bush's INS now expands Reagan's Family Fairness policy to all ineligible spouses *and* children under 18 of legalizing family members, provided they meet certain criteria.<sup>45</sup> The INS also provides them eligibility to apply for work authorization. INS Commissioner McNary noted that Bush's executive policy matched the Senate provisions,<sup>46</sup> even though the House had not yet acted.

The Commissioner also states, "We can enforce the law humanely... To split families encourages further violations of the law as they reunite."<sup>47</sup>

The *San Francisco Chronicle* reports that INS officials said the policy “is likely to benefit more than 100,000 people,” while the *Washington Post* reports that it could “prevent the deportation of as many as 100,000 illegal aliens.”<sup>48</sup> That said, an INS spokesman also said that the number of immigrants affected “may run to a million,” and did not dispute large estimates from immigrant advocacy groups.<sup>49</sup> The unpredictability appears to depend on whether immigrants overcome their fear and apply.<sup>50</sup>

- February 6, 1990:** The *Washington Post* editorial board, among others, applauds INS’ expanded Family Fairness policy, calling it “sensible, humane and fair.”<sup>51</sup> The Post notes it is “not an extension of amnesty, which would have required legislation,” but calls it “in line with traditional policy to favor immigration that reunites families.”
- February 6, 1990:** Senator Chafee applauds Bush’s Family Fairness action, which largely mirrored the Senator’s own legislative proposal. He says, “Mr. President... the family unit is sacred,” and “I am delighted, after four years of hard work, to see this principle triumph through the new Family Fairness guidelines.”<sup>52</sup>
- February 8, 1990:** An INS internal Decision Memorandum to Commissioner McNary states that Family Fairness “provides voluntary departure and employment authorization to potentially millions of individuals,” and discusses processing options given the “large workload.”<sup>53</sup>
- An INS “Draft Processing Plan,” also dated this day, states that “current estimates are that greater than one million IRCA-ineligible family members will file for” Family Fairness.<sup>54</sup> The plan calculates the financial resources required to process 1 million applications in 100 workdays.<sup>55</sup>
- February 12, 1990:** The INS releases Family Fairness processing guidelines. The filing fee for a work authorization application is \$35.<sup>56</sup>
- February 21, 1990:** INS Commissioner McNary testifies before the House Judiciary Committee.<sup>57</sup> McNary states to Rep. Morrison that there are about 1.5 million ineligible family members covered by Family Fairness here in the United States. McNary also states that there are another 1.5 million ineligible family members of the legalizing population, presumably outside the United States.<sup>58</sup>
- February 26, 1990:** A bulletin reports that the INS statistics office estimates that of the 3.1 million IRCA applicants at that point, 42 percent (1.3 million) were married.<sup>59</sup> The INS conceded that it lacked “reliable data” regarding children.<sup>60</sup> (Using current estimation tools, as many as 600,000 children of IRCA applicants may have been residing in the U.S in 1990).<sup>61</sup>

The INS also notes that over 740,000 legalization applications are pending or on appeal, and other class-action litigants are suing to legalize as well.<sup>62</sup> Their relatives cannot yet apply for Family Fairness protection.<sup>63</sup> However, once their legalization applications are approved, their family members will be eligible to apply.<sup>64</sup>

- March 5, 1990:** The *New York Times* reports McNary's February 21 testimony that "as many as 1.5 million illegal aliens could be affected by the new policy."<sup>65</sup>
- March 19, 1990:** Rep. Morrison introduces legislation which again includes a provision to defer deportations of the Family Fairness relatives.<sup>66</sup>
- September 1990:** The INS updates its statistics on the legalizing population in its *Statistical Yearbook 1989*.<sup>67</sup> The INS reports that over 3 million have applied for legalization through general provisions or SAW.<sup>68</sup> Of those whom applied for general legalization, 41.2 percent are married, and 9.9 percent are separated, divorced, widowed, or unknown. Of those whom applied for SAW, 41.7 percent are married, and 4.6 percent are separated, divorced, widowed, or unknown.<sup>69</sup> The INS does not report data on children.
- October 27, 1990:** The House and Senate conference agrees to a combined Immigration Act of 1990, which includes the provisions to defer deportation of the Family Fairness relatives (now called "Family Unity" provisions).<sup>70</sup>
- November 29, 1990:** President Bush signs the combined Immigration Act of 1990.<sup>71</sup> He salutes its "support for the family as the essential unit of society,"<sup>72</sup> and "respect for the family unit."<sup>73</sup> He also issues a signing statement, preserving the "authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases."<sup>74</sup>
- Congress' "Family Unity" provisions supersede the executive "Family Fairness" policy, as of Oct. 1, 1991.<sup>75</sup> Those Family Unity provisions are still in place today.<sup>76</sup>
- The Immigration Act of 1990 also dramatically increases the number of visas available to spouses and minor children of those with lawful permanent resident status (i.e. a green card).<sup>77</sup>
- 1990-1995:** Although it is unclear how many spouses and children of the legalizing population ultimately apply for the "family fairness" or "family unity" provisions, large numbers likely apply directly for green cards that were made available under the Immigration Act of 1990. For example, the 1995 report of the State Department's Office of Visa Services estimated that spouses or children of those legalized under IRCA represented 80 percent

of the 1.1 million applications by immediate relatives of lawful permanent residents, at that time (about 880,000 people).<sup>78</sup>

Family Fairness continued through Oct. 1, 1991. As of October 1, 1990, INS had received 46,821 applications.<sup>79</sup> Explanations for low application rates included fear and stringent documentary requirements.<sup>80</sup> As to Family Unity protection, it is unclear how many applied. About 140,000 individuals likely applied for a related “legalization dependent” visa, made available to the class of individuals eligible for Family Unity protection, and outside the normal visa caps.<sup>81</sup> One reason for relatively low rates of application for Family Fairness/Unity protection may be that many decided to apply directly for a green card, rather than making two applications.<sup>82</sup>

### Endnotes

<sup>1</sup> Jeffrey S. Passel, D’Vera Cohn, Jens Manuel Krogstad, and Ana Gonzalez-Barrera. “As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled” Washington, D.C.: Pew Research Center’s Hispanic Trends Project (September 2014), [http://www.pewhispanic.org/files/2014/09/2014-09-03\\_Unauthorized-Final.pdf](http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf).

<sup>2</sup> The Immigration Reform and Control Act of 1986 (IRCA), P. L. 99-603, at <http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf>.

<sup>3</sup> *Ibid.* Sec. 201, creating new Sec. 245A(a)(2)(A).

<sup>4</sup> *Ibid.* Sec. 302. IRCA also made legalization possible for certain Cubans and Haitians, *see* Sec. 202, and those whom had entered before 1972, by updating the registry date under INA § 249, *see* Sec. 203.

<sup>5</sup> Charles Kamasaki, *Doubling Down on a Grievous Error* (Dec. 4, 2014), p. 2, available at NCLR Blog, *Setting the Washington Post Straight on Executive Action* (Dec. 4, 2014), <http://blog.nclr.org/2014/12/04/setting-washington-post-straight-executive-action/>.

<sup>6</sup> S. Rep. No. 99-132, 99th Cong., 1 Sess. 343 (1985); *see also* *Angeles v. Ilchert*, 700 F. Supp. 1048, 1051 (N.D. Cal. 1988) (it is “clear” that “Congress did not intend to extend this legalization program to aliens who entered the United States after January 1, 1982—including the families of legalized aliens.”), at [http://www.leagle.com/decision/19881748700FSupp1048\\_11564](http://www.leagle.com/decision/19881748700FSupp1048_11564).

<sup>7</sup> *See* H.Amdt 1291 to H.R. 3810, 99<sup>th</sup> Cong. (offered Oct. 9, 1986) (amendment, sponsored by Rep. Bill McCollum (R-FL), to strike provisions in the bill permitting aliens who entered this country illegally prior to 1982, and who are otherwise eligible for admission, to apply for temporary resident status). The amendment failed 192-199. Record Vote No. 455.

<sup>8</sup> 64 Interpreter Releases 1191 (Oct. 26, 1987) (“The family unity issue has been an area of serious concern”); Doris M. Meissner & Demetrious G. Papademetriou, *The Legalization Countdown: A Third-Quarter Assessment*, 36 (February 1988) (the family unity issue has become “the most polarized of the disagreements between the government and immigrant advocates”), at <http://files.eric.ed.gov/fulltext/ED291836.pdf>.

<sup>9</sup> Marita Hernandez, *Qualifying for Amnesty—a House Divided by Law*, Los Angeles Times (May 25, 1987), at [http://articles.latimes.com/1987-05-25/news/mn-1459\\_1\\_family-unity/3](http://articles.latimes.com/1987-05-25/news/mn-1459_1_family-unity/3).

<sup>10</sup> 64 Interpreter Releases 1191 (Oct. 26, 1987), citing “Family Unity Called Need of Immigrants,” *San Diego Tribune*, August 8, 1987, at C4, col. 1. The diocese said it had analyzed over 6,000 applications.

<sup>11</sup> S. Amdt 894 to S. 1394, 100<sup>th</sup> Cong., at <https://www.congress.gov/amendment/100th-congress/senate-amendment/894>.

<sup>12</sup> Record Vote No. 311. <https://www.congress.gov/amendment/100th-congress/senate-amendment/894/actions>.

<sup>13</sup> 133 Cong. Rec. S13727 et. seq. (Oct. 7, 1987). *See also* *ibid.* (Sen. Chafee: “this bill passed the Senate 69 to 30.... Frankly, I do not think many of us realize that we are possibly breaking up families in giving this amnesty.”); (Sen. Thurmond: “a decision was consciously made to require everyone to qualify individually for the amnesty program.... Simply because one member of the family qualifies does not mean you have to bring in all members of

the family. It just does not make sense. That was never the intention of the bill.... Without this requirement I do not believe the amnesty program would have been passed in the first place.”); (Sen. Simpson: “indeed the bill did pass the Senate by a better margin than in the House. But the issue of legalization is what I was saying passed the House by only 7 votes.”).

<sup>14</sup> 64 Interpreter Releases 1191 (Oct. 26, 1987).

<sup>15</sup> U.S. Immigration and Naturalization Service Commissioner Alan C. Nelson, *Legalization and Family Fairness – An Analysis* (Oct. 21, 1987), at [http://www.prwatch.org/files/ins\\_family\\_fairness\\_memo\\_oct\\_21\\_1987.pdf](http://www.prwatch.org/files/ins_family_fairness_memo_oct_21_1987.pdf). This contrasts the Washington Post’s December 3, 2014 argument that President Bush’s executive action “was in step with legislation recently and subsequently enacted by Congress.” Washington Post, *President Obama’s unilateral action on immigration has no precedent* (Dec. 3, 2014), at [http://www.washingtonpost.com/opinions/president-obamas-unilateral-action-on-immigration-has-no-precedent/2014/12/03/3fd78650-79a3-11e4-9a27-6fdb612bfff8\\_story.html](http://www.washingtonpost.com/opinions/president-obamas-unilateral-action-on-immigration-has-no-precedent/2014/12/03/3fd78650-79a3-11e4-9a27-6fdb612bfff8_story.html).

<sup>16</sup> *Ibid.* at pp. 4-5. This was true even for the parents of U.S.-citizen children. *Ibid.* at p. 5.

<sup>17</sup> Washington Post, *Amnesty Families*, p. A18 (Oct. 27, 1987) (op-ed), at <http://pqasb.pqarchiver.com/washingtonpost/doc/306940299.html?FMT=FT>.

<sup>18</sup> Senators Alan Cranston, John H. Chafee, Claiborne Pell, Robert T. Stafford, Barbara A. Mikulski, Daniel P. Moynihan, Spark M. Matsunaga, Albert Gore, Jr., and Brock Adams, *Letter to Alan C. Nelson, INS Commissioner* (Oct. 27, 1987), reported at 133 Cong. Rec. S15999 et. seq. (Nov. 6, 1987) (statement of Sen. Cranston).

<sup>19</sup> H.J. Res. 395, 100<sup>th</sup> Cong.

<sup>20</sup> H.J. Res. 395, 100<sup>th</sup> Cong., Sec. 110; see also 133 Cong. Rec. H11996 et. seq. (Dec. 21, 1987) (Rep. Roybal (D-CA) statements).

<sup>21</sup> 133 Cong. Rec. H10900-03, 100<sup>th</sup> Cong. (Dec. 3, 1987) (Rep. Mazzoli: “Many of you who were here in the 99th and now in the 100th Congresses remember my saying so often that the legalization section of the immigration bill was not meant to be an amnesty but was meant to be a case-by-case examination.... “[I]t goes too far.... [T]hose individuals could be felons. They could be criminals.... under the amendment of the gentleman from California now in the bill, they could not be deported.”).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> P.L. 100-202 (Dec. 22, 1987); 133 Cong. Rec. H11996 et. seq. Notably, Sen. Orrin Hatch (R-UT) supported the Roybal amendment, in a Dec. 15, 1987 letter. *Ibid.*

<sup>25</sup> Vanna K. Slaughter, North Texas Immigration Coalition, Hearing, Committee on the Judiciary, House of Representatives, *Family Unification, Employer Sanctions and Anti-Discrimination under IRCA* (Aug. 23, 1988), p. 4, at <http://www.loc.gov/law/find/hearings/pdf/00005124906.pdf>. Slaughter had analyzed five thousand cases to date. *Ibid.* “Very few” would benefit from Reagan’s policy alone. P. 33.

<sup>26</sup> Fernando Dubove, Assistant Director, Texas Project, National Immigration, Refugee, And Citizenship Forum, Hearing, Committee on the Judiciary, House of Representatives, *Family Unification, Employer Sanctions and Anti-Discrimination under IRCA* (Aug. 23, 1988), p. 92.

<sup>27</sup> S. 358, 101<sup>st</sup> Cong., 1<sup>st</sup> session. The legislation passed 81-17. See [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_101\\_1.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_101_1.htm).

<sup>28</sup> *Ibid.*, sec. 108. Sen. Chafee argued that this provision was narrower than his prior amendment. See 135 Cong. Rec. S7748 et. seq. (July 12, 1989) (Sen. Chafee: “This is a modest solution... I offered an amendment similar to this in 1987 that was defeated, 55 to 45. But it was different. It was broader than this. That amendment would have granted legal status to the spouses and children of the legalized aliens. There is a lot of difference between granting legal status and what my bill does.... My bill does not confer legal status on the spouse or children who benefit from this legislation. My bill only applies to spouses and minor unmarried children. It does not apply to the whole family of brothers and sisters and cousins and parents.”)

<sup>29</sup> 135 Cong. Rec. S7748 et. seq. (July 12, 1989) (Sen. Simpson: “[I] oppose this amendment because to me it disturbs the delicate balance of the 1986 Immigration Reform and Control Act.... In the Judiciary Committee report we stated it very clearly.”)

<sup>30</sup> Ibid. (“It does not grant this actual legal status, but, as I say, it grants the thing that is most prized.... I promised all my colleagues during the presentation of the immigration bill over the course of 6 to 8 years that legalization is and will be a one-time-only program.”)

<sup>31</sup> Ibid. (Sen. Wilson: “[T]he law as it now stands has produced unintended hardship in my State and in many others.... [T]he time has come for us to say if this is to be regarded as such an expansion of amnesty, then so be it.... [L]et us not continue with a situation that is both unworkable, inhumane, and one that does not benefit the present citizens of the United States.”); *ibid.* (“This is ridiculous in the sense that we are talking about setting a standard that cannot be enforced in any case. There is not the ability to enforce the law. The law should not be enforced as it is being proposed by the Senator from Wyoming... it is also... I reemphasize... an unworkable situation now. We simply do not have the manpower to expend but the threat of deportation remains.”).

<sup>32</sup> S. Amdt. 244, Record Vote No. 107. See Helen Dewar, *Senate Votes Protection for Aliens' Kin*, Washington Post (July 13, 1989), at <http://pqasb.pqarchiver.com/washingtonpost/doc/307193985.html>.

<sup>33</sup> Josh Getlin, *Senate Acts to Protect Families in Amnesty Plan*, Los Angeles Times (July 13, 1989) (lead of story: “In an action that could affect more than 1.5 million illegal aliens...”), at [http://articles.latimes.com/1989-07-13/news/mn-4478\\_1\\_family-members](http://articles.latimes.com/1989-07-13/news/mn-4478_1_family-members).

<sup>34</sup> 1988 Statistical Yearbook of the Immigration and Naturalization Service (August 1989), available at <http://babel.hathitrust.org/cgi/pt?id=uc1.10062135033:view=lup:seq=9>.

<sup>35</sup> *Ibid.* at p. xxii (as of May 12, 1989, the INS had received applications from 1,768,089 legalization applicants and 1,301,804 Special Agricultural Worker (SAW) applicants). The *Yearbook* did not report numbers of Cuban-Haitian applicants, nor those whom had entered before 1972. *Ibid.*

<sup>36</sup> *Ibid.* at xxii-xxiii.

<sup>37</sup> Comprehensive Adult Student Assessment System, *Highlights: A Survey of Newly Legalized Persons in California* (August 1989), included in Hearing, Subcommittee on Immigration, Refugees, and International Law, House Judiciary Committee, *On H.R. 3374* (Nov. 9, 1989), at pp. 127-31.

<sup>38</sup> 101<sup>st</sup> Cong., H.R. 3374, IRCA Amendments of 1989, Sec. 205 (introduced Sept. 28, 1989), at <https://www.congress.gov/bills/101st-congress/house-bill/3374>. Sec 205 of Rep. Morrison’s bill was broader, in that it applied to spouses and children in the United States as of January 1, 1989, rather than November 6, 1986.

<sup>39</sup> Statement of Paul W. Virtue, Acting General Counsel, U.S. Immigration and Naturalization Service, Hearing, Subcommittee on Immigration, Refugees, and International Law, House Judiciary Committee, *On H.R. 3374* (Nov. 9, 1989), at p. 25; see also Prepared Statement, at p. 37 (IRCA “was never intended to place all illegal aliens within a legal status”). Former INS Commissioner Alan C. Nelson testified similarly. *Ibid.* at p. 171 (Statement of Alan C. Nelson, Former Commissioner, U.S. Immigration and Naturalization Service, Member of the National Board of Advisors and Consultant to the Federation for American Immigration Reform).

<sup>40</sup> See, e.g., Statement of Lavina Limon, Steering Committee Member, Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), at *ibid.*, pp. 111-12 (“INS under pressure to respond created the family fairness policy, but in our experience it doesn’t work.”).

<sup>41</sup> Statement of Carolyn Waller, Director, Alien Rights Project, Washington Lawyers’ Committee for Civil Rights Under Law (Nov. 9, 1989), at *ibid.*, pp. 216-20.

<sup>42</sup> *Ibid.* at 48 (Rep. Morrison: “On this issue of minor children and spouses, you would agree that most of the individuals in this class are receiving indefinite voluntary departure?” A: “Although I don’t have the numbers, I think that’s correct.” Rep. Morrison: “Very large numbers.... [I]t’s a lot of people?” A: “My sense is that’s correct.”)

<sup>43</sup> Section 205 “codifies an extraordinary expansion of the amnesty granted by IRCA.... I am aware of no reliable estimate of how many people will be made eligible for amnesty by this section....” [But] “[s]ince over three million illegal aliens were granted legalization by IRCA, the potential number is obviously enormous.” Testimony of Alan C. Nelson, Consultant to the Federation for American Immigration Reform, Member, National Board of Advisors, FAIR, and Former Commissioner of the U.S. Immigration and Naturalization Service, *On H.R. 3374* (Nov. 9, 1989), at *ibid.*, p. 179.

<sup>44</sup> Prepared Statement of David Simcox, Director, Center for Immigration Studies (Nov. 9, 1989), at *ibid.*, p. 209-10 (“[T]his proposal would be tantamount to a massive second stage amnesty....”). Simcox also criticized the administrative burden of adjudicating “millions of claims for such status.” *Ibid.* at 210. Simcox argued that Section

205 of Rep. Morrison's bill was broader than Sen. Chafee's provision, and that a recent Center for Immigration Studies study estimated the number of unlegalized spouses and children of legalized aliens, including Special Agricultural Workers, who would settle here if permitted to be 2.6 million. *Ibid.* at 209-10. CIS called this a "conservative" figure, since it did not include spouses and children acquired subsequent to legalization. *Ibid.*

<sup>45</sup> INS Commissioner Gene McNary, Memorandum, *Family Fairness: Guidelines for Voluntary Departure under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (hereinafter "McNary Memo"). Bush's INS memo built upon Reagan's (see p. 1, referring to 1987 guidelines). The criteria were that the ineligible alien was otherwise admissible, had not been convicted of a felony or three misdemeanors, and had not assisted in persecution. *Ibid.*

<sup>46</sup> 67 Interpreter Releases 153, 154 (Feb. 5, 1990).

<sup>47</sup> *Ibid.*

<sup>48</sup> Tim Schreiner, *INS Reverses Policy That Split Alien Families*, San Francisco Chronicle (Feb. 3, 1990), at A1.

<sup>49</sup> Paul Anderson, *New Policy on Illegal Immigrants*, Philadelphia Inquirer (Feb. 3, 1990), at [http://articles.philly.com/1990-02-03/news/25883655\\_1\\_illegal-immigrants-rick-swartz-american-immigration-reform](http://articles.philly.com/1990-02-03/news/25883655_1_illegal-immigrants-rick-swartz-american-immigration-reform). The article reported that McNary and his top INS aides "said they could not predict how many dependents would come forward." *Ibid.*

<sup>50</sup> Schreiner, *supra* note 48. For example, the San Francisco INS deputy district director stated, "I would not expect a big flood of people." He stated that his office had only granted 150 families permission to stay under the previous, narrower family fairness policy. *Ibid.* Meanwhile, immigrants' rights advocates said that the number would increase significantly under the new policy, because districts had been granting Family Fairness only if the applicant was already in deportation proceedings. "People could not come in and apply for it," Charles Wheeler of the National Center for Immigrants' Rights said. "Now they can. This will take the fear out of it." Or, Kip Steinberg, an attorney with the National Lawyers Guild's National Immigration Project, said that many family members had not been applying "because once it was explained to them that they could be deported if they did not qualify, a lot of people were not willing to take the risk." *Ibid.*

<sup>51</sup> Washington Post, *Amnesty and Compassion* (Feb. 6, 1990), p. A24, at <http://pqash.pqarchiver.com/washingtonpost/doc/307234315.html>.

<sup>52</sup> Cong. Record, 101<sup>st</sup> Cong., (Feb. 6, 1990), p. S929.

<sup>53</sup> Decision Memo to Gene McNary, Commissioner, "The implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the spouses and children of legalized aliens (section 245a and section 210)" (February 8, 1990), cited in Cong. Record, 113<sup>th</sup> Cong., H8636 (Dec. 4, 2014), at <https://www.congress.gov/crec/2014/12/04/CREC-2014-12-04-pt1-PgH8632.pdf>.

<sup>54</sup> T. Andreotta, "Draft Processing Plan RPF Processing of Family Fairness Applications Utilizing Direct Mail Procedures" (Feb. 8, 1990), cited in Cong. Record, 113<sup>th</sup> Cong., H8635-36 (Dec. 4, 2014), at <https://www.congress.gov/crec/2014/12/04/CREC-2014-12-04-pt1-PgH8632.pdf>.

<sup>55</sup> *Ibid.*

<sup>56</sup> Michael T. Lempres, Executive Commissioner, U.S. INS, *Guidelines for Implementation: Family Fairness Policy for Ineligible Spouses and Children of Legalized Aliens* (Feb. 12, 1990), available at 67 Interpreter Releases 204, 230-33 (February 26, 1990).

<sup>57</sup> INS Commissioner Gene McNary, House Committee on the Judiciary, Hearing, S. 358, H.R. 672, H.R. 2448, and H.R. 2646, *Immigration Act of 1989* (Feb. 21, 1990), at <https://www.scribd.com/doc/248088098/Feb-21-1990-hearing-House-subcommittee-on-Immigration>.

<sup>58</sup> See *ibid.*, p. 49, 52, 56 (Mr. Morrison: "Mr. McNary, you used the number 1.5 million IRCA relatives who are undocumented but who are covered by your family fairness policy. Do I have that number right?" Mr. McNary: "Yes.... We think you are right as to the 1.5 million being here. There is an estimate of another 1.5 million that would come as a result of this change in definition [ED NOTE: through new legislation]... They are not here.") This echoes other estimates of 3 million ineligible relatives of the IRCA-legalized. *Binational Study: Migration Between Mexico and the United States* (1997), p. 10, at <https://www.utexas.edu/lbj/uscir/binational/full-report.pdf>.

The Washington Post called McNary's testimony a "misunderstanding," based on Commissioner McNary's comments to the paper 24 years later. Washington Post, *President Obama's unilateral action*, *supra* note 15. The Post does not explain the misunderstanding, however. Glenn Kessler, *Obama's claim that George H.W. Bush gave*

relief to '40 percent' of undocumented immigrants (Nov. 24, 2014, subsequently revised), at <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/24/did-george-h-w-bush-really-shield-1-5-million-illegal-immigrants-nope/>. Kessler's "Fact Check" refers to the "different category of 1.5 million people," but does not explain that McNary's testimony referred to 1.5 million outside the United States. *Ibid.*

<sup>59</sup> 67 Interpreter Releases 204, 206 (February 26, 1990). Kamasaki estimates that about 840,000 spouses were likely ineligible. Kamasaki, *Doubling Down*, *supra* note 5, at p. 2.

<sup>60</sup> 67 Interpreter Releases 204, 206 (February 26, 1990). The bulletin reports that "No one knows how many people will apply for the family fairness program" (emphasis added), and that "[i]nformal estimates range from the thousands up to one million." Among the uncertainties are "how many will not apply because of the lack of confidentiality." The bulletin also reports that INS' current "guesstimate" is that no more than 250,000 aliens will apply for" Family Fairness, without citation. *Ibid.*

<sup>61</sup> Kamasaki, *Doubling Down*, *supra* note 5, at p. 2, citing, e.g., Jeanne Batalova, Sarah Hooker, and Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action* (Migration Policy Institute: Washington DC, August 2014), at <http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action>. Kamasaki thus estimated that nearly 1.5 million immigrants likely were, in fact, ineligible to legalize but potentially eligible for Family Fairness at that time. *Ibid.*

Glenn Kessler's Washington Post "Fact Check" omitted children from its analysis, and erroneously argued that the 1.5 million estimate "is a rounded-up estimate of the number of illegal immigrants who were married." Kessler, *supra* note 58. The Post also argued that "no underlying data or methodology to justify the 1.5 million figure has been uncovered." Washington Post, *President Obama's unilateral action*, *supra* note 15.

<sup>62</sup> 67 Interpreter Releases 204, 205-06 (February 26, 1990). There were several hundred thousand class action litigants at the time. Kamasaki, *Doubling Down*, *supra* note 5, at p. 2.

<sup>63</sup> *Ibid.*

<sup>64</sup> Kessler's "Fact Check" erroneously argued that these relatives should be excluded from then-estimates of potential Family Fairness applicants at the time. Kessler, *supra* note 58.

<sup>65</sup> Marvin Howe, *New Policy Aids Families of Aliens*, N.Y. Times (Mar. 5, 1990), at <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>.

<sup>66</sup> H.R. 4300, Family Unity and Employment Opportunity Immigration Act of 1990, Sec. 104 ("Prohibition of Deportation of Spouses and Children of Legalized Aliens"), 101<sup>st</sup> Cong., 2d session. As introduced, Sec. 104 applied to those in the United States as of Jan. 1, 1990. Sec. 104(a)(1).

<sup>67</sup> 1989 Statistical Yearbook of the Immigration and Naturalization Service (September 1990), available at <http://babel.hathitrust.org/cgi/pt?id=uc1.10055031603;view=1up;seq=15>.

<sup>68</sup> *Ibid.* pp. xxiv-xxv (1,762,143 legalization applications)

<sup>69</sup> *Ibid.*

<sup>70</sup> S. 358, sec. 301, "Family Unity," 101<sup>st</sup> Cong., 2d session. The final bill applied to those in the United States as of May 5, 1988. Sec. 301(a).

<sup>71</sup> P.L. 101-649, at <http://www.justice.gov/eoir/IMMACT1990.pdf>.

<sup>72</sup> President George H.W. Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), at <http://bush41library.tamu.edu/archives/public-papers/2514>.

<sup>73</sup> President George H.W. Bush, *Remarks on Signing the Immigration Act of 1990* (Nov. 29, 1990), <http://bush41library.tamu.edu/archives/public-papers/2513>.

<sup>74</sup> President George H.W. Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), at <http://bush41library.tamu.edu/archives/public-papers/2514>.

<sup>75</sup> Sec. 301(g). However, Congress stated that the delayed implementation "shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Ibid.* President Obama's Office of Legal Counsel argued that this provision evidenced "Congress's implicit approval" of President Bush's executive action to defer deportations, and thus "some indication" of "congressional understandings about the permissible uses of deferred action." U.S. Department of Justice, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the*

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*United States and to Defer Removal of Others* (Nov. 19, 2014), pp. 29-30 & n. 15, available at <http://www.justice.gov/sites/default/files/ole/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

<sup>76</sup> United States Citizenship and Immigration Services, *Adjudicator's Field Manual - Redacted Public Version, Chapter 24.4, Family Unity Program* (Family Unity program under IMMACT 1990 Sec. 301 "supersedes the administrative Family Fairness Program"); 8 C.F.R. §§ 236.10-18.

<sup>77</sup> Immigration Act of 1990, Sec. 111.

<sup>78</sup> Kamasaki, *Doubling Down*, *supra* note 5, at 1 (reporting that 80 percent of the 1.1 million applicants for immediate relative visas were spouses and children of those legalized under IRCA, according to a 1995 U.S. State Department report).

<sup>79</sup> David Hancock, *Few immigrants use family aid program*, Miami Herald (Oct. 1, 1990), at IB (noting that relatively few immigrants had applied for Family Fairness because of fear or documentary requirements).

<sup>80</sup> *Ibid.*

<sup>81</sup> Immigration Act of 1990, sec. 112 (creating a separate visa category for the spouses and children of the legalizing, and capping those visas at 55,000 per year for FY 1992 through FY 1994). See *The Immigration Act of 1990 and Legal Immigration*, (1994) at Table 4 (reporting 52,272 "legalization dependent" visas in FY 1992, 55,344 in FY 1993, and estimating 34,400 in FY 1994), at <https://migration.ucdavis.edu/mn/cir/94report/immact.htm>.

<sup>82</sup> Kamasaki, *Doubling Down*, *supra* note 5, at 1.



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

**Statement of the American Immigration Lawyers Association**

**Submitted to the Committee on the Judiciary of the U.S. Senate  
Hearing on "Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Immigration Reform"**

**December 10, 2014**

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The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA has over 13,000 attorney and law professor members.

America's immigration system is in urgent need of reform. AILA supports the enactment of legislation, the only way to provide lasting change. In recent years, however, Congress has not been able to pass a bill. In the absence of legislation, it would be irresponsible for the President to wait and do nothing while American families, businesses, and communities languish under the current system.

The executive actions announced by President Obama on November 20 are a welcome first step toward a more humane immigration system. These actions have the potential to provide temporary relief to millions of families who have been kept in legal limbo with the threat of deportation and separation hanging over them. AILA's statement specifically describes how the families of Brenda Gutierrez and Janelle Ngo Chin, who have long resided in the U.S., can be protected under the President's Deferred Action for Parental Accountability (DAPA) plan.

**Why is it necessary for the President to act now?**

Almost two decades have passed since a major reform was enacted to the country's immigration laws. During this time, the immigration system has become increasingly broken and is failing American families, businesses and communities. Nationwide polling has shown that Americans want major reform. A January 2014, Fox News poll showed that 68 percent of Americans support allowing illegal immigrants to remain in the country and eventually qualify for citizenship if they meet certain requirements like paying taxes, learning English, and passing a background check. After the November election, Edison Research, which does exit polling for the consortium of major news networks, found that 57 percent of voters preferred that "illegal immigrants working in the U.S." be offered legal status instead of deportation.

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Every day families are kept separated because of long backlogs in the visa system. AILA hears daily from businesses that cannot hire workers and are stymied by the slow and dysfunctional operations of the immigration system. Now 11.5 million people are living in the country without legal status. Most have families and jobs but cannot work legally and must exist in the shadows. These individuals are also subject to immigration enforcement and deportation. In the past several years, the Department of Homeland Security (DHS) has deported hundreds of thousands of parents of U.S. citizens—approximately 23 percent of all deportations—causing painful separations of families. The President's announced plans should bring temporary relief from the fear of removal that hangs over millions of people's lives.

***Brenda Gutierrez***

Ms. Gutierrez is the mother of three children, two of whom are U.S. citizens and a third who received a temporary reprieve from deportation through the President's 2012 Deferred Action for Childhood Arrivals (DACA) initiative. One of Brenda's U.S. citizen children has a rare blood disorder that requires constant medical attention. Ms. Gutierrez and her husband, Jose, have both been trained by their doctors to give their child injections when needed.

Ms. Gutierrez does not have legal immigration status. Many years ago, shortly after she arrived in the U.S., she applied for asylum. When she missed the deadline for filing her application, the government tried to deport her. She ultimately lost her asylum case. She is now in removal proceedings.

Ms. Gutierrez is a long-time U.S. resident with children who are U.S. citizens, a spouse who has his green card. She has never been arrested or convicted of any crime. Ms. Gutierrez could be eligible for a statutory form of relief called "Cancellation of Removal," but a technical rule that was triggered when the government initiated removal proceedings against her now prevents an immigration judge from granting her this relief. ICE has temporarily stayed her removal, but Ms. Gutierrez never knows whether ICE will renew her stay. She lives in fear of being torn apart from her family and the child who needs her.

Under the President's newly announced Deferred Action for Parental Accountability (DAPA) program, she should be eligible to receive a grant of deferred action enabling her to live and work in the U.S. for a three-year period. The long-standing fear of deportation threatening her and family would be removed for a temporary period.

***Janelle Ngo Chin***

Janelle Ngo Chin has lived in the U.S. for over 25 years, since she was 10 years old. She attended elementary, middle, and high school here. She now has three U.S. citizen children. As the mother of three and common-law wife to a hardworking noncitizen with Temporary Protected Status (TPS), Janelle now also takes care of her aging and ailing parents (who are both lawful permanent residents), who live with her. Her father has already had two heart attacks and suffers from coronary heart disease and many other health problems that interfere with his ability

to accomplish everyday tasks. Janelle's mother has diabetes, a history of cancer, and debilitating psychological problems.

Janelle does not have legal immigration status, and she is in removal proceedings. Our existing immigration system is so broken that, even with all of her compelling equities and hardships, the immigration judge found that Janelle could not meet the extremely high standard for Cancellation of Removal. She asked DHS to exercise prosecutorial discretion (PD), given that she should not be a high priority for enforcement – her only brush with the law was a petty theft conviction for stealing a pair of sunglasses when she was 19 – and she has compelling equities. But DHS declined. The federal court of appeals intervened on her behalf, and Janelle is now back before the immigration judge, trying desperately to make her case.

Like Brenda, Janelle should be eligible for DAPA and would be able to receive a reprieve from the removal proceedings that would put not only her life at risk but that of her children, spouse and parents.

#### **Legal Authority for Deferred Action**

In creating the DACA and DAPA programs, the President has acted well within his legal authority. The executive branch's authority to grant deferred action is derived from the federal immigration statute and regulations as well as the long-standing principle of prosecutorial discretion used by every law enforcement agency. It is common practice for law enforcement agencies and their individual officers to decide how and to what extent to pursue a particular case based on established priorities. A law enforcement officer who declines to pursue a case against a person has favorably exercised prosecutorial discretion. In a 1999 letter, 28 Republican and Democratic members of Congress (including the Chair of the House Judiciary Committee at that time, Lamar Smith) called for prosecutorial discretion in immigration enforcement: "The principle of the prosecutorial discretion is well-established."

Prosecutorial discretion ensures the smart use of finite enforcement resources. DHS cannot possibly deport everyone who is living unauthorized in the United States. Such a mass deportation is not only completely unrealistic but also an unwise policy choice as it would gravely fracture American society, negatively impact businesses, and hurt the economy. For these very reasons, Republican and Democratic leaders have spoken against the idea of deporting over 11 million undocumented immigrants. DHS and every other enforcement agency must choose priorities. Keeping America safe by focusing on those who present real threats to our national security and public safety is the right focus.

Over the past 50 years, Republican and Democratic presidents have designated various groups of people for temporary relief from immigration enforcement by granting deferred action or using a similar tool. In 1990, President Bush provided blanket protection from deportation for up to 1.5 million unauthorized spouses and children of immigrants, about 40 percent of the total unauthorized population at the time. Other presidents have provided temporary protection to victims of domestic violence, the family members of military service members, widows and

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widowers, as well as people from specific countries or regions such as Cuba, Haiti, Southeast Asia or the Persian Gulf.

Deferred action is a vital tool that has been used historically to protect vulnerable populations. If DHS could not grant deferred action it would be unable to ensure that victims of domestic violence, sexual assault, human trafficking, and other crimes are protected from deportation while their applications for protections under the Violence Against Women Act (VAWA) are processed.

Many have alleged that these grants of deferred action amount to a grant of amnesty. Such a comparison is inaccurate. Unlike the 1986 amnesty President Reagan signed into law, deferred action does not confer formal legal status to the individual but merely a reprieve from immigration law enforcement, specifically deportation. Moreover, the grant is temporary, so those granted the status could be at risk of deportation if the status expires. Finally, deferred action, by itself, does not provide a path to a green card or citizenship.

#### **Family Detention**

While the President's plans will protect hundreds of thousands of families from deportation, many of his current policies are causing great harm to families. Since July 2014, DHS has massively increased the detention of mothers and their children fleeing extreme violence in the Northern Triangle region of Central America – many of whom seek the safety of close relatives here in the U.S. DHS has set up a rapid deportation system that deprives these families fair and meaningful access to asylum and other humanitarian protection guaranteed by our laws.

The President's executive actions emphasized border enforcement and pledged to continue the "surge" in enforcement resources to the southern border that began this summer, in response to the high numbers of unaccompanied children and families seeking out Border Patrol agents to find safety in the U.S. This enforcement surge has had dire consequences for many asylum-seeking families. Many of these families continue to be detained despite suffering from serious medical and psychological ailments in detention, and despite the presence of close relatives here in the U.S. who are willing and able to support them. At extremely high rates, these families qualify for asylum. In fact, of the twelve cases volunteer AILA attorneys have brought to a final hearing, all twelve were granted asylum.

The detention of families has been a humanitarian and due process disaster. AILA urges the Administration to abandon this costly strategy and instead to implement policies reflecting longstanding consensus that detention is a wholly inappropriate place for asylum seekers, families and children.

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Testimony of Stosh Cotler  
 Chief Executive Office, Bend the Arc: A Jewish Partnership for Justice  
 Submitted to  
 The Senate Committee on the Judiciary  
 For the hearing record on:  
 “Keeping Families Together: The President’s Executive Action On Immigration  
 And The Need To Pass Comprehensive Reform”  
 December 10, 2014

The time is right for comprehensive reform of our nation’s broken, unjust and immoral immigration system. When President Obama acted within his legal authority and issued his Immigration Accountability Executive Action just a few weeks ago, millions of families around our nation rejoiced, and we rejoiced with them. Because of the Administration’s bold action, nearly five million people—people who are already living next door to us in our neighborhoods, praying with us in our houses of worship, working with us in our offices, and caring for our family members—will step from the shadows. We as a nation should greet them with open arms.

For years now, millions of Americans have called on Congress to pass comprehensive immigration reform. Indeed, the organization I serve as CEO, Bend the Arc: A Jewish Partnership for Justice, has helped lead the American Jewish community’s organizing and advocacy around this issue. As such, we welcomed the Senate’s passage last year of the Border Security, Economic Opportunity, and Immigration Modernization Act (S.744). We continue to support Congressional action that will finish the job of reforming to our nation’s immigration system to prevent families from being torn apart, reduce fear and suffering and strengthen our economy and our society. But the millions of families at risk of being torn apart every day by our broken deportation policy and the individuals being exploited in our shadow economy needed help now, help which we are relieved the Administration provided.

By emphasizing better border control and reprioritizing deportations to focus on those who have committed actual crimes rather than families merely trying to create better lives and contribute to society, the Immigration Accountability Executive Action makes our nation safer and stronger. Following in the footsteps of every president of every political party for the last 50 years, all of whom have acted within their legal authority on immigration, President Obama’s common sense steps are a crucial start to fixing the problems plaguing our immigration system.

There are an estimated 11 million people in our country who contribute to our economy and strengthen the fabric of our communities, but are living without

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the rights and protections that the rest of us enjoy. Immigrants, especially those without documentation, are targeted by criminals, subject to exploitation by employers, unable to secure social services and afraid of the personal risks of demanding their basic civil rights. We need an immigration system that includes a roadmap to citizenship for those aspiring citizens already living in America and visa policies that allow new immigrants to enter the United States legally. Within the political and public discourse, the debates about appropriate border control and visa policies often overshadow the daily reality of these 11 million people who have insufficient legal protections and are all too often targeted by the same hate groups that perpetuate anti-Semitism, racism, xenophobia and homophobia.

This fundamental injustice is especially personal for the American Jewish community whose own experience as immigrants taught us to value America's enduring history as a welcoming and compassionate nation. Many of our own families were able to enter America either as a result of the immigration policies of an earlier era or through other means. As such, our community has marched, raised our voices, met with our elected officials, and risked arrest, and we will continue to do so until we create a better America for all.

WRITTEN STATEMENT OF  
**CASA de Maryland & CASA de Virginia**

For a Hearing entitled:

“Keeping Families Together: The President’s Executive Action On Immigration And The  
Need To Pass Comprehensive Reform”

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Submitted by:  
**Gustavo Torres, Executive Director**

**CASA de Maryland and CASA de Virginia** welcomed the passage of S.744, the bipartisan immigration reform bill that passed the Senate last year with the support of 68 Democrats, Republicans, and Independents. We thank Senators Cardin, Kaine, Mikulski, and Warner for voting for S.744 and showing real leadership to resolve the immigration crisis.

Although the bill was not perfect, it was an effort to move the country forward on immigration. Had Republican leaders in the House of Representatives governed from a principle of majority vote, a similar bill would have passed the House with support from both parties, and today it would be the law.

Today’s hearing is about American families. Families who once lived in fear of being detained or deported are now going to be safe from the threat of being torn from their loved ones. Many immigrant parents will be able to come out of the shadows, pay taxes, and give back to their communities in even more meaningful ways. The President’s action will transform the lives of millions of families who came here in search of a better life.

President Obama’s leadership is a tremendous victory for Maryland and Virginia families. It is also a victory for those states’ economies.

Peter and Marlene Uribe immigrated to the United States eighteen years ago from their native Chile settling into a comfortable Glen Burnie community and building a life together. Arriving with their daughter Nathaly who later qualified for DACA, the couple had a second child Stephanie, who is now in the 11th grade. Peter and Marlene, together with their daughters, have spent countless hours organizing their neighbors and attending rallies in support of reform. The couple will join their large extended family in the

United States in acquiring lawful status in late Spring because of the President's leadership.

Catia Paz arrived in the U.S. from her native El Salvador 12 years ago and moved to Woodbridge, Virginia. Catia graduated from high school, has worked for the same employer for over seven years, paid taxes religiously and became a homeowner. Her husband, German Reyes, has TPS and together they have two US citizen daughters – Genesis Reyes, now five, and two year old Alison. Today, of her 65 close relatives in the US, 30 are U.S. citizens, 20 are legal permanent residents and 15 have temporary protected status. No one from her family remains in El Salvador. After a protracted battle, Catia got a one-year stay of deportation. Without administrative relief, her status in this country would expire on Mother's Day 2015. Because of the President's leadership, Catia will be able to apply for lawful status in late spring.

These are examples of the millions of lives that will change once immigrants who lack lawful immigration status are legally permitted to remain in the country and given the chance to more fully contribute to their communities.

The President's actions will also strengthen our economy and communities. The White House Council of Economic Advisors has found that the President's executive actions will raise average wages for U.S.-born workers and reduce the federal deficit.<sup>1</sup> It is worth noting this is only a fraction of the economic benefits that would occur if Congress passed comprehensive immigration reform. The Congressional Budget Office estimated that S. 744 would increase GDP by 3.3 percent, or roughly \$700 billion, in ten years and 5.4 percent, or about \$1.4 trillion, in twenty years.<sup>2</sup> In Virginia, an estimated 66,000 Virginians will directly benefit from this announcement, resulting in a \$106 million increase in tax revenues across five years. An estimated 60,000 Marylanders will directly benefit from this announcement, resulting in a \$114 million increase in tax revenues across five years.

It is critical to note that although this new policy offers promise to our families, the struggle for permanent relief is not over until everyone has freedom from fear of detention and deportation. We believe the best solution is a permanent one, which is why we will not stop until we win citizenship for the 11 million people who live, work and raise families in this country they call home. The President has done what he can, now it is up to Republicans to either step up or get out of the way to allow Congress to finish the job.

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<sup>1</sup> The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at: [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf)

<sup>2</sup> *Id.*

**FOR IMMEDIATE RELEASE**

Friday, November 21, 2014

[www.cbtu.org](http://www.cbtu.org)**For More Information, Contact:**

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**Executive Order on Immigration Reform**


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 CBTU President Supports President Obamas' Executive Order on Immigration Reform
 

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**Statement of Rev. Terry Melvin****President, Coalition of Black Trade Unionists**

On Nov. 20, 2014 President Obama announced he was signing an Executive Order to address the immigration crisis. He took this action based on a lack of any movement or resolution by the Legislative Branch of the government. CBTU President Rev. Terrence Melvin supports this action and stands with the President. For too long we have had a crisis at our border where families and children suffered as they hung in limbo with no resolution or hope. This is not what America stands for. This is not who we are as a country. CBTU supports this Executive Order and the 4 million families and children it seeks to help.

Immigration is a political subject with human consequences. With all the rhetoric thrown around many forget there are some facts that need to be considered. First, President Obama has deported more immigrants than both Bush Presidencies combined. Secondly, immigrants have paid more taxes than most major corporations in America. Immigrants pay their fair share more often than the very businesses profiting off our hard earned dollars. With those facts in mind, this Executive Order still increases border patrols and demands taxes be paid by immigrants prior to citizenship. What it also does is protect children, parents of US citizens, and those with long standing ties to this country from being deported and targets employers who exploit and hire undocumented workers.

4 million undocumented immigrants will be spared deportation by this action. There are roughly 12-15 million undocumented immigrants in the US. This Executive Order seeks to help the most vulnerable and committed immigrants become part of our great country, and it's a step forward to fixing the larger problem but it is not the sole solution. We need the Legislative Branch to do their job and pass comprehensive immigration reform. President Obama has only thrown a Band-Aid on a gaping wound. There are still around 10 million undocumented workers to be addressed and no clear pathway to citizenship available.

We are a nation built on immigrant labor. We maintain a long standing tradition where immigrants overall work hard, pay their fair share, and aspire for the same dream we all have. It is time we treat them like people and not prisoners. CBTU applauds President Obama for taking the first step but we also challenge our elected officials to enact comprehensive reform and reach a resolution before things get worse.

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For more information about CBTU, visit [www.cbtu.org](http://www.cbtu.org)

**CBTU**, which was founded in 1972, is the largest, independent voice of more than 2.2 million African American workers in labor unions today. With more than 50 chapters in major U.S. cities and one in Ontario, Canada, CBTU is dedicated to addressing the unique concerns of black workers and their communities. CBTU is a strong supporter of low-wage workers who are fighting for respect and the right to have a voice on their jobs.

In 2007, CBTU provided critical early union support for Barack Obama's historic campaign for the Democratic Party's presidential nomination in 2008, introducing him to black voters who were very skeptical then that an African American could ever reach the Oval Office. CBTU went on to galvanize tens of thousands of African American voters and union households in key states on behalf of President Obama's victorious campaigns in 2008 and 2012.

Rev. Terry L. Melvin, who was elected to lead the Coalition of Black Trade Unionists in 2012, is also the secretary-treasurer of the powerful New York State AFL-CIO. He succeeded CBTU President Emeritus William (Bill) Lucy, the iconic labor leader who co-founded CBTU in 1972.

WRITTEN STATEMENT OF  
**The Center for Popular Democracy**

For a Hearing entitled:

**“Keeping Families Together: The President’s Executive Action on Immigration and the  
Need to Pass Comprehensive Reform”**

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Submitted by:  
**Andrew Friedman**  
**Co-Executive Director**

**The Center for Popular Democracy (CPD)** is a national non-profit organization that works with community-based organizations across the country to develop, enact and implement pro-worker and pro-immigrant policy change in service of racial and economic justice. We have a strong cohort of over 30 partner organizations in twenty-seven states. Many of our partners have worked tirelessly for years, organizing and advocating for local and federal policy change to bring relief and support to immigrant families who live in daily fear of being locked up and sent into permanent exile from their loved ones. Together, we have won many victories in our state and municipal governments, but it has been a much more difficult struggle to have the voices of immigrant families heard in Washington, D.C.

We are grateful to the Judiciary Committee for the opportunity to comment on the recent Immigration Accountability Executive Action initiatives, particularly the impact of the expansion of the Deferred Action for Childhood Arrivals (DACA) and the new Deferred Action for Parental Accountability (DAPA) programs. It took years of courageous organizing by immigrant communities to make these programs possible, and

as a result millions of people will now be free to work, go to school, travel, express themselves, and lead empowered lives with the chance to reach their own full potential.

The President also announced the termination of the notorious Secure Communities program, which has come under increasing scrutiny for civil and human rights violations over the last two years, prompting more than 250 cities, counties and states to pass local policies limiting their collaboration with Immigration and Customs Enforcement (ICE). Many of CPD's partners have fought hard against the intrusion of Secure Communities into the operation of their local justice systems, and we are heartened to hear that this destructive program will not be responsible for any more suffering.

Enabling immigrants to live and work free from fear will also benefit both national and local economies. The White House Council of Economic Advisors has found that the President's executive actions will raise average wages for U.S. born workers and reduce the federal deficit. This will mean an improved standard of living for all our communities.

As welcome as executive action is, however, it cannot take the place of legislative change. Administrative relief does not offer permanent protection and cannot by itself put immigrants on a path to citizenship. Furthermore, millions of people will not be covered by executive action, and those immigrants will then become the targets of the harsh and punitive mass-deportation system that has removed more than 3 million people since President Obama took office.

Immigrant communities are now counting on Congress for a permanent solution. This should include a path to citizenship for the 11 million people who live, work and raise families in this country they call home. That path should not be filled with hurdles for low-income families and individuals who have had past contact with the criminal justice system. The federal government must also end the practice of relying on local law

enforcement to carry out immigration policy objectives. Linking policing and immigration drains limited state and municipal resources, and sows fear and distrust in communities that are already reluctant to rely on local law enforcement for protection. We are eager to see Democrats and Republicans collaborate on a permanent solution for our people that addresses all these issues; in the meantime, we are grateful that the President has taken a first step to provide some relief. While we wait for the federal government to recognize the full humanity of all immigrants, we will continue to work with our partners to push for state and local policies to help alleviate the suffering caused by persistent Congressional inaction.



CITIES UNITED FOR IMMIGRATION ACTION

December 10, 2014

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

The Honorable Chuck Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Chairman Leahy and Ranking Member Grassley:

As mayors and members of the Cities United for Immigration Action (CUIA) coalition, we write to express our unequivocal support for the President's Immigration Accountability Executive Action. This is an important first step in moving our nation forward on the critical issue of immigration. We urge Congress to follow the President's leadership and enact comprehensive immigration reform.

Most of the nation's twelve million undocumented immigrants live in America's cities, and as mayors, we must lead on this reform to provide all of our residents with the opportunities and services they deserve. Mayors across the country have led with local immigration reforms such as municipal identification cards, limits to detainers, and other welcoming initiatives, but we cannot do it alone.

Our mission is particularly urgent. Each day that Congress delays action on meaningful reform further hurts our families, negatively affects our economies, and creates insecurity in our communities. We have pledged our support to a Five Point Mayors Challenge to firmly fight for the effective implementation of the President's Executive Action and to advocate for comprehensive immigration reform. Through the Challenge, we have committed to:

1. Launch a mayoral war room to advocate for federal action on immigration reform
2. Establish local Cities United for Immigration Action coalitions
3. Safeguard immigrants from fraudulent services
4. Reach all eligible applicants through community outreach and public education
5. Assess services and programs to ensure efficient and affordable delivery of services to maximize enrollment by city residents

Our nation's immigration policies should empower cities to be inclusive of immigrants, so that all city residents can contribute to their local economies and can avail themselves of all city services and opportunities. We need an immigration system that makes our cities safer, by securing our border while focusing law enforcement resources on the most pressing threats. Instead, our immigration system is broken.

We are in the trenches and see firsthand the need for the President's Executive Action. His announcement is a strong beginning and a gateway to something much greater. We urge Congress to act now to pass permanent and comprehensive immigration reform.

Sincerely,

Kathy Sheehan, Mayor of Albany, NY  
Christopher Taylor, Mayor of Ann Arbor, MI  
Kasim Reed, Mayor of Atlanta, GA  
Stephanie Rawlings-Blake, Mayor of Baltimore, MD  
Martin J. Walsh, Mayor of Boston, MA  
Byron W. Brown, Mayor of Buffalo, NY  
Rahm Emanuel, Mayor of Chicago, IL  
Nan Whaley, Mayor of Dayton, OH  
Michael B. Hancock, Mayor of Denver, CO  
Dayne Walling, Mayor of Flint, MI  
Pedro E. Segarra, Mayor of Hartford, CT  
Annise Parker, Mayor of Houston, TX  
Steven Fulop, Mayor of Jersey City, NJ  
Virg Bernero, Mayor of Lansing, MI  
Paul Soglin, Mayor of Madison, WI  
Betsy Hodges, Mayor of Minneapolis, MN  
Toni Harp, Mayor of New Haven, CT  
Bill de Blasio, Mayor of New York, NY  
Ras Baraka, Mayor of Newark, NJ  
Michael Nutter, Mayor of Philadelphia, PA  
William Peduto, Mayor of Pittsburgh, PA  
Michael F. Brennan, Mayor of Portland, ME  
Charlie Hales, Mayor of Portland, OR  
Angel Taveras, Mayor of Providence, RI  
Lovely Warren, Mayor of Rochester, NY  
Francis G. Slay, Mayor of St. Louis, MO  
Ralph Becker, Mayor of Salt Lake City, UT  
Ed Lee, Mayor of San Francisco, CA  
Javier Gonzales, Mayor of Santa Fe, NM  
Gary McCarthy, Mayor of Schenectady, NY  
Ed Murray, Mayor of Seattle, WA  
Stephanie Miner, Mayor of Syracuse, NY  
Marilyn Strickland, Mayor of Tacoma, WA  
Bob Buckhorn, Mayor of Tampa, FL  
Muriel Bowser, Mayor-Elect of Washington, D.C.  
Mike Spano, Mayor of Yonkers, NY



**CWS statement to the U.S. Senate Judiciary Committee, regarding its hearing "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Immigration Reform," Wednesday, December 10, 2014**

Church World Service supports President Obama's decision to offer millions of our undocumented community members the opportunity to apply for temporary relief from deportation, and urges the all members of the U.S. Senate and House of Representatives to support its implementation.

The president has the full constitutional authority, and a moral obligation to keep families together and stop needless deportations. President Obama has signed fewer executive orders than most presidents,<sup>1</sup> and deferred action is one of the many long-standing forms of prosecutorial discretion available to the Executive Branch.<sup>2</sup> Every U.S. President has used their authority to offer temporary immigration relief to groups in need since at least 1956.<sup>3</sup> Ronald Reagan used categorical grants of deferred action for large groups of undocumented immigrants in 1987, as did George H.W. Bush in 1990.<sup>4</sup> George W. Bush exercised prosecutorial discretion in the aftermath of Hurricane Katrina for over 40 percent of the then-unauthorized population.<sup>5</sup> CWS celebrates alongside millions of our immigrant brothers and sisters who will be able to shed the fear of deportation and live anew.

Our immigration system is broken, and Congress has failed to enact legislation that would meaningfully fix it. When families are separated by backlogs of up to 27 years, bars to re-entry of up to 10 years, and no option to adjust their status, our immigration system, by failing to function in a timely way, incentivizes illegal entry. What mother or father would not go to the ends of the earth – or in this case cross a border – to reunite with their children? Any immigration system that ignores the God-given, deeply felt desire to be united with family does so at its own peril and renders itself ineffective.

While this administrative action helps millions who are here in the United States, it is temporary and will not lead to permanent status or citizenship. It also still does not make our immigration system more accessible to people seeking to come to the United States in order to reunite with their family members or provide a better life for their loved ones. CWS urges Congress to enact immigration reform that will provide a permanent solution and a path to citizenship for all our undocumented community members. Until such reform passes, CWS encourages all Members of Congress to support the President's actions and help facilitate its smooth implementation.

The CWS network has been praying, fasting, organizing and advocating for changes to the U.S. immigration system for decades, and will continue to push for broad implementation of this executive action and additional reforms from the administration and congress. CWS is also preparing for the implementation of this executive order, to assist our community members in applying for deferred action.

As we recently celebrated Thanksgiving and many of us prepare for Christmas with shopping and travel, let us reflect on the millions of agricultural workers who make our Thanksgiving feasts possible, who work in factories, stores and warehouses to make the gifts we give, and who work in restaurants and make the beds in our hotel rooms. Many of their lives will be improved by this action.

<sup>1</sup> "Executive Orders: Washington - Obama," The American Presidency Project. <[www.presidency.ucsb.edu/data/orders.php](http://www.presidency.ucsb.edu/data/orders.php)>.

<sup>2</sup> Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 103(a)

<sup>3</sup> "Executive Grants of Temporary Immigration Relief, 1956-Present," American Immigration Council, October 2014.

<[www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_1.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_1.pdf)>.

<sup>4</sup> Letter, "re: Executive authority to grant administrative relief for DREAM Act beneficiaries." May 2012.

<[www.law.yale.edu/documents/pdf/conference/ILR13\\_CALawProfessorsLetter.pdf](http://www.law.yale.edu/documents/pdf/conference/ILR13_CALawProfessorsLetter.pdf)>.

<sup>5</sup> "Executive Grants of Temporary Immigration Relief, 1956-Present," American Immigration Council, October 2014.

<[www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_1.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_1.pdf)>.



**Written Statement of Farmworker Justice  
Submitted to the Senate Judiciary Committee Hearing on  
“Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Immigration Reform”  
December 9, 2014**

**Contact:**

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Farmworker Justice submits this statement for inclusion in the record of the December 2, 2014 House Judiciary Committee hearing titled “Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Immigration Reform.” For over thirty years, Farmworker Justice has engaged in policy analysis, education and training, advocacy and litigation to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety and access to justice. Since its inception, Farmworker Justice has played an important role in immigration policy discussions, monitored the H-2A agricultural guestworker program throughout the country and helped farmworker organizations participate in policy debates.

Farmworker Justice seeks public policies and private conduct that treat the men and women employed on our ranches and farms with dignity. The wages and working conditions of most farmworkers deserve improvement and immigration policy plays an important role in the ability of farmworkers to win such improvements. Immigration status is not only an important determinant of job terms, but also of the health and safety of farmworkers, their family members and their communities. For these and other reasons, immigration policy has been at the core of the mission of Farmworker Justice for its entire existence.

We applaud President Obama for taking action to address our broken immigration system. The President's deferred action programs will allow hundreds of thousands of qualifying farmworkers and millions of other aspiring Americans to come forward, submit to background checks and properly document themselves with the federal government and in their workplaces. It also represents a step toward desperately-needed, comprehensive reform of our immigration system that Congress should enact.

The Administration took action because Congress has failed to address the urgent need for comprehensive immigration reform. Although the Senate passed a bipartisan comprehensive immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S.744, by a strong bipartisan majority, the House has failed to move legislation addressing our broken immigration system forward.

The need for administrative immigration relief in the absence of Congressional action is acute in farmworker communities. There are an estimated 2.4 million farmworkers laboring on our farms and ranches to bring food to our tables. Roughly one-half to up to 70% of farmworkers – at least some 1.2 million – are undocumented immigrants. Many family members of farmworkers also are undocumented. The broken immigration system inflicts harm on farmworkers, their family members, their communities, and the businesses that need their labor. There are ongoing efforts to obtain an estimate of the number of farmworkers who could qualify for President Obama’s administrative relief, but it appears there may be as many as 700,000 farmworkers and family members who may be eligible for the deferred action programs.

The presence of so many undocumented farmworkers in the labor force makes them vulnerable to exploitation and abuse; and has contributed to the pervasive violations of labor protections in agriculture. Unscrupulous employers take advantage of their undocumented workers, sometimes paying them less, or requiring them to do more difficult and dangerous work or work more demanding schedules. The rampant violations on farms and abusive working conditions are illustrated through reports and surveys across the country:

A survey conducted by Pinos y Campesinos Unidos del Noroeste (“PCUN,” Oregon’s farmworker union) of approximately 200 Marion County, Oregon farmworkers paid by “piece-rate” in the 2009 berry harvests revealed widespread violations of the state’s minimum wage law. Ninety percent of workers reported that their “piece-rate” earnings were consistently less than minimum wage, with an average hourly wage of about \$5.30 – 37% below the hourly minimum wage at the time—and an average daily underpayment of about \$25.00.

In New Mexico, a survey of farmworkers revealed the abusive conditions in the fields, including extremely low wages and high levels of wage theft.<sup>1</sup> Sixty-seven percent of field workers were victims of wage theft in the year prior to the survey; 43% of respondents stated that they never received the minimum wage and 95% were never paid for the time they waited each day in the field to begin working. The farmworkers surveyed also experienced dangerous working conditions, with 29% reporting work in a field with no drinking water; 52% reporting work in at least one field where they did not receive any breaks; and 47% reporting pesticide-related health problems as a result of pesticide exposure in the fields.

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<sup>1</sup> New Mexico Center on Law and Policy, *Human Rights Alert: New Mexico’s Invisible and Downtrodden Workers* (2013), <http://nmpovertylaw.org/WP-nmclp/wordpress/WP-nmclp/wordpress/wp-content/uploads/2013/07/Report-FINAL-2013-07-23.pdf>.

Women farmworkers are uniquely vulnerable to sexual harassment and assault. According to one study of 150 Mexican farmworker women in CA, 80% of respondents experienced some form of sexual harassment.<sup>2</sup>

The presence of a majority undocumented workforce depresses wages and working conditions for all farmworkers, including the roughly 750,000 to 1.3 million United States citizens and lawful immigrants in agriculture.<sup>3</sup> U.S. farmworkers recognize that they can easily be fired and replaced by more exploitable workers if they speak up for their rights. They are aware of the impact that a majority undocumented workforce has on conditions in the fields. In the words of one Texas farmworker,

*"[w]orking in the fields is very hard but it has taught [me] a lot of lessons on life. Sometimes I want to complain so bad, especially when it is raining and we are out there in the mud that makes our boots very heavy to walk in or when the rain has ceased and the sun comes out evaporating the rain making it so hard to breathe that you think you are going to faint. Then I remember those people that work with us but do not have documents. They have to do all this too but they are made to work longer hours and get paid less than us. Life as a farm worker is so hard but it is something we are always willing to do."*<sup>4</sup>

Farmworkers' incomes are very low. Poverty among farmworkers is more than double that experienced by other wage and salary workers. Farm work ranks as one of the three most dangerous occupations in the United States, with routine exposure to dangerous pesticides, arduous labor and extreme heat. In 2012, the injury rate for agricultural workers was over 40 percent higher than the rate for all workers. Despite these working conditions, farmworkers are excluded from many labor protections other workers enjoy, such as many of the OSHA labor standards, the National Labor Relations Act, overtime pay, and even the minimum wage and unemployment insurance at certain small employers. Such poor conditions and discriminatory laws serve to keep many farmworkers in a cycle of poverty. They also result in substantial employee turnover, and such instability in the workforce reduces productivity for businesses.

In a Miami Herald op-ed published on April 9, 2014, Jaime explains the impact of being undocumented and the importance of administrative relief for his family:

When you're undocumented, people take advantage. We show up for work as part of a crew of anywhere from 9 or 10 to 30 men and women. I'm lucky; I have a car so when I'm in a job with abusive supervisors, I leave. I have seen and heard of supervisors who take advantage of workers who don't have other options.

<sup>2</sup> Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women, Violence Against Women* (January 2010), <http://www.ncfh.org/pdfs/2k9/8716.pdf>.

<sup>3</sup> According to NAWS, about 33% of farmworkers are citizens, 18% are lawful permanent residents and another 1% have other work authorization. 52% of the total workforce of 2.5 million is 1.3 million. Even assuming that the number of undocumented farmworkers approaches 70% of the workforce, there would still be roughly 750,000 U.S. farmworkers.

<sup>4</sup> Farmworker Justice, *Who Works the Fields? The Stories of Americans Who Feed Us*, p. 2, <http://www.farmworkerjustice.org/sites/default/files/WhoWorkstheFields-FJ%20Report%20June%202013.pdf>

This is particularly true for indigenous workers who don't speak much Spanish or have a car; they stay because of a lack of options. Sometimes they cheat us out of what we are owed, or pay less than the contract promises. Even if we could report it, we would have to hang around instead of hitting the highway to the next job.

...

Farm work is the work I have. I like the idea that we feed other families. Where I come from, the family is the center of everything. I hope a new law will protect our families in the United States.

Jaime and his wife are likely DAPA beneficiaries. They came to the US from Mexico in 1995 and have worked in agriculture ever since. The Florida-based couple has three citizen children and two older undocumented children with families of their own who may also qualify for DAPA or DACA. Read Jaime's entire op-ed in appendix A.

The President's executive action is an important step toward achieving a greater measure of justice for families like Jaime's, who work hard to put food on our tables. With protection against the constant fear of deportation, farmworkers and other aspiring Americans will be able to contribute more fully to their communities and will be empowered in their workplaces. Eligible farmworkers will no longer have to tolerate poor or illegal working conditions; they can report abuse or find a better grower for whom to work. They will be able to open bank accounts and more easily invest in their communities. In many cases deferred action recipients will be able to obtain driver's licenses, making the roads safer for everyone and enabling eligible parents to bring their US citizen children to doctors' appointments, school meetings and community events without fear.

The President's actions are a prudent and proper exercise of his authority to enforce immigration laws. Since the 1950's, every President, including both Republican and Democratic Presidents, has used his authority to grant temporary immigration relief to groups of individuals in the country without status.<sup>5</sup> As part of the President's existing authority to enforce the law, he can and must set priorities, target resources, and shape how laws are to be implemented. Within that responsibility, the President has discretionary authority to execute the laws in a manner that most effectively utilizes limited resources, including through the use of prosecutorial discretion.<sup>6</sup> The deferred action programs in combination with the Department of Homeland Security's new enforcement priorities will better enable Immigration and Customs Enforcement and Customs and Border Patrol to target their resources towards serious criminals and recent border crossers. This will result in an even more secure border than we have today.<sup>7</sup>

Even as we celebrate with those who will be eligible for relief, we are disappointed at the limits of the program. The eligibility criteria will deny administrative relief to many deserving farmworkers and

<sup>5</sup>American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present*, [http://www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_4.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf).

<sup>6</sup> See Hiroshi Motomura et al., *Executive authority to grant administrative relief for DREAM Act beneficiaries*, <http://www.niic.org/document.html?id=754>.

<sup>7</sup> Net illegal immigration has been at record lows in recent years. See Doris Meissner et al., *Immigration Enforcement in the US: The Rise of a Formidable Machinery*, Migration Policy Institute.

their family members, including many long-time farmworkers who do not have U.S. citizen children. Moreover, the relief is only temporary. Only Congress can create an opportunity for undocumented farmworkers, their family members and the rest of the 11 million to obtain permanent immigration status and an opportunity for citizenship. Immigrant farmworkers and other aspiring Americans deserve to be treated with respect and should be given the opportunity to earn immigration status and citizenship. Demands by some employer groups for exploitative guestworker programs should be rejected. Congress should pass immigration legislation that values our heritage as a nation of immigrants.

## Appendix A

# The Miami Herald

April 8, 2014

## Life as an undocumented farm worker

Link: [http://www.miamiherald.com/2014/04/08/4047311/life-as-an-undocumented-farm-worker.html?fb\\_action\\_ids=10203254592622621&fb\\_action\\_types=og.likes](http://www.miamiherald.com/2014/04/08/4047311/life-as-an-undocumented-farm-worker.html?fb_action_ids=10203254592622621&fb_action_types=og.likes)

*LTE placed by Farmworker based on interview conducted by Farmworker Justice*

This week in Washington, immigrant groups are protesting the Obama administration's deportation of immigrants — 2 million, they say, in five years. They want it to stop until Congress finishes passing immigration reform. Here is what it's like to be an undocumented farm worker, as told (using a pseudonym) by a migrant worker in Florida.

It has been nearly 20 years since I left Mexico and came to Florida — two decades of hard work without getting ahead that much. That's 20 years in orchards and vegetable fields here, or picking cucumbers in Ohio, apples in Michigan and Washington, tomatoes in Tennessee, melons in Georgia — always in fear of deportation. I've spent 20 years dreaming about becoming legal. For me, that's the American Dream: to be a United States citizen.

We couldn't make a go of it in Mexico in 1995, my wife and I; there wasn't enough work so we came here. There really is no way to do it legally — to get a visa that lets you work and stay, unless you have family here or know someone important. I didn't have any experience in the fields. Farm work was what I could get and so a farm worker is what I became, and that is what I am today. I'm good at it, but it's not what I want my children to do.

We'd been here a couple of years before we sent for our two kids. It was scary. We paid someone to bring them across the border but for a long time, about a month but it felt like an eternity — we didn't hear anything. We weren't sure where they were or even if they were alive. Eventually we got a call that they were safe, but we had to drive to get them at the border. They were about 3 and 5 years old then. Today they are 24 and 22, also working in agriculture, with families of their own. Our other three kids were born here and are citizens.

Farm work is hard. We start in the orchards early, when the humidity is high and the trees are wet. We're carrying bags and they get heavy, up to 90 pounds of oranges when full, as we climb up and down from tree to tree, reaching in and picking the fruit, placing it in the bag and moving on. We're soaked all day with moisture and sweat. There aren't many breaks for water or a bathroom, although some places are better than others. We work when it's hot and cold; if we can't work, we don't get paid.

I travel — always taking my family. In recent years, we have driven 3,000 miles to Washington state. We get to the area where we hear they need apple pickers and look for a contractor. Sometimes we can afford a motel; or we sleep in the car until we find housing. We are cautious; if you attract attention someone could call a cop or the immigration guys. One slip-up and you're caught in the system that takes you away from your family forever. Half of the people I work with are in the same situation.

When you're undocumented, people take advantage. We show up for work as part of a crew of anywhere from 9 or 10 to 30 men and women. I'm lucky; I have a car so when I'm in a job with abusive supervisors, I leave. I have seen and heard of supervisors who take advantage of workers who don't have other options.

This is particularly true for indigenous workers who don't speak much Spanish or have a car; they stay because of a lack of options. Sometimes they cheat us out of what we are owed, or pay less than the contract promises. Even if we could report it, we would have to hang around instead of hitting the highway to the next job.

We never go back to Mexico. My father died and my wife's father, but we didn't attend the funerals. We would have had to leave the kids behind and if we couldn't get back in, what would happen?

I know people who have been deported, even some married to legal residents or citizens. They tell us Congress might pass immigration reform. The most important thing is to stop breaking up families. I've tried to tell my children that the police are their friends, but they know that the police also can destroy our family. They've seen it happen with their friends. If we could get legal status or citizenship, none of that would be a problem.

Farm work is the work I have. I like the idea that we feed other families. Where I come from, the family is the center of everything. I hope a new law will protect our families in the United States.

*Jaime Diaz is a pseudonym for a farm worker who lives in Florida.*



**FIRST FOCUS**  
CAMPAIGN FOR CHILDREN

**FIRST FOCUS CAMPAIGN FOR CHILDREN  
STATEMENT FOR THE RECORD**

**U.S. SENATE COMMITTEE ON THE JUDICIARY HEARING  
“KEEPING FAMILIES TOGETHER:  
THE PRESIDENT’S EXECUTIVE ACTION ON IMMIGRATION AND THE NEED TO PASS  
COMPREHENSIVE IMMIGRATION REFORM”**

**DECEMBER 10, 2014**

Chairman Leahy, Ranking Member Grassley, and Members of the Senate Committee on the Judiciary, we thank you for the opportunity to submit this statement for the record for the hearing on the recently announced executive immigration accountability actions and the need to pass comprehensive immigration reform.

The First Focus Campaign for Children (FFCC) is a bipartisan advocacy organization dedicated to making children and families a priority in federal policy and budget decisions. As an organization dedicated to promoting the safety and well-being of all children in the United States, we have been advocating on behalf of the passage of comprehensive immigration reform which addresses the unique needs of children, including U.S. citizen and lawfully present children in immigrant families, undocumented youth, and unaccompanied migrant children. In 2013, we developed a set of children’s principles for immigration reform, endorsed by over 200 national and state organizations, calling for immigration reform to: 1.) provide a path to citizenship for parents and youth; 2.) protect children’s fundamental rights; 3.) ensure that enforcement actions do not cause children harm; and 4.) keep families together.

In addition to advocating for legislative change, FFCC has also been advocating for administrative reforms to mitigate the harmful impact of immigration enforcement actions on children. In recent years, the FFCC has been instrumental in pushing for more humane approaches to immigration enforcement, including the 2013 Immigration and Customs Enforcement “parental interest directive,” which helps ensure that detained and deported parents are able to make critical decisions regarding their child’s care and participate in the child welfare system process when necessary. We have also been calling for the halt of parental deportations, and therefore we strongly support the President’s new executive immigration accountability actions as we firmly believe that they will provide immigrant families with much needed relief. Every day that Congress has waited to pass immigration reform has meant one more day of families being needlessly torn apart and millions of children living in fear. Currently, more than 5 million children in the U.S. live in a mixed-status family with at least one undocumented parent, and the high rates of parental deportations in recent years has directly impacted the health and well-being of our nation’s children. In fact, recent analysis by Human Impact Partners reveals that more than 150,000 U.S. citizen children lost a parent to deportation in 2013 alone.

This past week the FCC released an analysis entitled *A Step Forward: Immigration Executive Actions and Our Nation's Children*. The analysis highlights the impact of key provisions on the family unity and child well-being. We applaud the fact that more than 300,000 more youth will now be eligible for the expanded Deferred Action for Childhood Arrivals (DACA) program, a program which has already provided more than half a million young people with improved access to higher education, career opportunities, and basic necessities such as a driver's license or credit card.

We also strongly support the introduction of the new Deferred Action for Parental Accountability (DAPA) program, a program which has the potential to provide protection from deportation and access to work authorization for up to 4.1 million parents of U.S. citizens and lawfully permanent residents (LPRs). Up to 4.5 million children, nearly 7 percent of the U.S. K-12 student population, will no longer have to live in fear of losing a parent to deportation. The parents who qualify for the new Deferred Action for Parental Accountability Program will also be able to apply for work permits, enabling them to secure more stable employment and critical income supports. By strengthening parents, the program will enable them to better meet their children's basic needs. And that means children will be healthier and do better in school, which is a win for the nation as a whole.

Ultimately, the new executive immigration accountability actions represent a promising step in the right direction for millions of children who have fallen victim to the enforcement-heavy immigration policies of recent years. Given that children of immigrants comprise one quarter of the U.S. child population it is imperative that immigration policies promote their best interests. These new reforms have the potential to significantly improve not only lives of the children and families directly affected, but also the country as whole. However, we also recognize that they are incomplete and insufficient. Half of the U.S. undocumented population will remain vulnerable, including parents of DREAMERS, children too young to apply for DACA, parents who have already been deported, and parents of U.S. citizens who have been here less than 5 years. Thus, the only permanent solution remains for Congress to pass immigration reform legislation that includes a path to citizenship.

We thank you again for the opportunity to submit this written testimony. We look forward to working with Members on both sides of the aisle to continue to push for immigration reform. Should there be any questions regarding this statement, please contact Wendy Cervantes, Vice President of Immigration and Child Rights, at 202-657-0637 or [wendyc@firstfocus.net](mailto:wendyc@firstfocus.net).



WRITTEN STATEMENT OF  
THE FAIR IMMIGRATION REFORM MOVEMENT "FIRM"

For a Hearing entitled:

"Keeping Families Together: The President's Executive Action On Immigration And The  
Need To Pass Comprehensive Reform"

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Kate Kahan, Legislative Director  
Center for Community Change

The Fair Immigration Reform Movement "FIRM" worked with many of the 68 Democrats, Republicans, and Independents who came together to pass a bipartisan bill in the Senate last year and although the bill was not perfect, it was a good faith effort to move the country forward on immigration. We commend those of you who crossed the aisle to produce an immigration bill. Had Republicans in the House of Representatives allowed that kind of bipartisanship, a similar bill would have passed the House with support from both parties, and today it would be the law.

Today's hearing is about American families. Families who once lived in fear of being detained or deported are now going to be safe from the threat of being torn from their loved ones. Many immigrant parents will be able to come out of the shadows, pay taxes, and give back to their communities in even more meaningful ways. The President's action will transform the lives of millions of families who came here in search of a better life.

Families like the Uribe family from Maryland who came to the U.S. from Chile 17 years ago. Peter came to the U.S. followed a few months later by his wife, Marlene, and their infant daughter, Nathaly. The Uribe's daughter, Stephanie, was born in the U.S. and Nathaly was eligible for deferred action in 2012. Under administrative relief, the entire family can remain in the U.S. Peter says today because of President Obama's action his children no longer live in fear that their mom and dad will be taken from them.

And Jong-Min You of Brooklyn, New York, who came to the U.S. from South Korea

when he was just a year old. He attended the prestigious Stuyvesant High School in New York City and graduated *magna cum laude* from the University of Tennessee in Knoxville with a BA degree in Sociology. But due to his undocumented status, he was unable to pursue a career related to his studies and has worked in a flower store, a pizzeria and currently works in a grocery store. Because of the actions taken by President Obama, Jong-Min has finally been given a chance to fulfill his dreams. These are examples of the millions of lives that will change once immigrants who lack lawful immigration status are legally permitted to remain in the country and given the chance to more fully contribute to their communities.

The President's actions will also strengthen our economy and communities. The White House Council of Economic Advisors has found that the President's executive actions will raise average wages for U.S.-born workers and reduce the federal deficit.<sup>1</sup> It is worth noting this is only a fraction of the economic benefits that would occur if Congress passed comprehensive immigration reform. The Congressional Budget Office estimated that S. 744 would increase GDP by 3.3 percent, or roughly \$700 billion, in ten years and 5.4 percent, or about \$1.4 trillion, in twenty years.<sup>2</sup> The President's plan is also about accountability: it requires every business and worker to play by the same set of rules instead of the *status quo*, which everyone agrees is broken.

It is critical to note that although this new policy offers promise to our families, the action taken by the President is merely temporary. The struggle is not over until everyone has freedom from fear of detention and deportation. FIRM believes the best solution is a permanent one, which is why we will not stop until we win citizenship for the 11 million people who live, work and raise families in this country they call home. The President has done what he can to help build a system that lives up to our heritage as a nation of laws and a nation of immigrants, now it is up to Republicans to either step up or get out of the way to allow Congress to finish the job and pass comprehensive reform.

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<sup>1</sup> The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at: [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf)

<sup>2</sup> *Id.*



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## Statement of

**José Calderón, President  
Hispanic Federation**

**United States Senate  
Committee on the Judiciary**

### **Hearing on “Keeping Families Together: The President’s Executive Action on Immigration and Need to Pass Comprehensive Reform”**

**December 10, 2014**

Hispanic Federation respectfully submits this statement for the record on today’s hearing before the Senate Committee on the Judiciary on “Keeping Families Together: The President’s Executive Action on Immigration and Need to Pass Comprehensive Reform.”

Hispanic Federation is a social service and advocacy membership organization that represents and works with nearly 100 Latino non-profit community-based agencies to promote the social, political and economic wellbeing of Hispanic Americans and the nonprofits that serve them. For more than 20 years, the Federation has empowered and advanced the aspirations and needs of the Hispanic community by improving educational achievement, increasing financial stability, strengthening Latino nonprofits, promoting healthy communities, and giving voice to the Latino community.

#### **Summary**

There is a broad consensus that our immigration system is irrevocably broken. Millions are forced to live in the shadows, where they are exploited and victimized. And for families caught in the middle of our dysfunctional system, the human toll is horrific as children are separated from their parents and married couples from their spouses. Simply put, the status quo fosters insecurity, instability and devastation. Hispanic Federation believes that the enactment of Congressional legislation is the only way to permanently change this situation. However, in the absence of Congressional action on immigration reform, Hispanic Federation fully supports the President taking executive action to provide temporary relief for immigrants and their families.

On November 20, 2014, President Obama announced a series of *Immigration Accountability Executive Actions*, which apply the Executive’s inherent constitutional and administrative authority to make changes to our nation’s immigration enforcement practices. Among these actions was an expansion of Deferred Action for Childhood Arrivals (DACA), a program of deferred action for parents of U.S. citizens and lawful permanent resident children, and termination of the ineffective and counterproductive Secure Communities program. While such actions are limited in scope, they represent a critical and long overdue step to reduce some of the suffering caused by our dysfunctional immigration system.

**The Expansion of Deferred Action for Childhood Arrivals (“DACA”)**

Expanding DACA will provide reprieve from deportation to an estimated 270,000 young people who were brought to this country as children, study in our schools, are friends with our children, live in our communities, and call America home. While deferred action does not provide a permanent status, Hispanic Federation strongly supports this temporary measure that provides relief and hope to talented and driven immigrant youth.

**The Creation of Deferred Action for Parental Accountability (“DAPA”)**

Extending deferred action to parents of U.S. citizens or legal permanent residents is a moral imperative. Deportations have lasting effects on families, forcing children into foster care as their parents are deported to other countries. Preserving family unity is a core principle of Hispanic Federation. Families living without the constant fear of deportation are more stable and self-sufficient than those torn apart or living in fear. Parents can now enjoy work authorization, provide for their families and be afforded protections within our workforce.

**Ending Secure Communities**

Secure Communities is a deeply flawed program, that contrary to its name, has devastated families and made communities across America less safe. Statistics demonstrate that Secure Communities has not targeted the most serious offenders for immigration enforcement. In fact, the vast majority of people identified as a result of Secure Communities were arrested for less serious crimes, including traffic offenses. The new “Priority Enforcement Program” (PEP) seeks to identify deportable individuals in law enforcement custody, but is designed to lead to immigration enforcement actions against only those individuals who pose a threat to our communities and includes accountability and transparency measures. We are hopeful that the PEP program will address many of the faults of Secure Communities.

We look forward to working constructively with the Administration as it implements the policies announced and pursues meaningful protections and policies for those who come to this country seeking the American Dream.

Once again, Hispanic Federation believes that Congressional action is the permanent solution to fixing our nation's broken immigration system. Towards that end, Congress must enact bipartisan and compassionate immigration reforms that unite families, protects vulnerable migrants, provides a pathway to citizenship for the undocumented and integrates new Americans into the full fabric of society, and fairly and humanely enforces our immigration laws.

WRITTEN STATEMENT OF  
**Junta for Progressive Action**

For a Hearing entitled:

“Keeping Families Together: The President’s Executive Action On Immigration And The  
Need To Pass Comprehensive Reform”

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Submitted by:

**Sandra Treviño, MSW**  
**Executive Director, Junta for Progressive Action**

**Junta for Progressive Action** welcomed as an important step the passage of S.744, the bipartisan immigration reform bill that passed the Senate last year with the support of 68 Democrats, Republicans, and Independents. We thank **Senator Richard Blumenthal** for voting for S.744 and showing persistence, leadership, and determination by reaching across the aisle for the good of the country. Notably, Senator Blumenthal also sponsored eighteen amendments to further strengthen the bill.

Although the bill was not perfect, it was an effort to move the country forward on immigration. Had Republicans in the House of Representatives allowed that kind of bipartisanship, a similar bill would have passed the House with support from both parties, and today it would be the law.

Today’s hearing is about American families. Families who once lived in fear of being detained or deported are now going to be safe from the threat of being torn from their loved ones. Many immigrant parents will be able to come out of the shadows, pay taxes, and give back to their communities in even more meaningful ways. The President’s action will transform the lives of millions of families who came here in search of a better life.

Here in New Haven, Connecticut, hundreds of families have already attended informational talks about the relief announced by President Obama. These hardworking people are eager to do whatever is necessary to protect their families from separation. We are fortunate that Connecticut’s state legislature unanimously passed the TRUST Act, which has kept countless people safe from deportation for petty offenses like traffic stops. However, we believe all families are deserving of the protections afforded by the TRUST

Act, regardless of which state they call home.

Every day, thousands of families across the country are negatively impacted by our broken immigration system, and we are grateful that President Obama has taken the important and necessary steps to transform our current system—a system that does not value family, a system that has needlessly detained and deported so many people. Now we are counting on Congress to permanently reform this broken system and build one that reflects America's interests and values.

This is why the Executive Action taken by President Obama is so important. Millions of lives will change once these families are legally permitted to remain in the country and given the opportunity to more fully contribute to their communities.

The President's actions will also strengthen our economy and communities. The White House Council of Economic Advisors has found that the President's executive actions will raise average wages for U.S.-born workers and reduce the federal deficit.<sup>1</sup> It is worth noting this is only a fraction of the economic benefits that would occur if Congress passed comprehensive immigration reform. The Congressional Budget Office estimated that S. 744 would increase GDP by 3.3 percent, or roughly \$700 billion, in ten years and 5.4 percent, or about \$1.4 trillion, in twenty years.<sup>2</sup> The President's plan is also about accountability: it requires every business and worker to play by the same set of rules instead of the *status quo*, which everyone agrees is broken.

It is critical to note that although this new policy offers promise to our families, the action taken by the President is merely temporary. The struggle is not over until everyone has freedom from fear of detention and deportation. We believe the best solution is a permanent one, which is why we will not stop until we win citizenship for the 11 million people who live, work and raise families in this country they call home. The President has done what he can, now it is up to Republicans to either step up or get out of the way to allow Congress to finish the job.

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<sup>1</sup> The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at: [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf)

<sup>2</sup> *Id.*

**Testimony**

**Senate Judiciary Committee**

**Hearing on “Keeping Families Together: The President's Executive Action on  
Immigration and the Need to Pass Comprehensive Immigration Reform”**

**Latino Victory Project**

**December 10, 2014**

**Washington, D.C.**

The Latino Victory Project supports the Immigration Accountability Executive Actions as a first step to fix the nation’s immigration system. President Obama’s decision to address our persistently broken immigration system by using his legal authority through these executive actions is a welcome and extremely hopeful sign for all Americans – especially for those in the Latino community.

The Latino Victory Project is an ambitious, non-partisan effort to build power within the Latino community and ensure the voices of Latinos are reflected at every level of government and in the policies that drive our nation forward. The organization was founded by Eva Longoria and Henry R. Muñoz III to provide a voice for the 53 million Latinos whose voices have been ignored when it comes to important policy debates that matter so much to our community, including immigration.

Elections matter; they demonstrate what the American people care about and the issues that they want Congress to resolve. This election, Latino voters made it clear that immigration is their top priority.

The Latino Victory Project, in partnership with other national organizations, released findings of the largest ever mid-term election eve poll of the Latino vote.<sup>i</sup> What we found was that, for the first time through this polling, immigration was the number one issue for Latino voters. A combined two-thirds of Latino voters nationwide said that the issue of immigration was either the most important issue or one of the most important issues in their decision to vote and in their candidate preference, with nearly twenty percent of voters saying immigration was somewhat important. This aligns with another finding from our poll that showed that nearly sixty percent of Latino voters nationwide know an undocumented immigrant.

This data is only reinforced by other public polling. Latinos are joined by Americans from a variety of backgrounds in supporting the President's actions. According to a new Hart Research Poll,<sup>ii</sup> three-fourths of Americans support the temporary work permits aspect of the action and two-thirds support protecting the undocumented parents of children or young adults.

Latinos and all Americans are tired of Congress failing to act while families are ripped apart. Executive Action falls within the President's legal authority, but only Congress can

finish the job. Since 1960, 100% of United States Presidents – including Presidents Eisenhower, Nixon, Reagan, Clinton, and both Presidents Bush – have taken executive action on immigration.<sup>iii</sup> Furthermore, the current actions have the backing of 136 immigration legal scholars.<sup>iv</sup>

Immigration is exactly the type of policy that can bring together Republicans and Democrats. We hope that President Obama's new measures will inspire Congress to finish the hard work needed to pass comprehensive immigration reform with a pathway to citizenship. The bi-partisan Senate bill (Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744), which passed more than a year ago is the logical measure that would repair our broken system.

The United States of America is the strongest nation in the world because of immigration. As President Ronald Reagan spoke of the "shining city," he described an America with people of all kinds with the will and heart to get here. As the Latino Victory Project continues to engage Latinos to elevate and advance values that are important to our nation, we hope that Congress hears our voice in support of these executive actions, and turns to a long-term solution to fix the nation's immigration system so that millions can come out of the shadows, contribute to our economy, pay billions more in taxes, and become full participants in making our city stronger and brighter.

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<sup>i</sup> Latino Vote Election Eve Poll, [www.latinovote2014.com](http://www.latinovote2014.com)

<sup>ii</sup> Hart Research Poll, [http://aufc.3cdn.net/1b1ad804b726a59000\\_u7m6bxtti.pdf](http://aufc.3cdn.net/1b1ad804b726a59000_u7m6bxtti.pdf)

<sup>iii</sup> American Immigration Council,  
[http://www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_4.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf)

<sup>iv</sup> Letter from Lawyers on Executive Action,  
<https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>

United States Senate Committee on the Judiciary

*Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform*

Testimony of  
Mayor Eric Garcetti  
City of Los Angeles

December 10, 2014

Thank you Senator Hirono, Chairman Leahy, Ranking Member Grassley, and distinguished members of the Judiciary Committee, including Senator Dianne Feinstein from the great State of California. I appreciate this opportunity to provide my testimony on the President's executive immigration actions.

As Mayor of the nation's second-largest city, I urge Congress to support the President's recent action on immigration. Within the city I lead, 232,000 people will be eligible under this executive initiative. These Los Angeles residents already work, pay taxes, and spend money at our local businesses. If successful under the President's action, they will be better integrated into our society and our economy.

At the local level, we experience the benefits and challenges of our immigrant populations up close. As municipal officials, this issue is not a "policy debate." It's on our streets and in our neighborhoods every day. I know firsthand, after 12 years as a Councilmember and Council President, and now as Mayor, that this action will have a positive impact on individual families, our economy, our communities, and public safety. In fact, undocumented immigrants contributed an estimated \$10.6 billion in taxes in 2010 to our nation's economy, with \$2.2 billion in California alone.

That is why in Los Angeles, my Administration launched the Mayor's Office of Immigrant Affairs. It has coordinated efforts to help our residents access the Deferred Action for Childhood Arrivals program; obtain citizenship; and obtain drivers licenses under the state's new legislation that opens access to all Californians. In partnership with the U.S. Citizenship and Immigration Services, we have integrated citizenship centers within our libraries, organized attorneys to provide free legal assistance; and are working with California Mayors, including those of Long Beach, Oakland, Sacramento, San Francisco, San Jose and Santa Ana, to take our work to connect federal immigration reforms with our local residents. Our city also stepped up to the plate to serve the recent influx of unaccompanied minors at our borders, 3,000 of which were reunited with family members within the Los Angeles area.

In closing, I invite Members of Congress and the Administration to visit the City of Los Angeles to witness the strengths and benefits our immigrant communities can bring to our nation.

National Asian Pacific American Bar Association



**STATEMENT OF**

**George C. Chen, President**

**National Asian Pacific American Bar Association**

**UNITED STATES SENATE**

**COMMITTEE ON THE JUDICIARY**

**Hearing on Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform**

**DECEMBER 10, 2014**

Chairman Leahy, Ranking Member Grassley, and members of the Committee: I am honored to submit this testimony for the record on behalf of the National Asian Pacific American Bar Association (NAPABA), regarding today's hearing entitled "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform."

NAPABA is the national association of Asian Pacific American (APA) attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and almost 70 national, state, and local bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal services and non-profit attorneys, and lawyers serving at all levels of government. Since its inception in 1988, NAPABA has been at the forefront of national and local activities to increase the diversity of the federal and state judiciaries, protect civil rights, combat anti-immigrant backlash and hate crimes, support the

professional development of APA attorneys, and increase the pipeline of APAs entering the legal profession.

NAPABA has long supported the need for commonsense immigration reform and applauds President Obama's efforts to take action and provide temporary relief to help keep families together. At the same time, we must emphasize the pressing need for Congress to pass legislation to fully address problems within the immigration system. Immigration policy and law have a dramatic impact on the APA community, as nearly two-thirds of the APA community are foreign-born. The current immigration system is broken and has deeply affected the APA community by tearing our families apart.

Of the estimated 11.2 million undocumented people in the country, an estimated 1.3 million are of Asian origin. Many young immigrants and their families will benefit from the President's recent executive action, including more than 400,000 Asian Pacific Americans. This benefit is not only from the expansion of the Deferred Action for Childhood Arrivals (DACA) program, but also from the creation of the Deferred Action for Parent Accountability (DAPA), which will provide relief to the undocumented parents of U.S. citizen children and lawful permanent residents (LPRs). Through DACA and DAPA, many families will receive temporary relief from deportation and remain together for now without fear of being separated.

In addition, through the President's executive action the spouses of H-1B visa holders, i.e., H-4 holders, will be provided with portable work authorizations. Through the Department of Homeland Security (DHS), certain H1-B spouses will be given employment authorization as long as the H1-B spouse has an approved LPR application. This employment authorization is a step in the right direction because it will not only allow the spouses of many H-1B workers to seek employment, but also build sustainable lives in the U.S. and contribute to the economy. Without this authorization, most H1-B spouses or H-4 holders often find themselves as

involuntary homemakers upon their arrival to the U.S, which not only lowers their family income, but also wastes their professional skills. Accordingly, the issues faced by H-4 holders impact themselves as individuals and also impact their relationships inside and outside of their homes. Allowing H-4 holders the opportunity to seek employment is beneficial for themselves and their families.

Asian Pacific Americans naturalize at the highest rates of those who choose to become U.S. citizens. Since 1980, individuals from India, the Philippines, Vietnam, and China have ranked among the top five nationalities to apply for and receive U.S. citizenship. However, Asian immigrants are more likely than other groups to have family members trapped in visa backlogs. There are 4.2 million people awaiting family visas, and of that number, 1.8 million (i.e., over forty percent (40%)) are from Asian countries waiting to join loved ones in the United States. Family members caught in the backlogs wait decades—as long as 10 to 23 years—to be reunited with their families in the U.S. More specifically, immigrants born in mainland China or India must wait between three and 11 years, while immigrants from the Philippines must wait longer, between three and 23 years.

Unfortunately, President Obama's executive action does not provide relief or substantively address the visa backlogs, which significantly affect the APA community. APA immigrants who have been waiting for decades to reunite with family members due to the visa backlogs in the family immigration system will not obtain any relief, and it is therefore more pressing than ever for Congress to act now and pass commonsense immigration reform. Only through modernization of the current visa system will millions of Asian immigrants be able to reunite with their families and not spend decades apart.

Thank you again for this opportunity to express the views of NAPABA. We welcome the opportunity for further dialogue and discussion about these important issues.



NATIONAL CENTER FOR LESBIAN RIGHTS

WASHINGTON DC  
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December 9, 2014

The Honorable Patrick Leahy, Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Statement of the National Center for Lesbian Rights  
Before the United States Senate  
Committee on the Judiciary  
Committee Hearing on Keeping Families Together:  
The President's Executive Action on Immigration  
And the Need to Pass Comprehensive Immigration Reform (December 10, 2014)

Dear Chairman Leahy, Ranking Member Grassley, and members of the Committee:

The National Center for Lesbian Rights (NCLR) is grateful for this opportunity to submit testimony on the President's recent executive actions on immigration and the need to pass comprehensive immigration reform. As a national organization committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families, NCLR is particularly concerned about the impact that our broken and discriminatory immigration system has on all families. NCLR has a long-standing commitment to improving the immigration system. NCLR has had an Asylum & Immigration Project for 20 years, through which we have advocated on behalf of and won victories for countless LGBT immigrants and those LGBT people and families seeking asylum. We are also a member of the Coordinating Committee of the Alliance for Citizenship ("A4C"), a coalition of organizations working toward national reform of the immigration system. Moreover, in 2012, in order to make the newly announced Deferred Action for Childhood Arrivals (DACA) program more effective and accessible for as many LGBT young people as possible, NCLR collaborated with the Evelyn & Walter Haas, Jr. Fund and the LA Gay & Lesbian Center, and many generous contributors and created the LGBT DREAMers fund, which raised over \$100,000 to pay the DACA fees for over 200 LGBT young people. Our past work evinces a strong commitment to fixing our immigration system so that it works for all people and families.



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### Introduction

We are gravely concerned that our current system fails too many people in a number of ways, including by not providing a pathway to citizenship, penalizing families for attempting to stay together, placing overly burdensome and unrealistic expectations on those attempting to access the immigration and asylum systems, and focusing too much on enforcement at the expense of crafting humane and workable solutions. These problems with the system make it untenably difficult for undocumented immigrants who contribute greatly to their families, communities, and to this country to live and work free from the specter of deportation, including the at least 267,000 undocumented people who identify as LGBT.

We were incredibly excited about the recent announcement from President Obama concerning a series of executive actions that will provide work permits and temporary relief from the threat of deportation for close to five million undocumented immigrants currently living in the United States. This announcement is a welcome first step toward overhauling and replacing our flawed immigration system. While executive action can provide some important fixes, legislation is the only way to comprehensively reform our immigration system. This is particularly true for the problems facing LGBT undocumented people and families because many of the unique challenges that LGBT immigrants must navigate cannot be addressed merely by executive action. Rather, many of the concerns LGBT immigrants face under our existing immigration system require a legislative strategy.

### Legislative Action is Needed to Ensure Full Protection of LGBT Families

The President's plan has several provisions that will be beneficial for LGBT families. The President's expansion of the Deferred Action for Childhood Arrivals (DACA) policy will benefit many undocumented LGBT immigrants. Beneficiaries of the original DACA program, an estimated 10% of whom are LGBT,<sup>1</sup> will be able to renew their DACA status.<sup>2</sup> The expansion of DACA, which increases the age limit for applicants to 30 years of age, will also have the effect of benefiting LGBT people who were brought to the United States as children. The plan also contains at least one provision that is specifically designed to help foreign same-sex partners of U.S. citizen partners. The plan specifies that these partners will qualify for hardship waivers, allowing them to avoid returning to their home country before applying for a green card.<sup>3</sup> This means that married same-sex couples will not be unduly separated for long periods of time. The centerpiece of the President's new plan is a program called Deferred Action for Parental Accountability, or DAPA, which will grant relief from deportation and work authorization for three years at a time to the undocumented parents of U.S. citizens and Lawful Permanent

<sup>1</sup> Sharita Gruberg, "5 Ways the President's Plan on Immigration Helps LGBT Immigrants," ThinkProgress, (Nov. 24, 2014), available at <http://thinkprogress.org/lgbt/2014/11/21/3595520/obama-lgbt-immigrants/>.

<sup>2</sup> Zenen Jaimes Perez, "How DACA Has Improved the Lives of Undocumented Young People," Center for American Progress, (November 19, 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/11/BenefitsOfDACABrief2.pdf>.

<sup>3</sup> This is particularly important because many LGBT people are at risk of legal persecution in their home countries. Gruberg, "5 Ways the President's Plan on Immigration Helps LGBT Immigrants," (2014).



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Residents (LPRs) who meet certain requirements. This means that LGBT children born in the United States to undocumented parents who meet the plan's criteria will not be separated from their parents.<sup>4</sup> However, because this provision is based on familial status, there are serious concerns about how much it will be able to help LGBT undocumented parents.

By making relief under DAPA wholly dependent upon familial ties, the program could potentially exclude thousands of families in the LGBT community. Because of discriminatory laws concerning availability of second-parent adoptions and other recognition issues concerning nontraditional families, same-sex parents are much less likely to have legally recognized and biological relationships with their children. Additional guidance is needed to ensure that parental relationships will be recognized for the purposes of DAPA regardless of biological or legally recognized relationships.

To illustrate this point, consider a same-sex binational couple, where the immigrant partner is undocumented. Now imagine that couple is living and raising an adopted child in one of the 35 states where there are no explicit protections for same-sex couples to petition for second-parent adoptions. Thus, the couple has no access to a legal mechanism to ensure that both parents have a legally recognized relationship with their child. If the non-recognized parent is also the undocumented partner, it is not clear that relief would be available for this family under DAPA. A policy that provides relief from deportation only to the "parent" of a U.S. citizen or LPR would not necessarily protect the non-recognized parent in this situation. Without further guidance clarifying that the definition of "parent" can include a person acting as a parent even where there is no legally recognized relationship, this program will be ill-equipped to protect many families in the LGBT community.

Moreover, the fact that DAPA will be available only for the parents of U.S. citizens and LPRs, and not for parents of Deferred Action for Childhood Arrivals (DACA) recipients, may also have a disproportionately negative impact on the LGBT community. LGBT undocumented people are typically younger than the broader undocumented community, meaning that DACA has been, and will continue to be, a major source of relief for them. In fact, 10% of current DACA recipients identify as LGBT<sup>5</sup>, and that number is poised to go up with the new expansions to the program. Without extending DAPA relief to parents of DACA recipients, the program will exclude a large number of parents of LGBT youth from relief.

Accordingly, in order to fully protect LGBT families and make sure relief is available to them, comprehensive immigration reform legislation is needed that will clarify that families must be recognized regardless of sexual orientation, gender identity, marital status, or biological or legally recognized relationships. Likewise, legislative action is also needed to provide protection to the parents of DACA recipients. Moreover, LGBT families need reform to the asylum system as well, which can only happen through legislative action. The requirement that immigrants seeking asylum file within one year of coming to the U.S. is an arbitrary and unrealistic

<sup>4</sup> Gruberg, "5 Ways the President's Plan on Immigration Helps LGBT Immigrants," (2014).

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



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requirement. Many LGBT immigrants seeking asylum are escaping unspeakable persecution and horror in their home countries based on their sexual orientation or gender identity. Requiring them to immediately disclose their harrowing stories to government officials is an unrealistic and unnecessarily burdensome requirement. The result is that asylum is much more difficult to obtain for LGBT immigrants, and this devastates the ability to keep these families together. While the President's actions represent a crucial first step, many challenges remain for LGBT families that can only be addressed through legislative action.

It is critical that any definition of family in future guidance or regulations be inclusive of LGBT families. A focus on biological familial ties may potentially exclude LGBT immigrants from benefiting under the President's reforms. It would be a tragic misstep to apply new executive immigration policy to some families at the exclusion of others. Any immigration reform from Congress must also be inclusive of LGBT families and individuals.

#### **Legislative Action is Needed to Ensure the Safety of LGBT Immigrants**

In addition to more clarity around definitions and recognition of family relationships, legislative action is also needed to ensure that efforts around enforcement and detention are implemented, and the resulting system is nondiscriminatory and humane. In the past several years, the Department of Homeland Security (DHS) has conducted an estimated 23 percent of all deportations<sup>6</sup>, causing the painful and avoidable separation of families. Moreover, DHS also holds a substantially higher number of immigrants in detention than INS did in the past.<sup>7</sup> For LGBT families, legislative immigration reform is absolutely necessary to ensure their physical safety. LGBT people face an increased risk of abuse during detention.<sup>8</sup> This is especially true for transgender detainees who are much more likely to face discrimination, harassment, and abuse in these facilities. In fact, the United Nations Special Rapporteur on Torture has found the United States to be in violation of the Convention Against Torture based on the treatment of LGBT immigrants in U.S. detention facilities.<sup>9</sup> LGBT detainees, especially transgender detainees, are particularly susceptible to sexual abuse and rape. Transgender detainees are also disproportionately placed in solitary confinement and receive inadequate medical care.<sup>10</sup> These often horrific experiences by LGBT immigrants held in detention cause trauma and distrust of law enforcement, further destabilizing LGBT families.

The President's plan takes a first steps toward addressing several of these concerns. It reprioritizes deportation efforts away from illegal re-entry. This will benefit undocumented

<sup>6</sup> Sharita Gruberg, "Dignity Denied: LGBT Immigrants in U.S. Immigration Detention," Center for American Progress, 3 (November 2013), available at <http://cdn.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement-1.pdf>.

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

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 6-7.



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Suite 540  
Washington DC 20005

LGBT people who returned to the United States after deportation.<sup>11</sup> Deportation is particularly unsafe for LGBT people whose home countries criminalize LGBT status or have high rates of anti-LGBT discrimination and violence.<sup>12</sup> Refocusing prosecutorial discretion away from deportation for illegal re-entry will also help prevent separation of families who have reentered the United States after deportation. Increased prosecutorial discretion may also allow immigration officials to deprioritize action against people with nonviolent crimes in their criminal history. This is important because LGBT people are over-criminalized and targeted by police, and families should not be separated due to nonviolent criminal infractions.

The President's plan also ends the controversial and ineffective Secure Communities program. This move has the potential to decrease police profiling of LGBT people, who report high rates of targeting by police.<sup>13</sup> Ending the cooperation between law enforcement and immigration enforcement may have the effect of decreasing disproportionate deportation of LGBT people and the separation of families.<sup>14</sup> However, these actions are only one step toward making sure LGBT people and families are kept safe and are not targeted within our immigration system. Legislative action is needed to ensure that detention facilities are safe and welcoming for LGBT detainees, that solitary confinement is not discriminatorily used because of sexual orientation or gender identity, and that there is a high level of oversight at detention facilities. Moreover, legislation is also needed to ensure that LGBT people are not profiled and targeted by enforcement officials.

### Conclusion

With strong leadership and effective policies, immigration reform can benefit millions of undocumented immigrants and be fully inclusive of all families, including those in the LGBT community. Crucial steps have been taken in the right direction, but legislation is required to fully reform immigration policy. Congress must act to protect undocumented families, including LGBT families, from needless separation, profiling, and violence in detention centers. We again thank the committee and the administration for their work on this urgent issue.

Sincerely,

<sup>11</sup> Gruberg, "5 Ways the President's Plan on Immigration Helps LGBT Immigrants," (2014).

<sup>12</sup> Lucas Paoli Itaborahy and Jingshu Zhu, "State-Sponsored Homophobia: A world survey of laws: Criminalization, protection and recognition of same-sex love," The International Lesbian Gay Bisexual Trans and Intersex Association, (May 2013) available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf).

<sup>13</sup> Catherine Hanssens, et. al., "A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV," Center for Gender & Sexuality Law at Columbia Law School, (May 2014), available at [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf).

<sup>14</sup> Gruberg, "5 Ways the President's Plan on Immigration Helps LGBT Immigrants," (2014).



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A handwritten signature in black ink, appearing to read "M. Rupert".

Maya Rupert,  
Policy Director  
National Center for Lesbian Rights

**NCLR**  
NATIONAL COUNCIL OF LA RAZA

**History Shows on Immigration: First Executive Action, Then  
Legislation**

Submitted to

“Keeping Families Together: The President’s Executive Action on Immigration  
and the Need to Pass Comprehensive Reform”

Submitted to  
United States Senate Committee on the Judiciary

10 December 2014

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**History Shows on Immigration:  
First Executive Action, Then Legislation**

By Charles Kamasaki <sup>1</sup>

In June 2013, the U.S. Senate passed bipartisan legislation to reform immigration laws. After first repeatedly indicating his intention to enact immigration reform in the House, in June 2014 Speaker John Boehner told President Obama that he would not schedule any votes on immigration in this session of Congress. The president promptly announced that while he preferred the comprehensive and permanent reforms that could be achieved only by legislation, he would soon take executive action to do what he could to fix the broken immigration system.

The president's announcement stimulated an outcry from critics who assert that such action would be unprecedented unless first authorized by Congress. In fact, the record demonstrates the exact opposite. When it comes to immigration policy, in the modern era it's almost routine for presidents to act first to permit the entry of people outside normal immigration channels and/or to protect large numbers of people from deportation, with legislation ratifying executive action coming later.

In the midst of World War II in July 1942, President Roosevelt's secretary of agriculture initiated negotiations with the Mexican government for a temporary worker agreement that eventually became known as the bracero program, an action Congress ratified a year later. When the authorization expired in 1947, the Truman administration continued to operate the program until it was reauthorized in 1951.<sup>2</sup> Before it ended in 1964, millions of workers had entered the U.S. under the auspices of the bracero program, hundreds of thousands under executive—not legislative—authority.

After the war ended in 1945, President Truman used his executive authority to permit 250,000 people from war-ravaged Europe to enter and/or stay in the U.S. outside normal immigration channels. It was only three years after this exercise of presidential discretion that in 1948 Congress passed the Displaced Persons Act, permitting some 400,000 additional entries.<sup>3</sup>

In April 1975, at the end of the Vietnam War, President Gerald Ford used his parole authority to authorize evacuation of up to 200,000 South Vietnamese to this country; it was not until a month later that Congress passed and the president signed the Indochina Migration and Refugee Act of 1975, which provided resettlement funding for some 130,000 of those parolees.<sup>4</sup> Full legislative authorization to protect and resettle those fleeing Vietnam, Laos, and Cambodia did not come until 1980, when Congress eventually passed the Refugee Act, overhauling the nation's refugee and asylum policy, which resulted in the eventual permanent resettlement of some 1.4 million Indochinese in the U.S. Although technically most entered as bona fide refugees, hundreds of thousands were paroled into the U.S., both prior to 1980 and afterward when statutorily authorized numbers proved inadequate.<sup>5</sup>

But these broad exercises of discretion were unusual situations, limited to refugees fleeing shooting wars a long time ago, and are not applicable to people already here, right? Wrong. Presidents have exercised their discretion more than 20 times since the mid-1970s to permit people already in the U.S. from being returned to their home countries. Some, such as Czechoslovakians, Hungarians, Romanians, and Poles, sought to avoid being returned to a Soviet Bloc country. Iranians in the 1980s would have been forced to live under the regime that had occupied the American embassy and held our people hostage. Afghans in the 1980s and 1990s were protected first from the Soviet puppet state and later from the Taliban. Others, from Rwanda, Ethiopia, Uganda, Lebanon, Kuwait, and Serbia, would have been returned to face civil strife or civil war. Still others, from Sierra Leone and Burundi and several Central American countries in the 1990s, sought refuge from natural disasters such as famine-induced drought or hurricanes abroad.<sup>6</sup> It was not until 2003, several decades after the practice of country-specific relief from deportation was first deployed, that Congress specifically authorized and codified the practice now known as “temporary protected status.”<sup>7</sup>

Critics like to point out that most of these were temporary provisions for fairly small groups. However, the record shows that Congress made many executive orders of temporary relief permanent, often years after the fact. For example, just before and after Fidel Castro took power in Cuba in 1959, more than 900,000 Cubans fled to the U.S., the vast majority of whom were paroled into the country by Presidents Eisenhower, Kennedy, and Johnson. It was not until 1966, some seven years after the influx began, that the Cuban Adjustment Act was passed. The act theoretically only provides discretion to parole Cubans into the U.S. and eases access to lawful permanent resident status, although in practice few Cubans who reach U.S. soil are ever returned.<sup>8</sup>

Fourteen years later, in 1980, 130,000 Mariel Cubans and nearly 40,000 Haitians arrived in South Florida. Most, but not all, of the Cubans were paroled into the U.S. by President Carter. Haitians initially were protected from deportation only by successful litigation challenging the denials of their asylum claims; most of these Haitians, and some Cubans whose entry had been challenged, eventually received discretionary “Cuban-Haitian entrant status” in the Reagan administration. Six years later, the Immigration Reform and Control Act of 1986 (IRCA) created a process leading to lawful permanent resident status for Cuban-Haitian entrants.<sup>9</sup>

In 1987, President Reagan’s attorney general, Edwin Meese, directed the Immigration and Naturalization Service (INS) to not deport any of the estimated 200,000 Nicaraguans in the U.S. without authorization, including those whose asylum claims had been denied. Subsequently, after Congress had in 1990 first authorized 18-month temporary protected status for Salvadorans fleeing their country’s civil war, President George H.W. Bush instructed the attorney general to provide “deferred enforced departure status” to an estimated 190,000 Salvadorans. It was not until Congress passed the Nicaraguan and Central American Relief Act in 1997, more than a decade following Meese’s initial exercise of discretion, that all members of these groups were permitted to adjust to lawful permanent resident status.<sup>10</sup>

In 1989, President George H.W. Bush’s attorney general, Richard Thornburgh, instructed the INS to provide temporary deferred enforced departure status to some 80,000 Chinese students in the U.S. who feared returning to the civil strife that eventually led to the Tiananmen Square

massacre. Two years later, President Bush issued an executive order extending their deferred enforced departure status. Congress then passed the Chinese Student Protection Act in 1992, some three years following the attorney general's initial executive action, making the students eligible for lawful permanent resident status.<sup>11</sup>

Okay, so major exercises of prosecutorial discretion have benefitted those fleeing war, seeking to avoid returning to civil strife, or whose situations involved Cold War foreign policy considerations, but never for domestic policy reasons, right? Wrong again. Broad executive actions have been used by virtually every modern administration on more than a dozen occasions to further purely domestic policy and humanitarian objectives. For example, in the aftermath of various domestic emergencies—the San Francisco earthquake, the 9/11 attack, Hurricanes Katrina and Ike, and wildfires in California and elsewhere—immigration and disaster relief officials typically have relaxed enforcement efforts, in part to advance public health and safety goals.<sup>12</sup> Every recent administration in office during a decennial Census, beginning with President Carter in 1980 and continuing through President Bush in 1990, President Clinton in 2000 publicly instructed immigration officials to reduce enforcement efforts across the country during the Census. While under President George W. Bush “immigration enforcement officials did not conduct raids for several months before and after the 2000 Census,” in 2010 under President Obama, the Department of Homeland Security issued far more circumscribed guidance instructing immigration officials not to interfere with the Census.<sup>13</sup>

Other exercises of discretion have gone well beyond specific emergencies or events like the Census. In 1977, President Carter's attorney general, Griffin Bell, temporarily suspended the deportation of an estimated 250,000 people in the so-called “Silva class” who had successfully argued in federal court that they had unfairly been denied visas by a quirk in the allocation process. It was not until nearly a decade later, via IRCA in 1986, that all of these cases were resolved.<sup>14</sup>

In 1990, George H.W. Bush's INS commissioner, Gene McNary, issued a “Family Fairness” policy deferring the deportation of and granting work authorization to 1.5 million immediate family members of people who had qualified for legalization under IRCA, building on an earlier, more limited exercise of discretion in 1987 by Edwin Meese. It was not until late 1990, more than three years following Meese's original executive action, that Congress codified the practice in the Immigration Act of 1990, making all of those affected eligible for permanent residence.<sup>15</sup>

In 1997, President Clinton provided deferred enforced departure status to some 40,000 Haitians previously paroled into the U.S. who had applied for asylum before December 1, 1995. At the end of the 105th Congress a year later, legislation allowing these Haitians to adjust their status was enacted.<sup>16</sup>

The historical record is clear: presidents of both parties have used their discretionary powers on multiple occasions to protect various groups from deportation for an enormously wide variety of reasons. Moreover, in virtually every case, except those clearly linked to temporary conditions abroad, Congress has acted, albeit often years later, to ratify the president's original decision. And wisely so, because reflecting on this history makes another point clear: would we now, with the benefit of 20-20 hindsight, have reversed any of these major executive actions? Would we

prefer to have returned Eastern Europeans back behind the Iron Curtain, Cambodians to the killing fields, Ethiopians to a brutal civil war, Iranians to the arms of the ayatollah, or Chinese students to face the tanks in Tiananmen Square? Would our country be better off without the Cubans and Haitians who revitalized South Florida over the past 30 years? Were we wrong to prevent the separation of 1.5 million people from their family members who were getting right with the law during the implementation of IRCA's legalization program?

Many of these executive actions were controversial when first announced. But the fact that Congress later affirmed virtually all of them—without explicitly reversing *any* of them—suggests that over time they were widely accepted by the American people. Decades from now, when we look back on President Obama's imminent announcement of broad-scale executive action, they'll see that his actions prevented the separation of families and began the process of fixing a badly broken immigration system. They'll see that wages, housing, and education improved for those granted temporary legal status, thus immeasurably enriching not just the immigrants affected but also the entire country. They'll see that Congress would later ratify and build on his exercise of presidential discretion, as has happened so often before.

And, they'll wonder, what was all the fuss about?

#### Notes

<sup>1</sup> Charles Kamasaki is Senior Cabinet Adviser at the National Council of La Raza, the largest Hispanic civil rights and advocacy organization in the U.S.

<sup>2</sup> Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law," *Yale Law Journal* 119 (2009).

<sup>3</sup> Audrey Singer and Jill Wilson, "From 'There' to 'Here': Refugee Resettlement in Metropolitan America," Migration Policy Institute, March 1, 2007.

<sup>4</sup> Carl Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* (Princeton, NJ: Princeton University Press, 2008).

<sup>5</sup> David Haines, *Refugees in America in the 1990s: A Reference Handbook* (Westport, CT: Greenwood Press, 1996); Donald M. Kerwin, *The Faltering U.S. Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers, and Others in Need of Protection* (Washington, DC: Migration Policy Institute, 2011).

<sup>6</sup> Kate M. Manuel and Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*.

Congressional Research Service. Washington, DC, 2013; Ruth Ellen Wasem and Karma Ester, "Temporary Protected Status," Current Immigration Policy and Issues." Congressional Research Service. Washington, DC, January 14, 2014; Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum," July 13, 2012, Congressional Research Service Memorandum, Washington, DC.

<sup>7</sup> Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."

<sup>8</sup> Heather Reynolds, "Irreconcilable Regulations: Why the Sun Has Set on the Cuban Adjustment Act in Florida," *Florida Law Review* 63, no. 4 (February 8, 2013).

<sup>9</sup> T. Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* (Eagan, MN: West Publishing Company, 2012); Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum"; Heather Reynolds, "Irreconcilable Regulations"; and Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law."

<sup>10</sup> Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."

<sup>11</sup> Ibid.

<sup>12</sup> Shikha Dalmia, "On Immigration, Obama may be cynical, but he's not breaking the law," *Washington Examiner*, August 7, 2014.

<sup>13</sup> Stephen Ohlemacher, "Census Bureau Wants to Halt 2010 Raids," *Washington Post*, August 16, 2007; and John Morton, "Policy Guidelines for ICE Operations During Census 2010," March 3, 2010. The latter indicates that

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"steps should be taken to avoid adverse effects on census participation," but does not end raids or other enforcement actions during the Census period.

<sup>14</sup> Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."

<sup>15</sup> Ibid.

<sup>16</sup> Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law"; and Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."

WRITTEN STATEMENT OF  
**NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST**

For a Hearing entitled:

“Keeping Families Together: The President’s Executive Action on Immigration and the  
Need to Pass Comprehensive Reform”

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Submitted by:

**OMAID ZABIH, STAFF ATTORNEY, IMMIGRANTS & COMMUNITIES  
PROGRAM**

Nebraska Appleseed welcomed as an important step the passage of S.744, the bipartisan immigration reform bill that passed the Senate a year and a half ago with the support of 68 Democrats, Republicans, and Independents. The bill addressed the impossible situation many families in America face due to a continued delay in updating antiquated U.S. immigration laws, and it was an important effort to uphold our nation’s values and move the country forward on immigration.

There is strong support in Nebraska for fixing our nation’s outdated immigration laws. More than 50 diverse Nebraska institutions representing a wide range of perspectives have come together to support common-sense immigration laws with a clear process for citizenship. Over the past years, this coalition – which represents thousands of Nebraskans – has worked closely together with thousands more in dozens of events across the state calling for action: business and community roundtables, faith vigils, Keep Families Together events, press conferences, meetings with members of the House and Senate, and a Families’ March for Dignity and Respect drawing more than 2,000 people in a sea of Cornhusker red. Each of these actions were inspired by a recognition that failing to fix our dated immigration laws hurts Nebraska’s communities, families, economy, and future.

Today’s hearing is about American families. Some families who have needlessly lived in fear of being detained or deported are now temporarily safe from the threat of being torn from their loved ones while Congress continues to work on the long-term goal of creating common-sense immigration laws. The President’s action inserts a little breathing space, removes some fear and family separation from the equation, as we continue the work of long-term policy reform. Many immigrant parents will be able to continue paying taxes and giving back to their communities in other meaningful ways. The President’s action –

while limited and temporary – is a positive first step in transforming the lives of millions of families who enrich our communities every day. Now we’re counting on Congress for the next step.

In Nebraska, talented youth who came to this country as young children are studying to be accountants, doctors, and teachers. They are already serving as counselors for victims of domestic violence, marketing professionals, nonprofit staff, and small-business owners. Their parents are supporting their education and Nebraska communities in myriad ways, but until Congress accomplishes a meaningful update of our outdated immigration laws, many Nebraskans have no way to apply for permanent immigration status. They are American in every way but their papers, not because it is in anyone’s best interest, but only because we are living with an immigration system from a past era.

In Nebraska, undocumented immigrants already contribute \$42 million per year in state and local taxes. The President’s temporary action and long-term action by Congress would further strengthen our economy and communities. The White House Council of Economic Advisors has found that the President’s executive actions will raise average wages for U.S.-born workers and reduce the federal deficit.<sup>1</sup> It is worth noting this is only a fraction of the economic benefits that would occur if Congress passed comprehensive immigration reform. The Congressional Budget Office estimated that the final version of S. 744 would cut the deficit by \$175 billion in ten years and by close to \$1 trillion in the second decade.<sup>2</sup> In Nebraska, immigrants (including undocumented) contribute 7% more in taxes than they receive in services (the ratio for the state’s U.S. born population is one-to-one).<sup>3</sup> The passage of S. 744 would mean an increase in tax contributions to Nebraska of more than \$10 million per year.<sup>4</sup> The President’s plan is also about accountability: it requires every business and worker to play by the same set of rules instead of the *status quo*, which everyone agrees is in desperate need of an update.

It is critical to note that although this new policy offers promise to our families, the action taken by the President is merely temporary. The struggle is not over until everyone has freedom from fear of detention and deportation. We believe the best solution is a clear process to apply for immigration status and eventual citizenship for the 11 million people who live, work and raise families in this country they call home. The President has done what he can and we hope that Congress follows by enacting common-sense immigration laws.

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<sup>1</sup> The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at: [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf)

<sup>2</sup> *Id.*

<sup>3</sup> *Nebraska’s Immigrant Population: Economic and Fiscal Impacts 2008*  
[www.unomaha.edu/ollas/Econ%20Im%20Report/EconImpact.pdf](http://www.unomaha.edu/ollas/Econ%20Im%20Report/EconImpact.pdf).

<sup>4</sup> Institute on Taxation and Economic Policy 2013  
[www.itp.org/pdf/undocumentedtaxes.pdf](http://www.itp.org/pdf/undocumentedtaxes.pdf).

**More than 50 Nebraska organizations say now is the time for common-sense immigration laws**

*Creating a clear and inclusive process for citizenship is good for Nebraska's families, communities, economy, and future*

ACLU of Nebraska  
 Anti-Defamation League - Plains States Region  
 Black Men United  
 Brown Immigration Law, LLP  
 Campbell's Nurseries and Garden Center  
 Catholic Charities of the Archdiocese of Omaha  
 Center for People in Need  
 Center for Rural Affairs  
 Central Nebraska Human Trafficking & Immigration Outreach  
 Centro Hispano Comunitario (Columbus)  
 College of Saint Mary  
 Creighton Center for Service and Justice  
 DREAMers Project Coalition  
 El Centro de las Americas (Lincoln)  
 Fair Housing Center of Nebraska and Iowa  
 Great Plains United Methodist Peace with Justice Ministries  
 Great Plains Conference United Methodist Women  
 Heartland Workers Center  
 Inclusive Communities  
 Interchurch Ministries of Nebraska  
 Iowa/Nebraska Chapter of the American Immigration Lawyers Association  
 Justice For Our Neighbors - Nebraska  
 Latino American Commission of Nebraska  
 Latino Center of the Midlands  
 League of Women Voters of Greater Omaha  
 League of Women Voters of Lincoln and Lancaster County  
 Malcolm X Memorial Foundation  
 Mulhall's Nursery, Omaha  
 NAACP - Lincoln  
 National Association of Social Workers - Nebraska Chapter  
 National Council of Jewish Women - Omaha Section  
 Nebraska State AFL-CIO  
 Nebraska Appleseed  
 Nebraska Catholic Conference  
 Nebraska Cattlemen  
 Nebraska Restaurant Association  
 Nebraska Retail Federation  
 Nebraska State Dairy Association  
 Nebraska Urban Indian Health Coalition  
 Nebraskans for Peace  
 Omaha Healthy Kids Alliance  
 Omaha Together One Community  
 One World Community Health Centers

June 2014

**Peck Law Firm**  
**Sisters of Mercy, West Midwest Community**  
**Southern Sudan Community Association (SSCA Omaha)**  
**St. Mary's Immigration Program (Grand Island)**  
**Unity in Action (South Sioux City)**  
**Voices for Children in Nebraska**  
**YWCA Adams County**  
**YWCA Grand Island**  
**YWCA Lincoln**



Statement of  
Mary Meg McCarthy, Executive Director  
Heartland Alliance's National Immigrant Justice Center

Senate Judiciary Committee  
Hearing on "Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform"

December 10, 2014

Chairman Leahy, Ranking member Grassley, and members of the Judiciary Committee:

As a national leader in immigration law and policy, Heartland Alliance's National Immigrant Justice Center (NIJC) appreciates this opportunity to submit testimony for today's hearing. We write in support of the President's Immigration Accountability Executive Action, which will keep millions of families together and ensure that we do not waste limited resources deporting people with strong ties to American families and communities.

NIJC is a non-governmental organization dedicated to safeguarding the rights of noncitizens. With offices in Chicago, Indiana, and Washington D.C., NIJC advocates for immigrants, refugees, asylum seekers and victims of human trafficking through direct legal representation, policy reform, impact litigation, and public education. NIJC and its network of 1,500 *pro bono* attorneys provide legal representation to approximately 10,000 noncitizens annually. Since its founding 30 years ago, NIJC has defended the rights of noncitizens and advocated for much-needed comprehensive immigration legislative reform.

Family unity is one of NIJC's five core guiding principles for immigration reform.<sup>1</sup> Through its Immigrant Legal Defense Project, NIJC has helped thousands of immigrants remain with family members in the United States. Many of those individuals are now U.S. citizens. However, millions of families have no avenue to reunite, and others live under the constant threat of deportation and permanent separation. NIJC has witnessed the tremendous harm caused by the fear of deportation of loved ones and the separation of families.

This testimony provides an assessment of the flaws in the current immigration system and the benefits of executive action. It also recommends actions that Congress can take to create permanent solutions that keep families together.

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<sup>1</sup> National Immigrant Justice Center, *Principles and Priorities for Reforming the U.S. Immigration System*, <http://immigrantjustice.org/immigrationreformpriorities#.VHyt24vE.O0>.

### I. The Need for Reform: Broken System has Tragic Consequences for Families

The United States has dedicated unprecedented resources to border security and interior immigration enforcement over the past few decades. Currently, the federal government spends more on immigration enforcement than all other federal law enforcement agencies combined.<sup>2</sup> Consequently, the Department of Homeland Security (DHS) has deported record numbers of immigrants. Yet most interior removals did not involve a conviction for a violent crime or other crimes that U.S. Immigration and Customs Enforcement (ICE) classifies as most serious.<sup>3</sup> Many deportees have strong family and community ties to the United States and their deportations have devastating consequences for family members left behind, especially children.

Undocumented immigrants are interwoven into our communities. Nationally, there are an estimated 11.2 million undocumented immigrants in the United States.<sup>4</sup> Many immigrants live in mixed-status families—meaning that one or more persons in the family is undocumented—and 16.6 million people reside in a mixed-status household.<sup>5</sup> Consequently, harsh enforcement practices targeting undocumented immigrants also have a huge impact on family members, many of whom are U.S. citizens. Indeed, one in three U.S. citizen children is part of a mixed-status family.<sup>6</sup> In 2012 alone, an estimated 100,000 parents with U.S. citizen children were deported.<sup>7</sup> Often left without a primary earner, both spouses and children of a deported family member experience poorer health and educational outcomes, lower access to food, and higher rates of poverty.<sup>8</sup> In addition, since more than 90 percent of those detained and deported are men, women are disproportionately left to manage single-parent households that are more vulnerable to poverty.<sup>9</sup> Nationally, the poverty rate for single-mother families is 40.7 percent versus 24.2 percent for single-father families.<sup>10</sup> One of the most disturbing consequences of a parent getting deported is when a child is placed in foster care, at great emotional and taxpayer expense (\$26,000 per year per child), because there is no family member in the United States to care for them.<sup>11</sup> There are approximately 5,000 children in foster

<sup>2</sup> Doris Meissner, et. al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE, p. 12, Jan. 2013, <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

<sup>3</sup> Marc R. Rosenblum & Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change*, MIGRATION POLICY INSTITUTE, p. 3, Oct. 2014, <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>.

<sup>4</sup> Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CENTER, Nov. 18, 2014, <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14>.

<sup>5</sup> Jeffrey Passel, et. al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RESEARCH CENTER, Dec. 2011, <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood>.

<sup>6</sup> Joanna Dreby, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities*, CENTER FOR AMERICAN PROGRESS, Aug. 2012, <http://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

<sup>7</sup> Seth F. Wessler, *Primary Data: Deportations of Parents of U.S. Citizen Kids*, COLORLINES NEWS FOR ACTION, Dec. 17, 2012, [http://colorlines.com/archives/2012/12/deportations\\_of\\_parents\\_of\\_us-born\\_citizens\\_122012.html](http://colorlines.com/archives/2012/12/deportations_of_parents_of_us-born_citizens_122012.html).

<sup>8</sup> Sara Satinsky, et. al., *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, Human Impact Partners, June 2013, <http://www.familyunityfamilyhealth.org>.

<sup>9</sup> Rosenblum & McCabe, 2014, p. 11.

<sup>10</sup> Dreby, 2012.

<sup>11</sup> *Id.*

care as a result of immigration-related issues.<sup>12</sup> These outcomes are avoidable and shameful in a society that values the integrity of families.

*NIJC's client, Rigoberto, was deported in 2009, leaving behind his infant U.S. citizen daughter. Immigration officers had wrongfully suspected Rigoberto of being a gang member and forced him to sign a stipulated removal order without allowing him access to an attorney. At the time, Rigoberto did not understand that he was waiving his right to see a judge and to appeal his deportation. A few days later, ICE deported him back to Mexico, a country he had not visited since he was two years old. More than a year later, Rigoberto learned that his daughter had suspicious bruises, leading him to believe that her mother was abusing her. Concerned over his daughter's well-being, he returned to the United States. Rigoberto was pulled over at a traffic stop and arrested for driving without a license, at which point he was transferred to ICE custody. Rigoberto was deported again to Mexico. After his motion to reopen his case was denied, he is now looking to appeal the decision from Mexico, away from his daughter and family.*

In addition to the costs to families, detention and deportation is extremely expensive for American taxpayers. The estimated average cost to deport one person is \$23,480, including the costs for apprehension, detention, removal proceedings, and transportation.<sup>13</sup> The annual immigration detention budget is over \$2 billion. Even if it were logistically feasible to deport the entire undocumented population, the astronomical costs would total more than \$260 billion. Bearing in mind the impact on taxpayers and families, President Obama's executive action on immigration appropriately prioritizes limited resources around public safety concerns and provides much-needed relief to millions of families.

## II. The Benefits of Executive Action

### *Executive Action Promotes Family Unity*

The President's executive action on immigration will help millions of families stay together.<sup>14</sup> The new policy will expand protections for those who came to the United States as young children and the parents of U.S. citizen and lawful permanent resident children.<sup>15</sup> Carla and Gael (pseudonyms), whose parents are NIJC clients, are two of the millions of U.S. citizen children who will not have to worry about being separated from their parents as a result of the president's announcement:

<sup>12</sup> Emily Butera, *ICE's Parental Interests Directive: Helping Families Caught Between the Immigration and Child Welfare Systems*, WOMEN'S REFUGEE COMMISSION, Aug. 26, 2013, <http://womensrefugeecommission.org/blog/1713-new-ice-directive-helps-families-caught-between-the-immigration-and-child-welfare-systems>.

<sup>13</sup> Marshall Fitz, et. al., *The Costs of Mass Deportation: Impractical, Expensive, and Ineffective*, CENTER FOR AMERICAN PROGRESS, Mar. 2010, [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/cost\\_of\\_deportation.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/cost_of_deportation.pdf).

<sup>14</sup> Migration Policy Institute, *As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, Nov. 20, 2014, <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

<sup>15</sup> See Memorandum from Secretary of Homeland Security Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with Respect to Certain Individuals who are the Parents of U.S. Citizens or Permanent Residents*, U.S. DEPARTMENT OF HOMELAND SECURITY, Nov. 20, 2014, [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

*Carla and Gael were born in the United States and are U.S. citizens. Their parents, Antonio and Maria (pseudonyms), are upstanding members of their community in Crystal Lake, Illinois. They have resided in the United States for nearly 15 years. They attend and volunteer for their church and pay taxes. Eleven-year-old Carla has asthma and Gael, age six, sees a speech therapist. In 2012, Antonio was placed in removal proceedings and denied a form of immigration relief known as non-LPR cancellation of removal. Antonio's deportation would be devastating to his family since they depend on his financial support. NIJC filed a request for prosecutorial discretion so Antonio could stay with his family; however, more than one year later, the request awaits a decision. The president's executive action will allow both Antonio and Carla to pursue relief and provide for their family with more stability and reduced fear of separation.*

### **Executive Action Provides Relief to Survivors of Violence and Crime**

Recognizing that immigrant survivors of violence, serious crimes, and human trafficking face unique barriers to seek police protection, Congress passed bipartisan legislation – the Violence Against Women Act (VAWA) – 20 years ago.<sup>16</sup> As part of VAWA, Congress created the U and T visas to ensure that survivors may safely come forward to report crimes, seek police protection, and help investigate crimes without fear of deportation.

Despite Congress's clear intent to protect these survivors, many individuals are unable to pursue protections under the U and T visas. As part of the application process, survivors must obtain certification from law enforcement agencies regarding the crime. The certification does not grant any immigration benefit, but is a key document that individuals must submit as part of the process. While some law enforcement agencies have been exemplary in assisting U and T visa applicants, others continue to resist helping immigrant crime victims.

*One such survivor of violence is NIJC client, Rebeca (pseudonym), who suffered years of physical and verbal abuse at the hands of her partner. Her partner, who was often drunk, would yell and beat her in front of her children. He also punched her in the stomach while she was pregnant, and threatened her with a knife. Rebeca's partner was arrested for felony battery, and eventually deported. Despite the fact that Rebeca went to court to assist in her partner's prosecution, the local law enforcement agency and prosecutor have refused to certify that she cooperated in the investigation and prosecution of the crime, preventing her from being able to apply for U visa protection (for certain victims of crime). As a long-time resident of the United States and the mother of four U.S. citizen children, Rebeca is now eligible for relief from removal under the new Deferred Action for Parental Accountability program.*

### **III. Families Continue to Suffer in Immigration Detention**

While the president has taken action to protect millions of families from separation, harmful family detention continues. Since June 2014, DHS has increased its capacity to detain families by more than 1300 percent.<sup>17</sup> The majority of families in detention are mothers and children fleeing rampant

<sup>16</sup> Violent Crime Control and Law Enforcement Act of 1994, Title IV Violence Against Women, H.R. 3355, P.L. No. 103-322, 103<sup>rd</sup> Congress (1994), <http://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf>.

<sup>17</sup> See <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Family%20Detention%20Factsheet%202014-11-17.pdf>.

violence in Central America. More than half of all children who entered family detention in fiscal year 2014 were age six or younger.<sup>18</sup>

*Elena and her two-year-old son Fernando (pseudonyms) fled Guatemala seeking protection in the United States. They have been detained in Artesia, New Mexico for more than a month. Fernando's father subjected Elena to severe domestic violence. He told Elena that he would rather see her dead than with any other man. NIJC represented Elena in her credible fear interview, and she and her son are now seeking asylum.*

Elena and Fernando represent thousands of detained families who are fleeing violence in Central America. Detention re-traumatizes these individuals. In addition, children are particularly vulnerable in detention. Children at Artesia experienced weight loss, gastro-intestinal problems, and suicidal thoughts.<sup>19</sup> Regardless of the amount of time they are detained, children can suffer psychological trauma and are vulnerable to future mental health issues.<sup>20</sup>

Many of the mothers and children in family detention have *bona fide* asylum claims or may be eligible for legal protections in the United States. In August 2014, the Board of Immigration Appeals (BIA) ruled that a Guatemalan mother who fled domestic violence is eligible for asylum protection, effectively recognizing that women who are unable to seek protection from domestic violence in their home countries could be eligible for asylum.<sup>21</sup> To date, the American Immigration Lawyers Association (AILA) Artesia Pro Bono Project has represented 12 women detained at Artesia in their asylum proceedings. All of the women, many of whom had experienced domestic violence in their home countries, were granted asylum.<sup>22</sup> These families' stories must be heard if they are to obtain justice and safety from persecution, yet they continue to struggle to obtain counsel in remote family detention centers. Further, DHS subjects families to high or no bond policies, thereby preventing families from being released on more humane alternatives to detention even if they have family ties in the United States or pass their credible fear interviews. These practices contradict American values of protecting families.

#### IV. Conclusion and Recommendations

While NIJC welcomes the temporary relief provided by recent executive action, it is imperative that Congress take action to provide permanent relief to families where our broken immigration system has failed. No steps taken administratively preclude Congress from passing legislative remedies. NIJC urges Congress to:

<sup>18</sup> *Locking Up Family Values, Again*, Lutheran Immigration and Refugee Service & Women's Refugee Commission, Oct. 2014, [http://lirs.org/wp-content/uploads/2014/11/LIRS-WRC\\_LockingUpFamilyValuesAgain\\_Report\\_141114.pdf](http://lirs.org/wp-content/uploads/2014/11/LIRS-WRC_LockingUpFamilyValuesAgain_Report_141114.pdf).

<sup>19</sup> Rappleye, H. & L. Riordan Seville, "Flood of Immigrant Families at Border Revives Dormant Detention Program," *NBC News*, 25 Jul. 2014, <http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461>.

<sup>20</sup> International Detention Coalition, *Captured Childhood*, 2012, [http://idcoalition.org/wp-content/uploads/2012/03/Captured\\_Childhood-report.pdf](http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report.pdf), p. 49.

<sup>21</sup> *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014), <http://www.justice.gov/eoir/vll/intdec/vol26/3811.pdf>.

<sup>22</sup> American Immigration Lawyers Association, "Artesia Family Detention Asylum Case Examples," Dec. 4, 2014, <http://www.aila.org/content/default.aspx?bc=25667150484>.

- **Pass inclusive immigration reform** that values the long-standing family and community ties many undocumented immigrants have in the United States, and places these individuals on earned paths to citizenship. The Senate must build on the momentum it created with passage of S. 744<sup>23</sup> and renew its support for immigration reform with passage of a similar bill in the 114<sup>th</sup> Congress.
- **Increase the number of family-based immigrant visas.** Extremely low quotas for many categories of visas have led to long waiting periods, particularly in family visa categories. Congress should pass a bill in the new legislative session that raises the cap for family-based immigrant visas without sacrificing visas for certain family relationships and urge the administration to recapture unused family visas wherever possible.
- **Repeal the one-year asylum filing deadline.** The one-year asylum deadline bars individuals from asylum unless they apply within one year of their entry into the United States or demonstrate that they meet one of two limited exceptions to the deadline. Individuals who fail to meet this requirement will face deportation or a lesser form of relief that offers no permanent status in this country. Congress should repeal the one-year deadline to ensure protections for bona fide asylum seekers, including LGBT asylum seekers.
- **End the use of family detention.** The U.S. government essentially eliminated family detention in 2009 after a lawsuit challenged conditions.<sup>24</sup> Warehousing vulnerable mothers and children in remote facilities is inhumane and wastes taxpayer dollars.
- **Expand the use of alternatives to detention programs.** Congress should clarify that “custody” does not require placement in a detention center. An interpretation of “mandatory custody” that includes alternatives such as release on their own recognizance could reduce the humanitarian concerns of locking up families and save taxpayers hundreds of millions of dollars each year.
- **Encourage the administration to expand deferred action.** Until Congress can take comprehensive legislative action, it should push DHS to recognize the need for all families to stay together, not only those with U.S. citizen or permanent resident children. Parents of children who have deferred action or are undocumented suffer from fear of deportation just as parents of U.S. citizens and permanent residents do. In addition, many noncitizens with long-standing ties to the community have no qualifying child but instead have other important relationships that would be severed by deportation. These individuals’ compelling circumstances merit deferred action as well.

<sup>23</sup> *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744, 113<sup>th</sup> Congress (2013), <http://www.epo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

<sup>24</sup> ACLU, “DHS Plans to Improve Immigration Detention and Close Hutto Facility a Good First Step,” 6 Aug. 2009, <https://www.aclu.org/immigrants-rights/dhs-plan-improve-immigration-detention-and-close-hutto-facility-good-first-step>.



**Written Testimony of  
National Immigration Law Center**

**Hearing on the  
“Keeping Families Together: The President’s Executive Action On  
Immigration And The Need To Pass Comprehensive Reform”**

**Submitted to the  
Committee on the Judiciary  
U.S. Senate  
Washington, D.C.**

**December 10, 2014**

## I. Introduction

The National Immigration Law Center is the primary organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. At NILC, we believe that all people who live in the U.S. – regardless of their race, immigration, and/or economic status – should have the opportunity to achieve their full human potential and contribute their very best to our nation. Over the past thirty-five years, NILC has won landmark legal decisions protecting fundamental civil rights and advocated for policies that reinforce our nation's values of equality, fairness, and justice for all.

NILC utilizes a core set of integrated strategies – litigation, advocacy, and strategic communications – to focus on key program areas that affect the lives and well-being of low-income immigrants and their families, including: access to justice, education, healthcare and economic opportunities, and immigration reform. We also conduct trainings, publish educational materials, and provide legal counsel and strategic advice to inform a wide range of audiences about complex legal and policy matters affecting immigrants and to help strengthen other groups' advocacy work.

On November 20, 2014, President Obama announced the Immigrant Accountability Executive Actions which amount to significant immigration policy changes aimed at bringing about fairness and accountability to a dysfunctional immigration system. Among other new policy directives, the Department of Homeland Security (DHS) will “implement a new department-wide enforcement and removal policy that places top priority on national security threats, convicted felons, gang members, and illegal entrants apprehended at the border; the second-tier priority on those convicted of significant or multiple misdemeanors and those who are not apprehended at the border, but who entered or reentered this country unlawfully after January 1, 2014; and the third priority on those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014.”<sup>1</sup> Although the plan is comprehensive in that it establishes these more targeted border and interior enforcement priorities, among other policy changes, much of the public debate is focused on the Deferred Action for Parental Accountability (DAPA) program, and the changes made to the Deferred Action for Childhood Arrivals (DACA) program. Under the new DAPA program, individuals who have been continuously residing in the U.S. since January 1, 2010 and who can establish they are the parents of a U.S. citizen or lawful permanent resident, will be able to come forward and affirmatively apply for a temporary reprieve from deportation. If after an adjudication conducted on a case-by-case basis, including a national security and criminal background check, the DHS determines that the individual meets the criteria and merits a grant of deferred action, she will be able to also obtain an Employment Authorization Document if she has an economic necessity.

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<sup>1</sup> Memo from Jeh Charles Johnson, Secretary, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” November 20, 2014.

In the absence of House consideration of the Senate bipartisan legislation, S. 744, or similar immigration reform bills, the president's new executive actions on immigration bring a measure of much-needed order, fairness, and sanity to a system that everyone agrees is broken. Soon, many of our family members, friends, and loved ones will finally go about their daily lives knowing they can live, work, and remain united with their family members in this country without the fear of deportation. They will be able to work lawfully, pay more taxes, and participate more fully in their communities. Parents will be able to actively contribute to their children's education by attending school activities, freely participating in their place of worship, and engaging in their local communities. Fewer workers will be subject to abuse by employers who retaliate against them for lack of work authorization. There will be increased workplace fairness as the economic incentive for unscrupulous employers to hire undocumented workers will have been removed.

While the DAPA and the expanded DACA programs are not a legalization program and only provide a temporary reprieve from deportation, one cannot understate the significant impact this policy change will have on the estimated 4.4 million individuals who might qualify. Most importantly, this will lift the traumatic and paralyzing experience of living in fear of deportation that has robbed individuals with deep ties to our country of their humanity and dignity. In sum, these mothers, fathers, and young immigrants who are already here, working, part of the social fabric of our country, will be able to contribute even more fully to our great nation. Until Congress finally establishes a long-term solution that addresses the needs of 11 million immigrants currently living on the margins of society, President Obama's administrative changes represent a partial and temporary, but necessary, measure.

Latinos, Asian Pacific Islanders, Afro-Caribbean and other immigrant communities have been calling on the Obama administration to adopt much-needed administrative reforms and restore a sense of balance and fairness to the immigration system. Despite a dramatic increase in immigration enforcement funding and increased deportations, the nation's laws have not been updated in over twenty years to address failing aspects of the nation's immigration system. This has led to a situation where our nation focuses solely on enforcement rather than addressing the system as a whole.

Americans who care deeply about civil rights and civil liberties have criticized the Obama administration for its aggressive immigration detention and deportation policies, which have been well documented in the Migration Policy Institute's *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* report.<sup>2</sup> Spending for the federal government's two main immigration enforcement agencies surpassed \$17.9 billion in fiscal year 2012 – 15 times the spending level of the Immigration and Naturalization Service when the Immigration Reform and Control Act was passed in 1986.<sup>3</sup> Interior enforcement directed at increasing collaboration between immigration agents and local and state law enforcement authorities has targeted non-

<sup>2</sup> Meissner, Doris; Kerwin, Donald; Chisti, Muzaffar and Bergeron, Claire, "Immigration Enforcement in the United States," Migration Policy Institute, January 2013.

<sup>3</sup> *Id.* at 2.

criminal immigrants and undermined community policing as many immigrants fear that coming forward to report a crime will result in their deportation.

Accordingly, the president's announcement is welcome news not only to the estimated 4.4 million eligible Americans in waiting but to their U.S. citizen and lawful permanent resident family members who have been enduring the instability that a broken immigration system has created. Moreover, the much-awaited immigration policy changes have been applauded by Latinos, 89 percent of whom approve of the President's executive action.<sup>4</sup> Faith, business, and civil rights leaders lauded the move, calling it an important step toward fixing a system that has long failed to meet our economic and societal needs.

## II. Commonsense and Moral Temporary Solution

These much-needed immigration policy changes are a commonsense and moral – albeit temporary – solution that 1) protects family unity, 2) benefits our economy, and 3), rests on solid legal ground,

### 1. Protects Family Unity

Deportations uproot communities and take a tremendous toll on families. The number of immigrants detained and deported by U.S. immigration authorities has reached historic highs in recent years, at a time when overall migration has decreased. Since 2009, nearly 400,000 people have been deported from the U.S. each year, compared with just 189,000 in 2001. More than 4 million people have been removed from the United States since 2001, with 2 million removed during the Obama administration alone.<sup>5</sup> Two-thirds of all unauthorized 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.<sup>6</sup>

Significant numbers of U.S. citizen children are impacted by immigration enforcement activities. Data from DHS reveals that 72,410 parents of U.S. citizen children were removed in 2013.<sup>7</sup> This data only reflects those parents who reported having U.S. citizen children and therefore fails to account for those individuals who did not voluntarily

<sup>4</sup> "National Poll Finds Overwhelming Support for Executive Action on Immigration," Latino Decisions, November 24, 2014, available at <http://www.latinodecisions.com/blog/2014/11/24/new-poll-results-national-poll-finds-overwhelming-support-for-executive-action-on-immigration/>.

<sup>5</sup> Caplan-Bricker, Nora, The New Republic, "Who's the Real Deporter-in-Chief, Bush or Obama?," April 17, 2014. ICE Press Release. (December 18, 2013) FY2013: ICE announces year-end removal numbers. Retrieved from <https://www.ice.gov/news/releases/1312/131219washingtondc.htm>; Print edition. (2014, February 8). The Great Expulsion: Barack Obama has presided over one of the largest peacetime outflows of people in America's history. *The Economist*. Retrieved from <http://www.economist.com/news/briefing/21595892-barack-obama-has-presided-over-one-largest-peacetime-outflows-people-america>. U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2012, Table 39, Aliens Removed or Returned, Fiscal Years 1892 to 2012, 2012.

<sup>6</sup> Taylor, Paul, and others, "Unauthorized Immigrants: Length of Residency, Patterns of Parenthood, Pew Hispanic Center, 2011.

<sup>7</sup> Foley, E. "Deportation Separated Thousands of U.S. Citizen Children from Parents in 2013." *Huffington Post*, June 25, 2014.

report parental status out of fear that they would lose their children. Using deportation data, researchers estimate that at least 152,000 U.S. citizen children experience the deportation of a parent each year.<sup>8</sup>

U.S. citizen and legal resident children need their parents to help them grow into successful, responsible community members. Children suffer immensely when a parent is arrested or deported, facing years of separation, decreased economic support, and social and psychological trauma. Some seek care from extended relatives, placing a burden on other families to care for children who remain in the U.S. without a parent. For some, the trauma of separation can have even more devastating consequences: as of 2011, 5,100 children were in foster care due to their parents' detention or deportation.<sup>9</sup> This strains foster care systems at the state level, all while a parent is able and willing to care for their child if only he/she was not deported.

The current political gridlock and legislative inaction is having a devastating impact not simply on families, but on community institutions that support them, including churches and other religious institutions and schools.

## **2. Benefits Our Economy**

Expanding deportation relief and work authorization will inject positive growth into our local, state and national economies. It will allow more individuals to engage in steady employment, contributing to our gross domestic product (GDP) and our tax base. Average wages will rise. Working conditions will improve. Employers who have employed immigrant workers for decades, investing in their workforce and providing training, will now have made a secure investment in workers who are able to remain in the U.S., putting their training and knowledge into growing the U.S. economy.

Two years ago, President Obama announced the DACA program as an initial step toward addressing the impact of deportations on young individuals who have lived in the U.S. for years and contributed to their community. Data has proven that this program is an undeniable economic success. DACA beneficiaries who have received work permits work at levels comparable to or higher than their peers. 45 percent have increased their earnings.<sup>10</sup> Work permits allow DACA beneficiaries to better provide for themselves and their families and to pay taxes. Before DACA, the ability of these young immigrants to pursue career and educational opportunities was severely limited.<sup>11</sup>

The economic benefits of the DACA program will only be magnified with the expanded DACA and DAPA programs. According to the Council of Economic Advisors, within ten years, these programs will increase our GDP by up to 0.9 percent, or an additional \$210

<sup>8</sup> Farhang, Lili; Heller, Jonathan; Hu, Alice; and Satinsky, Sara, "Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families," June 3, 2013 at i.

<sup>9</sup> Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, Race Forward, the Center for Social Justice Innovation, November 2, 2011.

<sup>10</sup> Immigration Policy Center, "Two Years and Counting: Assessing the Growing Power of DACA," June 2014, p. 5.

<sup>11</sup> *Id.*

billion. They will reduce the federal deficit by \$25 billion through increased economic growth. They will raise the average wage for all U.S. workers by 0.3%.<sup>12</sup>

Expanded deferred action will create substantial new tax revenues. Expanding deferred action for 4 million people will raise an additional \$3 billion in national payroll taxes in the first year alone, and \$22.6 billion over five years, as workers and employers get on the books and pay more taxes. Individual states will experience similar tax gains for the same reasons.<sup>13</sup>

When immigrants are able to work legally, they can better shield themselves from workplace abuses and move freely across the labor market. This will benefit all American workers. Moving workers from the informal economy to the formal economy will ensure that America's competitiveness, GDP and tax base continues to grow. Moreover, the president's executive action included important elements to allow businesses to more easily retain high-skilled talent and it also included important provisions to allow entrepreneurs grow new businesses in the United States.<sup>14</sup>

The economic benefits described here are not as robust as those predicted by the Congressional Budget Office under the immigration reform bill passed by the Senate last year (S. 744), which would have raised the GDP by more than 5.4 percent over the next 20 years and reduced the deficit by \$832 billion but it still represents substantial economic benefits.<sup>15</sup>

Providing permanent legal status to undocumented immigrants would be much better for the U.S. economy than mass deportation. Besides being extremely costly, mass deportation would in fact harm the U.S. economy. A 2014 academic economic analysis finds that legalization of half of all undocumented immigrants in the U.S. would decrease the unemployment rate for citizens by 4% and increase citizen wages by .19%. Deportation of half of all undocumented immigrants contrarily would increase citizen unemployment by 1.6% and reduce citizen wages by .08%.<sup>16</sup>

### 3. Rests on Solid Legal Ground

The president has strong legal and historical precedent to take executive immigration action. This legal authority of the executive branch is derived from statutes, regulations, Supreme Court decisions, and historic precedents.

<sup>12</sup> Council of Economic Advisors, "The Economic Effects of Administrative Action on Immigration," November 2014

<sup>13</sup> Center for American Progress, "The Economic and Fiscal Benefits of Deferred Action," 21 November 2014

<sup>14</sup> Memo from Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, "Policies Supporting U.S. High-Skilled Businesses and Workers," November 20, 2014.

<sup>15</sup> Congressional Budget Office, "Cost Estimate, S. 744 Border Security, Economic Opportunity, and Immigration Modernization Act," July 2013

<sup>16</sup> Chassamboil, Andri and Giovanni Peri. 2014. "The Labor Market Effects of Reducing Undocumented immigrants."

As chief prosecutor, the president and his administration not only have a duty to enforce laws, but also the authority to decide how to do so. Every law enforcement agency, including the agencies that enforce immigration laws, has “prosecutorial discretion” – the power to decide whom to investigate, arrest, detain, charge, and prosecute. Agencies properly may develop discretionary policies specific to the laws they are charged with enforcing, the population they serve, and the problems they face.

There is a great deal of agreement in the courts about the wide latitude that Executive officials have when determining whether to prosecute apparent violators of the law.<sup>17</sup> In *Heckler v. Chaney*, the Supreme Court held that an agency’s decision to enforce or prosecute, in either a civil or criminal matter, is a matter of the agency’s “absolute discretion,” noting that the agency was “better equipped” to handle the balancing of its own resources and interests.<sup>18</sup> In the area of immigration enforcement, the power of deportation, which is a civil matter, has been treated similarly to a prosecutor’s power to pursue criminal charges.<sup>19</sup> The Supreme Court recently weighed in on the scope of immigration prosecutorial discretion in *Arizona v. United States*. The Court stated that, “Discretion in the enforcement of immigration law embraces immediate human concerns.” Stopping or suspending the deportation of immediate family members certainly seems encompassed within “immediate human concerns.”<sup>20</sup>

The Immigration and Naturalization Act (INA) does not require immigration officials to initiate removal proceedings against all individuals unlawfully present in the United States. Section 103(a) of the INA expressly delegates to the Secretary of Homeland Security the “administration and enforcement of the INA and all other laws relating to immigration and naturalization of aliens.”<sup>21</sup> Moreover, the Homeland Security Act of 2002 expressly charged the Secretary of Homeland Security with the responsibility of “establishing national immigration enforcement policies and priorities.”<sup>22</sup> The president’s executive actions are therefore simply a matter of statutory interpretation.

As in any law enforcement context, some immigration enforcement activities are far more costly than others and some discretion must be exercised. The large gap between the number of people who could be removed and the resources required to remove them demonstrates the inherent necessity for the Executive to develop enforcement priorities. Enforcement priorities, in the context of immigration, have been used for decades for this very reason. The President can continue to prioritize serious criminals and still use the resources that Congress has appropriated.

<sup>17</sup> Wadhia, Shoba S., “The Role of Prosecutorial Discretion in Immigration Law” (2010). *Scholarly Works*. Paper 17; Pierce, Richard J. Jr., *Administrative Law Treatise* 1252 (4<sup>th</sup> ed. 2002) (citing to the Confiscation Cases, 74 U.S. 454 (1868)).

<sup>18</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>19</sup> 525 U.S. 471, 489-90 (1999).

<sup>20</sup> 132 S. Ct. 2492, 2499 (2012).

<sup>21</sup> INA Section 103(a).

<sup>22</sup> Homeland Security Act of 2002, Sec. 402(5), codified at 6 U.S.C. § 202(5) (emphasis added).

In addition to the broad authority granted by the courts and immigration statutes, there is ample historical justification for Executive action in this area. In fact, every president since Dwight Eisenhower, including Ronald Reagan, George H.W. Bush, and George W. Bush, have taken similar action to protect immigrants.

### **III. Conclusion**

The president's action, while much needed, is only a partial and temporary solution to a complex problem. The DAPA and expanded DACA programs outlined by the Obama administration do not lead to permanent residence or a path to citizenship. They will have clear, defined limits with strict cut-off dates and eligibility criteria. There is no adjustment of status process, only a deferral of deportation. In fact, they do not go far enough and exclude millions of aspiring Americans who also have deep ties to our country.

As Americans have learned over the last years about the shattered lives and broken dreams that are the real victims of our dysfunctional immigration system, there has been increasing support for solutions and changes. This is not about numbers or political parties but about our core values as a nation and what it means to be an American – including Americans in waiting.

The only way to fix the broken immigration system once and for all is for Congress to pass and the President to sign comprehensive immigration reform legislation. We at the National Immigration Law Center look forward to working with members of this committee and others in Congress to make that a reality.



National Task Force  
to End Sexual and  
Domestic Violence Against Women

December 9, 2014

Dear Senator,

The Steering Committee of the National Task Force to End Sexual and Domestic Violence ("NTF"), comprised of national leadership organizations advocating on behalf of sexual and domestic violence victims and women's rights, writes in support of President Obama's Executive action to defer the removal of the parents of U.S. Citizen and Legal Permanent Resident children, and to expand the deferred action program for non-citizens who entered the United States as children. These Executive actions offer a needed opportunity to remove obstacles to immigrant survivors' access to safety and justice, by reducing their vulnerabilities to abuse and exploitation due to fear of deportation.

This fall we are celebrating the twentieth anniversary of the bipartisan Violence Against Women Act ("VAWA"), which has, since it was first enacted, included critical protections for immigrant victims of domestic and sexual violence. Over the last two decades, victims have benefited from executive action deferring removal in cases involving victims protected by VAWA. Executive actions under both Republican and Democratic administrations have enhanced their safety and ability to recover from abuse. These include protections for spouses and children of abusive U.S. Citizens and Permanent Residents, with approved petitions under the Violence Against Women Act, who are awaiting the availability of immigrant visas. In addition, non-citizens eligible for crime-victim visas based on certification from criminal legal system officials have benefited from executive branch deferral from removal, enhancing victims' ability to participate in holding offenders accountable. For these reasons, we support the authority of the Executive branch to defer the removal of classes of very vulnerable non-citizens.

We strongly urge members to prioritize the needs of immigrant survivors of domestic and sexual violence, stalking, trafficking, and child abuse and support President Obama's Deferred Action for Parents, and expansion of the Deferred Action for Childhood Arrivals program. If you have any questions or concerns, please contact us for further information through Grace Huang at [grace@wscadv.org](mailto:grace@wscadv.org), or (206) 389-2515 x 209.

Sincerely,

The member organizations of The National  
Taskforce to End Sexual and Domestic Violence  
[www.4vawa.org](http://www.4vawa.org)

WRITTEN STATEMENT OF  
**Pennsylvania Immigration and Citizenship Coalition**

For a Hearing entitled:

“Keeping Families Together: The President’s Executive Action On Immigration And The  
Need To Pass Comprehensive Reform”

**Submitted to the U.S. Senate Committee on the Judiciary**

December 10, 2014

Submitted by:

**Natasha Kelemen, Executive Director**  
**Pennsylvania Immigration and Citizenship Coalition**

The Pennsylvania Immigration and Citizenship Coalition (PICC) welcomed as an important step the passage of S.744, the bipartisan immigration reform bill that passed the Senate last year with the support of 68 Democrats, Republicans, and Independents. We thank Senator Robert Casey for his leadership in voting for S.744, but we were disappointed in Senator Patrick Toomey’s unwillingness to address the needs of Pennsylvania immigrant families and the nation as a whole.

Although the bill was not perfect, it was an effort to move the country forward on immigration. Had Republicans in the House of Representatives allowed that kind of bipartisanship, a similar bill would have passed the House with support from both parties, and today it would be the law.

Today’s hearing is about American families. Families who once lived in fear of being detained or deported and are now going to be safe from the threat of being torn from their loved ones. Many immigrant parents will be able to come out of the shadows, pay taxes, and give back to their communities in even more meaningful ways. The President’s action will transform the lives of millions of families who came here in search of a better life.

**Caterina’s Story:**

My name is Caterina Vilches and I am from Chile. My mother passed away from cancer when I was 9 years old. At age 17, my father decided to bring me to the United States to stay with my sister. I was really excited to get to see my sister after 10 years! I enrolled in high school and graduated in 2001 and I was able to learn English, which was really beneficial. I then went to college for two years. I had no idea I was undocumented. So my dreams were crushed when I tried to apply for financial aid to continue

school, and realized that I did not qualify because of my immigration status. But I thought I could still work and earn enough money to go back to school.

Twelve years have gone by and I have not been able to go back to school. I am now married and have a beautiful family to work for, so I shifted my priorities. I have two beautiful children; they are fraternal twins, their names are Daniel and Isabella and they are going to be 11 years old in April. They are my life, and I could not imagine what my life would be like without them. Being here undocumented puts me at risk of being deported every day of my life. I know what it is like to grow up without a mother and I would never want my children to go through that. So on November 20, 2014 I felt relieved! Being able to apply for DAPA will change my life because I will now be able to tell my kids that they don't have to fear growing up without their mother, that I will be here with them to see them succeed in school, and their lives. I can tell them I don't have to hide anymore. I can tell them I can go to their field trips because I will now be able to pass all the background checks schools require to chaperone. I can tell them our family will stay together.

**Maria's Story:**

My name is Maria Sotomayor. I am 22 years-old from Ecuador and I am an undocumented immigrant living in Pennsylvania. I came to this country when I was nine years old. I come from a mixed status family. In my family my younger sister and I are beneficiaries of Deferred Action for Childhood Arrivals (DACA), my youngest sister, who is 9 years old, is a U.S Citizen and my parents are both undocumented. Only one of my parents will qualify for Deferred Action for Parental Accountability (DAPA).

My parents left Ecuador when I was 5 years old, their goal was to be in the US for a year, work really hard, save money, build a home in our country and pay for us to get the best education. While I was in Ecuador my grandmother was my main caregiver, mother and father figure. When I was 9 years old, my parents decided to bring us to the US, which had become their home. This was first time I had the chance to hug my parents, it felt like a dream.

I had always imagined my parents living in a beautiful home and with really great jobs. It was not until I came to the US that I realized that my parents were living paycheck to paycheck, working too many hours, and making just enough money to pay the rent and bills and send money to us back home. Over the years I have seen my parents be taken advantage of by employers who make them work without pay because of their immigration status. I have seen them very ill, but unable to go to the doctor unless it was an emergency. I have seen them upset over the loss of

loved ones, and the fear of losing their parents and siblings without being able to be there to take care of them or say a final goodbye.

My parents have been living in this country for almost two decades, paying taxes for years, working hard, and giving back to the community. But regardless of what they did, they could not adjust their status. They had to live in the shadows, being careful of what they do and say and who they trust or where they are.

Two years ago when DACA was announced and my sister and I found out we qualified for this program, my parents said “they could finally breathe a little because they knew we didn’t have to live in fear anymore.” When the President announced DAPA, and I found out that my parents might be able to obtain relief from deportation and a work authorization, I finally was able to breathe too because that means they will be able to be, at least temporarily, protected from deportation. All we want is for our family to be together.

These are examples of the millions of lives that will change once immigrants who lack lawful immigration status are legally permitted to remain in the country and given the chance to more fully contribute to their communities.

The President’s actions will also strengthen our economy and communities. The White House Council of Economic Advisors has found that the President’s executive actions will raise average wages for U.S.-born workers and reduce the federal deficit.<sup>1</sup> It is worth noting this is only a fraction of the economic benefits that would occur if Congress passed comprehensive immigration reform. The Congressional Budget Office estimated that S. 744 would increase GDP by 3.3 percent, or roughly \$700 billion, in ten years and 5.4 percent, or about \$1.4 trillion, in twenty years.<sup>2</sup> The President’s plan is also about accountability: it requires every business and worker to play by the same set of rules instead of the *status quo*, which everyone agrees is broken.

It is critical to note that although this new policy offers promise to our families, the action taken by the President is merely temporary. The struggle is not over until everyone has freedom from fear of detention and deportation. We believe the best solution is a permanent one, which is why we will not stop until we win citizenship for the 11 million people who live, work and raise families in this country they call home. The President has done what he can, now it is up to Republicans to either step up or get out of the way to allow Congress to finish the job.

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<sup>1</sup> The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, Nov. 2014, available at: [http://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](http://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf)

<sup>2</sup>*Id.*

# **MAREK**

**Statement for the Record of  
Stan Marek, President and CEO of Marek Family of Companies**

**U.S. Senate Committee on the Judiciary**

**"Keeping Families Together: The President's Executive Action on  
Immigration and the Need to Pass Comprehensive Reform"**

**December 10, 2014**

My name is Stan Marek, and I am the President and CEO of the Marek Family of Companies in Houston, Texas. I would like to thank the Committee for the opportunity to submit a statement for the record for this important hearing on the President's executive action and the need for broad common sense immigration reform.

I have been in the construction industry my whole life just like my great grandfather who built the castles in Olomouc, Czech Republic. He left the Czech Republic to find the freedom offered by emigrating to America. My father and his brothers started our company 75 years ago with the sons of immigrant farmers from Central Texas towns such as Yoakum, Hallettsville and Shiner. Our company is now in seven cities, and we employ roughly 1,000 workers in Houston alone.

President Obama's executive action will benefit many of our former employees – individuals with U.S. citizen children that we have terminated over the years in compliance with our nation's labor and immigration laws. The President's actions provide happiness for these employees. They will be welcome to return as soon as the president's executive action is effective, and they receive work authorization. Many have kept in touch with me and told us sad stories of low pay, long hours with no overtime and no insurance if hurt. They are ready to rejoin a company that pays by the hour, pays payroll taxes, and cares about their employees.

I will be particularly happy to be able to hire a stellar employee who I had to let go when we learned he was undocumented. He started working for our company thirteen years ago sweeping floors at 18 and worked his way up. He moved to the United States with his mother at the age of eleven and went to school and worked from a young age.

At the age of eighteen he got married, and he now has four U.S. born children with his wife, ages 15, 13, 9 and 4. His mother, now a legal permanent resident, filed a visa petition for him in 2001, but since she is not a citizen the process has been lengthy, and they are still waiting on USCIS to process the application. His wife, who is also undocumented, was recently terminated from her job for being undocumented.

# MAREK

The president's executive action will allow both of them to apply for Deferred Action for Parental Accountability (DAPA). He will be able to come back to work for us, where we can guarantee him fair pay and health benefits, and we gain a skilled, experienced, and loyal worker. He told me that when he heard President Obama's executive action and he saw his fifteen year old daughter jumping with joy, he couldn't hold back the tears - he could finally stop fearing deportation and being separated from his children. He has been living here since he was 11, paying taxes since 1999, has 5 U.S. citizen siblings and 4 U.S. born children- he has been waiting to become a legal permanent resident since 2001 and executive action will give him the opportunity to come to work for us and live without the constant fear of deportation.

The President took an important step to stabilize our workforce and keep families together, but we still need sensible immigration reform that will make these positive changes permanent.

CITY OF GARDEN CITY  
POLICE DEPARTMENT304 N. 9<sup>th</sup> STREET  
GARDEN CITY, KANSAS 67846JAMES R. HAWKINS  
CHIEF OF POLICE620-276-130  
FAX: 620-276-131  
OR 620-276-131**Statement for the Record of Chief of Police James R. Hawkins  
Garden City, Kansas, Police Department****U.S. Senate Committee on the Judiciary****Keeping Families Together: The President's Executive Action on  
Immigration and the Need to Pass Comprehensive Reform****December 10, 2014**

My name is James Hawkins, and I have served as the Chief of Police of the Garden City Police Department in Garden City, Kansas, since February 1996. I joined the Garden City Police Department in October 1983 as a patrol officer and, before being appointed Chief, held the ranks of Detective, Lieutenant, and Captain. I have a Master's Degree in Spanish and Portuguese from the University of Massachusetts and worked as a teacher with the Garden City School District for four years prior to joining the department.

Garden City is located in southwest Kansas and serves as a significant retail hub for the region. The city's economy is largely rooted in the agriculture, construction, education, and retail industries, and the city's population increased more than 46 percent between 1980 and 2010.<sup>1</sup> Garden City is a "majority-minority" city, with Latinos making up 48.6 percent of the population in 2010 and other minority groups comprising an additional 7 to 8 percent of the population.<sup>2</sup> There are approximately 12,000 undocumented immigrants in southwest Kansas, including a few thousand residing in Garden City.

I applaud the Committee for holding this hearing on the importance of keeping families together and the need for comprehensive immigration reform and thank the members for the opportunity to share my views on this subject. As a law enforcement leader in my community, I support broad immigration reform to fix our broken immigration system as a matter of public safety and urge Congress to enact comprehensive immigration reform legislation.

In my 31 years with the Garden City Police Department, I have seen firsthand how the fear of being separated from one's family has a negative impact on community safety. I have had the opportunity to work with Catholic Agency for Migration & Refugee Services, a non-profit that provides valuable legal services to the

<sup>1</sup> U.S. Census Bureau. Census of Population and Housing, <http://www.census.gov/prod/www/decennial.html>.

<sup>2</sup> U.S. Census Bureau. American FactFinder, [http://factfinder2.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml).

immigrant community in southwest Kansas. Over the years, I have completed several certifications for Catholic Agency for Migration & Refugee Services on behalf of those they are helping, confirming that the individuals live in my community and have no criminal records. In the overwhelming majority of cases, my checks reveal that these immigrants are law-abiding, long-standing members of the community, often with children and families.

The current immigration system separates families and undermines trust and cooperation between police agencies and immigrant communities, which is an essential element of community-oriented policing. All too often, immigrants resist calling authorities or otherwise cooperating with law enforcement, out of fear that their cooperation may lead to being discovered and deported. Undocumented immigrants may be afraid to call authorities when criminal activity is happening in their neighborhood or when they are victims of crime, and sometimes go so far as to fail to call an ambulance when someone is sick or injured. For law enforcement officers, this situation creates breeding grounds for criminal enterprises and undermines safe communities. By legitimizing the presence of otherwise law-abiding immigrants and reassuring them that their cooperation with law enforcement will not separate them from their lives and families in the United States, the president's package of recently announced executive reforms to the immigration system will build trust between immigrant communities and law enforcement, helping to root out crime and improve public safety.

Providing temporary deferred action from deportation to qualifying parents of U.S. citizens and legal permanent residents under the Deferred Action for Parental Accountability (DAPA) program, as well as to young people under the Deferred Action for Childhood Arrivals (DACA) program, will provide these individuals with a sense of belonging to the community in which they reside, enabling them to better contribute to their community. By gaining temporary work authorization, the undocumented community will be encouraged to invest in themselves, their families, and the community at large, creating thousands of new taxpayers in the region. Additionally, they will boost the local economy, strengthening crucial industries in doing jobs that, in general, native-born workers do not apply for.

Immigrant labor is already crucial to local construction, meat processing, and feedlots, and immigrant consumers are a significant market for southwest Kansas retailers. Mass deportation of this group would be devastating to our community and the rest of southwest Kansas and would threaten to undermine the local economy. Key businesses would find themselves without workers, and retailers would find themselves missing a significant proportion of their customers. The executive reforms provide a measure of certainty for these workers and their employers, albeit temporarily, assuring a three-year window to live and work in our community.

Additionally, to the extent that the executive reforms facilitate the issuance of identification (including driver's licenses) to undocumented immigrants, the reforms

will aid law enforcement in identifying those residing in our community, making the communities safer for everyone.

Already, Kansas has joined the overwhelming majority of states in issuing driver's licenses to recipients of DACA. My hope is that it would do the same for new beneficiaries of deferred action, DAPA and DACA, under the executive reforms. Driver's licenses are a public safety issue. As a police chief, I would elect to have several hundred licensed drivers abiding by relevant traffic and insurance laws and regulations than several hundred unknown, unlicensed, and uninsured drivers.

In conclusion, I support the executive reforms because they will benefit families, businesses, and law enforcement in southwest Kansas, but I acknowledge that they represent only the first step in improving our broken immigration system. What our broken system truly needs is a permanent legislative solution, and I urge Congress to enact comprehensive immigration reform legislation.

United States Senate Committee on the Judiciary

*Keeping Families Together: The President's Executive Action on Immigration  
and the Need to Pass Comprehensive Reform*

Testimony of

Chief Charlie Beck

Los Angeles Police Department

December 10, 2014

Thank you Senator Hirono, Chairman Leahy, Ranking Member Grassley, and distinguished members of the Judiciary Committee, including Senator Dianne Feinstein from the great state of California. I appreciate this opportunity to provide my testimony on this important topic.

My name is Charlie Beck and I am the 56<sup>th</sup> Chief of the Los Angeles Police Department where I have spent forty years of my life serving the communities of this nation's second largest city. I am proud of the work we have accomplished in Los Angeles building trust with each of our communities. This has been accomplished as result of focused and effective outreach with stakeholders to identify and address concerns. Our efforts, whether through regular forum meetings involving myself and stakeholders from our diverse communities, or in the day-to-day interaction with an officer on the beat, have proven that local law enforcement can hold the trust of its communities. However, over the years, immigration policies and federal programs, such as Secure Communities, have posed challenges to the trust established between the police and undocumented immigrants who fear that any interaction with the police will result in their removal.

I would like to share my perspective on the important matter of immigration reform and President Obama's recent executive action on immigration. I write on behalf of the Los Angeles Police Department as this matter before the Committee and the Congress is of significant importance to public safety in my city as well as cities and communities across this great nation.

The President's Immigration Accountability Executive Action has many elements including specific actions designed to improve our border security, implementing a new Priority Enforcement Program (PEP) focused on national security threats and serious criminals, and creating deferred action mechanisms for certain undocumented immigrants. I will focus on the last two – replacement of the Secure Communities program with the PEP, and mechanisms to establish deferred action mechanisms for certain undocumented immigrants. This would include young people who have been in the United States (U.S.) at least five years or parents of U.S. citizens or legal permanent residents who have been in the country for more than five years.

I am encouraged by the President's announcement of Administration's plan to replace the existing Department of Homeland Security (DHS) Secure Communities program with the new Priority Enforcement Program. Over the course of the last five years, my Department has worked tirelessly with senior members of the DHS to refocus the enforcement priorities and other aspects of the Secure Communities program. Unfortunately, despite numerous changes to the program, many immigrants and others have lost faith in the program's stated purpose. Given the close association many made between the DHS Secure Communities program and local law enforcement, that loss of faith continues to undermine the immigrant community's relationship with the police working in their neighborhood.

With the announcement of the PEP and its stated focus, there exists the opportunity to repair the damage that has been done to local law enforcement's ability to garner the trust and cooperation of our immigrant communities.

However, to be clear, critical to the success of the newly announced PEP will be the makeup of those undocumented individuals identified by the DHS as the result of an arrest by local law enforcement and the PEP. Many in the immigrant community and elsewhere remain suspicious that the actual outcome of the new program will not substantially differ from the earlier Secure Communities program. Simply stated, too often in the past the DHS chose to focus on undocumented individuals who were recent entries charged with low-level criminal offenses. Should PEP focus its priority on those undocumented immigrants who pose a risk to national security or those charged with serious criminal offenses, there exists the opportunity to move forward in a much more productive manner.

Similarly, we support the President creating deferred action mechanisms for certain undocumented immigrants who pass a background check and young people who have been in the U.S. for at least five years and meet specific education and public safety criteria. For too long, these individuals have lived in the shadows of our communities fearing any misstep or involvement with law enforcement would result in their identification and removal. As members of this committee clearly understand, such circumstances pose significant risks. Many of these undocumented individuals have been and continue to be victimized and exploited by others in our community. Law enforcement is often unable to take action to stop this victimization as the undocumented immigrant and others fear stepping forward will result in their identification and removal. Additionally, criminal gangs and others intimidate whole communities with misinformation and innuendo that undocumented individuals who step forward to be a witness or testify will be deported and separated from their families. All of this creates and reinforces barriers to the trust needed between local law enforcement and our communities. The President's actions offer an opportunity for individuals who have proven themselves responsible to be given a deferred action and the ability to participate in their community without fear of being torn apart from their family.

In closing, I urge this committee to support intelligent, measured, and focused actions that allow local law enforcement to further build the trust of every member of the communities it serves. The President's actions, particularly to refocus the DHS on border security, national security threats and serious criminals, while also providing temporary relief for certain undocumented immigrants, are the kind of pragmatic steps needed at this critical time. The benefits gained for this group of undocumented immigrants will allow them to step out of the shadows and work with law enforcement for the safety of their communities and themselves. Thank you for the opportunity to address this with you. I will be pleased to respond in writing to any questions you may have.

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Written Statement of

**The United Farm Workers of America**

Submitted to the Senate Judiciary Committee Hearing on

**“Keeping Families Together: The President’s  
Executive Action on Immigration and the Need  
to Pass Comprehensive Immigration Reform”**

December 9, 2014

Submitted by

Giev Kashkooli, Political/Legislative Director, 3<sup>rd</sup> Vice President

The United Farm Workers has worked for 14 years on a bipartisan basis to get Congress to act on immigration policy. Different versions of agricultural compromises, negotiated by the UFW with the nation's agricultural employers, passed the U.S. Senate multiple times over the last 14 years including during the current session. This proposal has enjoyed majority support in the House of Representatives multiple times during the last 14 years, including in the current session, yet the House of Representatives has failed to act. As enforcement at the border has dramatically increased over the last decade, agricultural employers have become increasingly vocal about their inability to hire professional, competent farm workers. We thank the members of the Senate Judiciary committee for all of their work on the immigration proposal in this Congressional session. Yet the House of Representatives has failed to act.

Prior to Thanksgiving, President Obama announced actions within the executive branch's authority to begin to fix our broken immigration system. We urge Congress to continue the work to pass immigration legislation that will respect today's agricultural industry and the hard working professional farm workers whose work sustain the industry. We urge the House of Representatives to adopt the compromise proposal between the United Farm Workers and all of the nation's major agricultural employer associations.

The nation will benefit from a safer, more stable food supply as a result of President Obama's immigration actions. The President's action also shows respect to some of the new Americans currently working in the fields to feed the country. Consider the words of Raul Esparza De La Paz, a farm worker who works on a cattle ranch whose work ensures other Americans across the country get to enjoy eating beef.

*"My name is Raul Esparza De La Paz and I've been in the U.S. since 1998. I work at a dairy in Hermiston, OR. When the President announced his executive order. I was excited and nervous. Upon hearing that I would meet the requirements, I was happy. This would benefit myself and my wife. My four children and five grandchildren would be able to live as a family in peace without the fear of being separated from each other. We call the U.S. home now. I and others would greatly benefit from Obama's executive order because it's not fair to live in fear because of our immigration status. I was pleased with the President's decision. But Congress must do their part, so those who weren't covered by administrative relief can benefit from comprehensive immigration reform and those of us who work on America's farms can be part of a permanent solution."*



Committee on Migration  
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**Statement of Most Reverend Eusebio Elizondo  
 Auxiliary Bishop of Seattle, WA  
 Chairman, U.S. Conference of Catholic Bishops' Committee on Migration**

**Senate Judiciary Committee**

**December 10, 2014**

The U.S. Conference of Catholic Bishops (USCCB) has long supported the enactment of comprehensive immigration reform legislation that includes a path to citizenship for undocumented persons residing in the country.

The Catholic Church in this country has a long history of welcoming and aiding the poor, the outcast, the immigrant, and the disadvantaged. Each day, the Catholic Church in the United States, in her social service agencies, hospitals, schools, and parishes, witnesses the human consequences of the separation of families, when parents are deported from their children or spouses from each other.

In the attached September 9 letter to Homeland Security Secretary Jeh Johnson, we asked the Administration to do everything within its legitimate authority to bring relief and justice to our immigrant brothers and sisters. As pastors, we welcome any efforts within these limits that protect individuals and protect and reunite families and vulnerable children, including the Administration's recent executive action.

Although short of what is necessary to fully reform our nation's broken immigration system, the Administration's recently announced executive actions on immigration represent a first step in the process of fixing it. Importantly, it would prevent the separation of families, ensuring that U.S. citizens and permanent residents are not faced with losing their parents or being forced to return with them to a country in which they have never lived. Instead of traumatizing these children and young adults—the future leaders of our country—we should invest in them by ensuring that their families remain intact.

Rather than attempting to rescind the Administration's recent executive actions on immigration, Congress should act on a comprehensive and permanent solution to our immigration challenges by passing comprehensive immigration reform legislation that addresses all aspects of our immigration system. Enactment of such a measure would supersede the recent executive actions.

I strongly urge Congress and the President to work together to enact permanent reforms to our nation's immigration system for the best interests of the nation and the migrants who seek refuge here. We will continue to work with both parties in the 114th Congress to enact legislation that welcomes and protects immigrants and promotes a just and fair immigration policy.



Statement of Andrea Cristina Mercado and Miriam Yeung, co-chairs of We Belong Together

Submitted to the Committee on the Judiciary of the U.S. Senate  
Hearing on "Keeping Families Together: The President's Executive Action on Immigration and  
the Need to Pass Comprehensive Immigration Reform"

December 10, 2014

Chairman Leahy, Ranking Member Grassley and members of the Committee, we are Andrea Cristina Mercado and Miriam Yeung, co-chairs of We Belong Together. Thank you for the opportunity to submit testimony for inclusion in the record for today's hearing.

We Belong Together is a campaign co-anchored by the National Domestic Workers Alliance and the National Asian Pacific American Women's Forum to mobilize women in support of common-sense immigration reform that will keep families together and empower women. We Belong Together was launched on Mother's Day in 2010 and has exposed the dangerous impact of immigration enforcement on women and families, advocated for comprehensive immigration reform legislation and campaigned President Obama to take executive action within his legal authority to improve the broken immigration system.

#### Executive Action

On November 20, 2014 the Obama Administration announced several reforms to the immigration system. These reforms include revamping immigration enforcement mechanisms such as the Secure Communities program and the use of detainers as well as granting deferred action to a portion of the undocumented community.

The announced enforcement reforms have the potential to protect families against painful separation that is the unfortunate consequence of the current detention and deportation system. In addition, the current immigration enforcement practices employed by the Department of Homeland Security (DHS) result in the over-criminalization of communities of color, a matter of great concern to the Senate Judiciary Committee. Reforms such as shifting from the use of detainers to a notification system can potentially reduce the over-policing and criminalization of immigrant communities, allowing law enforcement to focus their limited resources more efficiently and restore the trust of the very communities they are sworn to protect. Since the inception of the We Belong Together campaign, we have highlighted the dangerous impact immigration enforcement has on women and families including family separation, impeding access to life-saving

services for survivors of violence against women and increasing vulnerabilities faced by immigrant women workers.

The November 20<sup>th</sup> announcement acknowledged these vulnerabilities and as a result, the Department of Labor (DOL) will attempt to make nonimmigrant visas for victims of crime and human trafficking more accessible to immigrant workers as well as continue to investigate improvements for workers who face retaliation as a result of their immigration status.

The President's most sweeping reform, the granting of deferred action to a wide scope of the undocumented community, brings relief to numerous immigrant women and children who are embedded in the fabric of our country and fuel our families and our economy. One such woman, Lydia, recently came to DC to thank the President for executive action. Lydia, a leader within the We Belong Together campaign, is the mother of three children, ranging from ages 8 to 2. Her youngest was born while her husband was in immigration detention. Lydia is eligible for deferred action and feels most excited about being able to work to support her family and also to obtain a driver's license. She says now, she will be able to drive her young children to school in the bitter Massachusetts winter, rather than forcing them to walk close to a mile each way.

The President has clear legal authority to enact these announced reforms. Moreover, We Belong Together, along with countless constituents campaigned with members of Congress to enact legislative reform to no avail. In the face of this inaction, we commend President Obama for using his legal authority to change immigration practices to ease the pain of women workers, children, survivors of violence and families.

#### **Why Women and Families Need the President to Act Now**

Women need the President to act now. Women and children make up three-quarters of immigrants and there are over 20 million immigrant women and girls in the U.S. today. It is estimated that over four million undocumented women live in the country and the President's deferred action programs will allow many of these women to emerge from the shadows and fully contribute their talents. With regard to enforcement, the President's reforms send the message that DHS, where possible, should exercise discretion in favor of keeping families together. This is in alignment with our values and traditions.

In addition, immigrant women are three to six times more likely to experience domestic violence than U.S.-born women because immigration status is often used as a tool to control women in violent relationships. Ending the Secure Communities program can help survivors who may fear going to the police for help and safety and improve relationships between law enforcement and immigrant communities.

Immigrant women earn less in the labor force than any other demographic and undocumented women workers face significantly higher rates of wage and hour violations. Domestic workers are among the most highly trafficked groups. Executive action ensuring more expansive DOL protections and attention to the issues faced by immigrant women are an important step in addressing these vulnerabilities.

We Belong Together hopes the President will further exercise his legal authority and assist families separated as a result of the family visa backlogs. Nearly 70% of all women immigrant who have legal status obtain it through the family immigration system. Unfortunately, the system is burdened with over four million people who are stuck in the backlogs for years to be reunited with their families. This burden disproportionately falls on women. As part of the executive action announcement, a task force to examine modernizing the visa system was created. This task force should explore avenues to relieve the burden of the family visa backlogs and specifically recommend granting parole to relatives with approved visa petitions, to allow them to live in the US with their families as they await the processing of their visas.

We Belong Together also strongly recommends that the Administration end the practice of family detention, which has resulted in locking up women and young children, many of whom are survivors of violence against women.

Even with President Obama's executive action to improve the functioning of the immigration system, the system remains broken and in severe need of legislative reform. We Belong Together hopes to work with Congress to make legislative reform of the immigration system a reality.





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**MEMORANDUM**

December 5, 2014

**To:** Senate Judiciary Committee, Antitrust, Competition Policy, and Consumer Rights  
Subcommittee  
Attention: Michael Lemon

**From:** Kate M. Manuel, Legislative Attorney, 7-4477

**Subject:** **Deferred Action, Advance Parole, and Adjustment of Status**

Per your request, this memorandum briefly explains the legal authorities and reasoning that could permit certain aliens granted deferred action who are also granted advance parole by the Department of Homeland Security (DHS) to adjust to lawful permanent resident (LPR) status pursuant to Section 245 of the Immigration and Nationality Act (INA). The memorandum also notes major legal constraints that could, under current law and policy, limit the ability of at least some deferred action beneficiaries to adjust to LPR status as the result of a grant of advance parole.<sup>1</sup>

**Deferred Action**

Deferred action is one type of relief from removal that DHS may grant to unlawfully present aliens. A grant of deferred action is generally seen to constitute an exercise of prosecutorial or enforcement discretion by the Executive, not an exercise of authority explicitly delegated to the Executive by Congress.<sup>2</sup> As such, the Executive has generally been seen as able to grant deferred action to any potentially removable alien as to whom it determines that seeking or executing a final order of removal is not warranted due to humanitarian considerations or enforcement priorities.<sup>3</sup> The Obama Administration

<sup>1</sup> Information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided by CRS in memoranda or reports for general distribution to Congress. Your confidentiality as a requester will be preserved in any case.

<sup>2</sup> See, e.g., *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9<sup>th</sup> Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7<sup>th</sup> Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App'x 238, 239 (9<sup>th</sup> Cir. 2004); *Matter of Yauri*, 25 I. & N. December 103 (BIA 2009); *Matter of Singh*, 21 I. & N. December 427 (BIA 1996); *Matter of Luviano-Rodriguez*, 21 I. & N. December 235 (BIA 1996); *Matter of Quintero*, 18 I. & N. December 348 (BIA 1982). For further discussion as to the basis for the Executive's prosecutorial discretion, see the section titled "Prosecutorial Discretion Generally," in CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

<sup>3</sup> See, e.g., *Arizona v. United States*, --- U.S. ---, 132 S. Ct. 2492, 2499 (2012) ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service."); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 489 (1999) ("This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts (continued...)")

has developed several initiatives which permit unlawfully present aliens who meet specified criteria—which include having significant ties to the United States and being low priorities for removal under DHS guidance—to request deferred action.<sup>4</sup> Other aliens who do not meet these criteria could also be granted deferred action at DHS’s initiative, or at the alien’s request.<sup>5</sup>

A grant of deferred action does not, in itself, give an alien lawful immigration status—such as LPR status—although it could potentially permit certain aliens to acquire such status, as discussed below.<sup>6</sup>

### Advance Parole

DHS also has a practice of granting “advance parole” to certain aliens who are physically present within the United States, but lack any generally recognized legal rights to return to the United States after departing from it.<sup>7</sup> A grant of advance parole is commonly described as a “travel document” whereby such aliens may leave the country and return.<sup>8</sup>

Advance parole is a type of parole pursuant to INA §212(d)(5)(A), which authorizes the Executive to allow aliens to enter the country regardless of whether they are entitled to “admission” under other provisions of the INA.<sup>9</sup> Thus, while determinations as to whether to grant parole to individual aliens have sometimes been described as within the Executive’s prosecutorial or enforcement discretion,<sup>10</sup> any grant of parole must arguably be consistent with INA §212(d)(5)(A)’s requirement that parole be granted on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>11</sup> DHS has, to date, granted advance parole to aliens granted deferred action through the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) initiative only if their travel abroad is in furtherance of humanitarian, educational, or employment purposes.<sup>12</sup>

(...continued)

are competent to undertake.”) (internal quotations and citations omitted).

<sup>4</sup> DHS Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents [sic] Are U.S. Citizens or Permanent Residents*, November 20, 2014; DHS Secretary Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012 (copies on file with the author).

<sup>5</sup> See, e.g., DOJ, Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, November 20, 2014, at 14 (copy on file with the author).

<sup>6</sup> U.S. Citizenship & Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, last updated October 23, 2014, available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (“[D]eferred action does not confer lawful status ...”).

<sup>7</sup> LPRs, for example, are generally seen as entitled to return to the United States after departing for certain periods of time.

<sup>8</sup> See, e.g., U.S. Citizenship & Immigration Services, I-131, Application for Travel Document, last updated July 14, 2014, available at <http://www.uscis.gov/i-131>.

<sup>9</sup> See 8 U.S.C. §1182(d)(5)(A). The INA defines “admission” to mean the “lawful entry of an alien into the United States after inspection and authorization by an immigration officer.” INA §101(a)(13)(A), 8 U.S.C. §1101(a)(13)(A). Aliens applying for admission may be denied on certain health or security grounds, among other grounds. See INA §212(a), 8 U.S.C. §1182(a).

<sup>10</sup> See, e.g., *Assa’ad v. U.S. Attorney General*, 332 F.3d 1321, 1339 (11<sup>th</sup> Cir. 2003); *Matter of Artigas*, 23 I. & N. December 99 (BIA 2001) (Filppu, J., dissenting).

<sup>11</sup> 8 U.S.C. §1182(d)(5)(A).

<sup>12</sup> *Frequently Asked Questions*, *supra* note 6. Travel for vacation is expressly said not to constitute a valid basis for advance parole. *Id.*

### Adjustment of Status

Historically, aliens who had accrued more than 180 days of unlawful presence in the United States, left the country, and reentered pursuant to a grant of advance parole or otherwise were generally seen as ineligible for adjustment to LPR status pursuant to INA §245(a) because INA §245(a) expressly limits adjustment of status to aliens who were “inspected and admitted or paroled into the United States” and “are admissible to the United States for permanent residence,” among other things.<sup>13</sup> Such aliens were seen as having been “paroled into the United States” when they reentered the country pursuant to a grant of advance parole. However, they were also seen as inadmissible (at least for a certain period of time) under INA §212(a)(9)(B)(i) because they had departed the United States after accruing more than 180 days of unlawful presence.<sup>14</sup>

This situation has recently changed, however, as a result of the 2012 decision by the Board of Immigration Appeals (BIA)—the highest administrative tribunal for interpreting and applying immigration law—in *Matter of Arrabally and Matter of Yerrabelly*. There, the BIA found that aliens who leave the United States pursuant to a grant of advance parole do not “depart” for purposes of INA §212(a)(9)(B)(i) and, thus, are not precluded from adjustment of status pursuant to INA §245(a) on this basis.<sup>15</sup> As a result of this decision, some commentators have suggested that aliens who would otherwise be precluded from adjusting status because they entered the United States unlawfully and have not been “inspected and admitted or paroled” could potentially become eligible to do so if granted deferred action and advance parole by DHS.<sup>16</sup> When such aliens reenter the United States they would generally be seen to have been “inspected and admitted or paroled,” which is one of the requirements for adjustment under INA §245(a), as previously discussed.<sup>17</sup> Moreover, because of the *Arrabally* decision, they would not be seen as inadmissible as a result of their prior unlawful presence because leaving the United States pursuant to a grant of advance parole does not constitute a “departure” that triggers the grounds of inadmissibility for aliens who have accrued more than 180 days of unlawful presence.<sup>18</sup>

### Constraints upon Adjustment of Status Pursuant to Grants of Deferred Action and Advance Parole

It is important to note, however, that not all aliens granted deferred action would be able to adjust to LPR status pursuant to a grant of advance parole for several reasons. The first such reason is arguably INA §212(d)(5)(A), which permits the Executive to grant parole on a “case-by-case basis for urgent

<sup>13</sup> 8 U.S.C. §1255(a).

<sup>14</sup> See *Matter of Arrabally and Matter of Yerrabelly*, 25 I. & N. Dec. 771, 773-75 (BIA 2012) (discussing earlier administrative and judicial decisions taking this view).

<sup>15</sup> *Id.* at 779 (“[W]e hold that an alien who has left and returned to the United States under a grant of advance parole has not made a ‘departure from the United States’ within the meaning of section 212(a)(9)(b)(i)(II) of the Act.”). Aliens who have been unlawfully present for more than 180 days but less than 1 year are generally barred from admission for three years after departing the United States. A 10-year bar applies to aliens who have been unlawfully present for 1 year or longer. Longer or permanent bars could apply to certain aliens, depending upon their circumstances. See, e.g., INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A) (certain aliens barred from entry for 20 years).

<sup>16</sup> See, e.g., Tidwell, Swaim & Assocs., “*Dreamers*” *Get an Enormous Unintended Benefit*, Sept. 2014, available at <http://tsalaw.com/2014/09/04/dreamers-enormous-unintended-benefit/>; Hogan & Vandenberg LLC, *Adjustment of Status through Advance Parole: An Alternative to Provisional Waivers*, Feb. 28, 2013, available at <https://immigrationlawmonitor.wordpress.com/2013/02/28/adjustment-of-status-through-advance-parole-an-alternative-to-provisional-waivers/>.

<sup>17</sup> See 8 U.S.C. §1255(a).

<sup>18</sup> See *supra* note 15.

humanitarian reasons or significant public benefit.”<sup>19</sup> Neither “urgent humanitarian reasons” nor “significant public benefit” is defined by the INA or its implementing regulations. However, an argument could be made that granting advance parole to an alien solely so that s/he can be said to have been “inspected and admitted or paroled” and, thus, become eligible for adjustment of status pursuant to INA §245(a), does not constitute an “urgent humanitarian reason” or “significant public benefit” under INA §212(d)(5)(A).<sup>20</sup>

Another reason is that INA §245(a) requires that aliens not only be “inspected and admitted or paroled” and “admissible to the United States for permanent residence” for adjustment to LPR status, but also that an immigrant visa be “immediately available” to the alien at the time when s/he files the application for adjustment of status.<sup>21</sup> Only “immediate relatives” of U.S. citizens—a term which includes only children, spouses, and certain parents of U.S. citizens<sup>22</sup>—are assured of having an immigrant visa “immediately available” to them since only they are exempt from the numerical caps on the number of employment- and family-based immigrant visas issued per year.<sup>23</sup> These caps, in turn, generally result in delays in the availability of immigrant visas which would mean that immigrant visas are not “immediately available” at the time of the alien’s application for adjustment of status.<sup>24</sup> Aliens who are not the immediate relatives of U.S. citizens must also be in legal status at the time of the application,<sup>25</sup> and aliens in legal status have no need of deferred action.

Relatedly, INA §245 also imposes other limitations upon aliens’ ability to adjust to LPR status by barring certain aliens from adjustment. Notable examples include: aliens who were employed while they lacked work authorization from DHS; aliens who have otherwise violated the terms of a nonimmigrant visa; certain aliens who were admitted as nonimmigrant visitors without visas and overstayed their period of authorized presence; and aliens who are subject to the grounds of deportation for terrorist activity.<sup>26</sup> Further, any approved application for adjustment of status pursuant to INA §245(a) for an alien who is not the immediate relative of a U.S. citizen results in a reduction in the number of preference visas authorized for issuance under INA §§202-203 for the fiscal year then current to the class to which the alien is chargeable.<sup>27</sup>

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<sup>19</sup> 8 U.S.C. §1182(d)(5)(A).

<sup>20</sup> Cf. “A Brief History of the Executive Branch’s Parole of Aliens into the United States,” in CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia (discussing the legislative history of and apparent congressional intent behind the provisions regarding parole in INA §212(d)(5)(A)).

<sup>21</sup> INA §245(a), 8 U.S.C. §1255(a).

<sup>22</sup> In the case of parents, the child must be at least 21 years of age. See INA §201(b), 8 U.S.C. §1151(b).

<sup>23</sup> See generally CRS Report R43145, *U.S. Family-Based Immigration Policy*, by William A. Kandel.

<sup>24</sup> *Id.*

<sup>25</sup> INA §245(c)(2), 8 U.S.C. §1255(c)(2).

<sup>26</sup> INA §245(c)(4), (6) & (8), 8 U.S.C. §1255(c)(4) (6) & (8).

<sup>27</sup> INA §245(b), 8 U.S.C. §1255(b).

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## ADMINISTRATIVE OPTIONS

1. Registration Program and Deferred Action for the Current Unauthorized Population or Selected Subsets

Maintaining the status quo with regard to the millions of illegal immigrants living in the United States threatens our security and fuels the underground economy. To address these problems, DHS has long envisioned legislation establishing a broad-based legalization program to register and screen this population, excluding individuals who pose a security risk, and legalizing those who qualify and intend to stay here. To register and screen these applicants effectively, DHS has proposed a two-phase process. During Phase 1, eligible applicants would be registered, fingerprinted, screened and considered for an interim status that allows them to work in the U.S. Successful applicants would receive a biometric-enabled, tamper-resistant credential. During Phase 2, applicants who had fulfilled additional statutory requirements would be permitted to become lawful permanent residents.

In the absence of legislation, much of Phase 1 of the program could still be implemented, either by the Secretary of Homeland Security granting eligible applicants deferred action status<sup>1</sup> or the President granting deferred enforced departure. Such a "registration-only" program would require undocumented immigrants to register their presence in the U.S. in exchange for work authorization.<sup>2</sup> Individuals would have a strong incentive to register if this can be implemented because the simultaneous implementation of ~~simultaneously with an~~ expanded E-Verify program that would ~~drastically~~ substantially curtail opportunities for unauthorized employment. On the other hand, they may be skeptical of registering because deferred action status is subject to revocation if there is a policy change, and it does not readily lead to LPR or another more secure status.

Registration would need to be completed quickly, in order to reduce incentives for individuals to enter the U.S. unlawfully in the hope of applying for the program. To create an operationally feasible application process, DHS would require up-front funding and sufficient time to a ramp-up and the need for upfront funding may provide an opportunity for Congress to block this initiative if it objects.

If going forward with a larger registration program that reaches the entire potential legalization population is not possible, we could propose a more narrowly-tailored registration program for individuals eligible for relief under the DREAM Act, AgJOBS, or other specifically defined subcategories. This strategy has benefits and drawbacks. If public reaction is positive, it could galvanize the Department's efforts to execute a broader registration program in the future. A

<sup>1</sup> Although deferred action determinations are made on a case-by-case basis, the Department has periodically decided to grant deferred action to discrete classes of aliens, including victims of trafficking and certain other serious crimes.

<sup>2</sup> Aliens granted deferred action status must establish an economic necessity to obtain work authorization. 8 C.F.R. § 274a.12(c)(14).

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negative reaction could hinder the program and even affect future legislative efforts. Similar to the arguments made against piecemeal legislation, proposing a smaller registration program may generate the same level of opposition as the full registration program.

#### Pros

- A registration program can be messaged as a security measure to bring illegal immigrants out of the shadows. Screening, registering, and issuing biometric documents to those eligible for interim status would allow help law enforcement to easily identify and remove convicted criminals and others who pose a threat to national security or public safety.
- Providing work permits to this population will enable these workers to become full-fledged tax payers, therefore increasing U.S. tax revenues.
- Allowing successful applicants to work legally would create a level playing field for honest employers and all workers.
- Registration would reduce the use of fraudulent documentation and decrease identity theft.
- A bold administrative program would transform the political landscape by eliminating using administrative measures to sidestep the current state of Congressional gridlock and inertia.
- Up-front funds required to set up the registration program could potentially be reimbursed through fees collected from applicants.

#### Cons

- The Secretary would face criticism that she is abdication her charge to enforce the immigration laws. Internal complaints of this type from career DHS officers are likely and may also be used in the press to bolster the criticism.
- Even many who have supported a legislated legalization program may question the legitimacy of trying to accomplish the same end via administrative action, particularly after five years where the two parties have treated this as a matter to be decided in Congress.
- Opponents of the registration program will characterize it as "amnesty." The same political effort necessary to achieve a legislative solution may will probably be required to promote and implement defend this administrative proposal.
- Critics of the administrative program would claim that it is being proposed to pander to Latino voters.
- A program that reaches the entire population targeted for legalization would represent use of deferred action on a scale far beyond its limited class-based uses in the past (e.g. for widows). Congress may react by amending the statute to bar or greatly trim back on deferred action authority, blocking its use even for its highly important current uses in limited cases.
- Congress could also simply negate the intent of deferred action (which by its nature is temporary and revocable) to this population. If criticism about the legitimacy of the program gain traction, many supporters of legalization may find it hard to vote against such a bill.

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- The proposed timeline would require a rapid expansion of USCIS's current application intake capacity. Significant upfront resources would be needed for hiring, training, facilities expansion and technology acquisition, and the only realistic prospect of a source of funding may be a new appropriation. Agencies involved in other parts of the process would also require additional resources and personnel.
- Some immigrant advocates may view this program as a way to gather information on illegal workers without ensuring them any permanent legal status. The lack of a guarantee of permanent status may deter some individuals who would be eligible for interim status from coming forward to register.
- Immigration reform is a lightning rod that many Members of Congress would rather avoid. An administrative solution could dampen future efforts for comprehensive reform and sideline the issue in Congress indefinitely.
- Unilateral action by the Administration could be viewed as an end-run around Congress, angering both Republicans and Democrats.
- Legal challenges are possible and could halt implementation of the program.
- Congress may disagree with the deferred action policy and seek to undermine it through legislation or by using its appropriations authority to prohibit the expenditure of funds on such a program.

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#### *Clearing Family-Based Visa Backlogs*

The following options would enable DHS to promote family reunification by removing certain barriers that could otherwise delay or prevent the immediate relatives/family of U.S. citizens and legal permanent residents from adjusting their status. They operate on a smaller scale than the previous option, but would provide full legal status, not just deferred action, for many undocumented individuals with the strongest equities.

#### 2. Waiver of Inadmissibility for Spouses, Sons and Daughters of U.S. Citizens and LPRs Subject to Three and Ten-Year Bars

Section 212(a)(9)(B)(i) of the Immigration and Nationality Act ("INA") renders inadmissible certain persons who have been unlawfully present in the U.S. and thus prevents them from adjusting to permanent residence status. An individual who has been unlawfully present in the U.S. for more than 180 consecutive days but less than one year and voluntarily departs the U.S. prior to the commencement of removal proceedings is barred from readmission for 3 years upon re-entry. Those who are unlawfully present for at least one year and voluntarily depart are barred from readmission for 10 years.

Under the INA, DHS has sole discretion to waive the above-referenced grounds of inadmissibility for spouses, sons and daughters of U.S. citizens and lawful permanent residents (LPRs) in cases where the refusal to admit such aliens would result in extreme hardship to the qualifying relative (i.e. the U.S. citizen or LPR spouse or parent). The "extreme hardship" standard tends to be has to date been strictly construed, thereby limiting the number of persons

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who apply for such relief.<sup>3</sup> As a result, individuals who could otherwise become permanent residents, but who are subject to the 3 and 10 year bars, are afraid to leave the U.S. and go through consular processing because if their waiver applications are denied they are barred from reuniting with their families for up to 10 years.

DHS could take administrative action to address this problem by issuing guidance specifying a lower evidentiary threshold for "extreme hardship." The former INS took comparable action when they created a presumption of extreme hardship for individuals applying for permanent residence under the somewhat similar provision in the Nicaraguan Adjustment and Central American Relief Act of 1998. (Nonetheless issuing guidance setting a low threshold would require careful legal groundwork, which could well be subject to question, to distinguish this particular waiver standard from other portions of the INA where "extreme hardship" is also used as a standard.) Making the possibility of obtaining a waiver more likely would encourage many more spouses and sons and daughters of U.S. citizens and LPRs illegally here to return to their home countries for consular processing and reenter the U.S. as permanent residents. (Overstays granted a waiver... in contrast to entrants without inspection (EWIs)... could probably adjust status without leaving the U.S. EWIs could also have that possibility if option 3 is adopted.) Decisions and other actions regarding waivers are not subject to judicial review.

#### Pros

- This option would prevent the dissolution of families, which is a goal that many Members of Congress from both parties support.
- By promoting family unity, the Administration could advance one of the central goals of immigration reform.
- The individuals who would be affected represent a relatively small cross-section of the undocumented population, and are all persons who would eventually have qualified for LPR status anyway based on their family relationship, thus blunting the "amnesty" charge.

#### Cons

- The Administration could be criticized for its uncharacteristically expansive interpretation of "extreme hardship" to facilitate legalization of the undocumented.
- Critics might characterize this proposal as a partial amnesty.
- Because of statutory limits on the waiver, this measure does not reach the parents of U.S. citizen children. It would primarily benefit those who have married a citizen or LPR and many LPR spouses would still have a lengthy wait because of quota-based backlogs.
- A change in regulation may be needed to permit application for the waiver in advance of consular processing.

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### 3. Parole Immediate Relatives of U.S. Citizens Who Entered Without Inspection and Would Otherwise be Ineligible for Adjustment of Status

<sup>3</sup> To satisfy the high evidentiary threshold regarding the impact of his or her non-admission on the qualifying relative, an applicant must submit extensive evidence. Relevant factors include the qualifying relative's age, family ties in the U.S. and abroad, length of residence in the U.S., health/medical conditions, financial status and community ties.

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INA § 245(a) permits immediate relatives (i.e. spouses, minor children and parents) of U.S. citizens to adjust their status only if they have been inspected, admitted or paroled into the country. If such individuals entered the U.S. without inspection, they are normally ineligible for adjustment of status<sup>2</sup> and must return to their home countries for consular processing of their applications, which can take years because of the application of the 3- and 10-year bars, which are triggered by a departure after a period of unlawful presence in the U.S.

Such individuals could, however, be paroled into the U.S. for purposes of applying for adjustment of status. Under INA § 212(d)(5)(A), parole is a discretionary act exercised on a case-by-case basis for "urgent humanitarian reasons" or where a grant would result in a "significant public benefit." Parole is expressly limited to aliens applying for admission to the United States. Traditionally, it has been applied only to arriving aliens, but since a legal change in 1996, it technically also is available to aliens who entered without inspection.<sup>3</sup> To date parole has been used quite sparingly for I/Ws, but wider application is permissible, which includes individuals who entered without inspection.<sup>4</sup> To render immediate relatives of U.S. citizens eligible for parole, DHS could issue guidance establishing that family reunification constitutes a "significant public benefit." Parole would only be available under this option only to individuals who are the beneficiaries of approved immediate relative petitions.

Use of the parole authority in this way need not lead to an increased risk to public safety or national security, or otherwise open the door to fraud. Before parole is granted, the parole applicant would be vetted via security and criminal checks, as is done with parole applicants in an existing parole program for Cubans. Current national security and fraud vetting mechanisms – like requiring DNA testing where there are indications of fraud, and standard biographic and biometric checks run against State, Department of Justice, and DHS databases – currently used in immigrant visa processing could be duplicated in the parole context.

In cases where such individuals are already subject to the three or ten-year bars, because of a prior departure and return, this option alone will not suffice to provide status to them (with limited individual exceptions who can obtain the "extreme hardship" waiver). But if this measure is combined with option 2, they could be accommodated – an advance waiver of inadmissibility would be necessary to enable them to reenter the country. This could be accomplished by issuing guidance that establishes a presumption of hardship for the intended beneficiaries.

**Pros:**

- This initiative promotes family unity by allowing immediate relatives of U.S. citizens to pursue adjustment of status in the United States, instead of their home countries.

<sup>2</sup> INA § 245(i) permits adjustment of status for aliens who entered the U.S. without inspection and filed a family or employment-based visa petition on or before April 30, 2001.

<sup>3</sup> See INA § 235(a)(1), *Authority to Parole Applicants for Admission Who are Not Also Arriving Aliens*, No. 98-10 (Aug. 21, 1998).

<sup>4</sup> See INA § 235(a)(1), *Authority to Parole Applicants for Admission Who are Not Also Arriving Aliens*, No. 98-10 (Aug. 21, 1998).

- Except for those barred by other grounds barring any grounds of inadmissibility, the beneficiaries would eventually have been admitted to the United States able to gain LPR status in the U.S. This fact provides a strong basis to counter to charges of amnesty.
- The pool of potential beneficiaries is limited to those with approved immediate relative petitions.

Cons:

- The exercise of parole authority in this manner is not common and would be subject to criticism from opponents. It could trigger legislative efforts to curtail parole, and the curtailment might go beyond simply negating these FWT adjustment cases.
- This exercise of parole authority would probably bring pressure on DHS to parole FWTs in other settings, in order to facilitate work authorization or access to some other public benefits.
- USCIS would require significant additional personnel and resources to process parole applications.

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4. Allow Beneficiaries of Approved Family-Based Visa Petitions To Wait in the U.S.

The INA requires beneficiaries of family-based preference petitions to apply for and be issued an immigrant visa before they can immigrate to the U.S. With the exception of immediate relatives of U.S. citizens (discussed above), who are not subject to numerical limitations, visas for family-based preference petitions are subject to annual caps.<sup>7</sup> According to the current visa bulletin,<sup>8</sup> no family preference category is current:

<b>PREFERENCE CATEGORY:</b>	<b>PRIORITY DATES NOW BEING PROCESSED:</b>
1 <sup>st</sup> Preference – Unmarried sons and daughters of a USC	01JUN04
2A Preference – Spouse and children of a LPR	01MAR06
2B Preference – Unmarried sons and daughters of a LPR	01JAN02
3 <sup>rd</sup> Preference – Married sons and daughters of a USC	22MAY01
4 <sup>th</sup> Preference – Brothers and sisters of a USC	15NOV99

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As discussed above, INA § 212(d)(5)(A) authorizes the Secretary to parole certain individuals into the U.S. temporarily “for urgent humanitarian reasons or significant public benefit.” This

<sup>7</sup> See INA § 201(c), 202(a), 203.

<sup>8</sup> US Department of State, *Visa Bulletin*, February 2010, [http://www.travel.state.gov/visa/fixr/bulletin/bulletin\\_4611.html](http://www.travel.state.gov/visa/fixr/bulletin/bulletin_4611.html), last accessed February 3, 2010.

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authority could be used to allow beneficiaries of approved family-preference petitions who are waiting for immigrant visas to do so in the U.S. A precedent exists in the ~~above-referenced~~ parole program for Cubans, in which DHS permits beneficiaries of approved family-based immigrant visa petitions to be paroled into the ~~United States~~ U.S. instead of waiting for an immigrant visa number to become available. As you know, DHS is currently considering a similar program for Haitians.

The parole program could make parole available to all beneficiaries of approved family-preference petitions or it could limit availability to: (1) beneficiaries with priority dates that ~~are~~ are less than two; or three; year waits for the cases to be current; (2) beneficiaries in certain preference categories (e.g., only to spouses and minor children of LPRs); or (3) some combination of these options. Keeping program availability open to all beneficiaries of approved petitions would help the greatest number of persons. However, limiting the potential pool of parolees would minimize the costs associated with such a program, as parolees are eligible to receive a variety of public benefits once in the ~~United States~~, and so reduce likely political objections.

Pros:

- This initiative promotes family unity by allowing beneficiaries of family-based preference petitions to await adjustment of status in the ~~United States~~ U.S. instead of their home countries ~~for visas work authorization and documentation (via parole) to those family members already here as L-1s assuming option 2 is adopted).~~
- The targeted population already has approved preference petitions and is only awaiting current visa numbers to immigrate to the ~~United States~~ U.S.
- The pool of potential beneficiaries is limited to those with approved petitions.

Cons:

- The exercise of parole authority in this manner is not common and would be subject to criticism from opponents.
- USCIS would require significant additional personnel and resources to process parole applications, though this cost would eventually be covered by fees.

*Expanded E-Verify*

The administrative measures described above to provide interim legal status to illegal immigrants and enable certain categories of immigrants to become permanent residents would likely need to be proposed in conjunction with either administrative or legislative enforcement measures. Expansion and improvement of the E-Verify program are the enforcement-related measures that would give us the most political space to propose significant benefits-related administrative changes. Without legislation, DHS cannot make employer participation in this program mandatory. However, the Department can undertake certain initiatives to significantly encourage more employers to use E-Verify, address implementation problems, and identify other improvements to the program.

By conducting hundreds of I-9 audits over the last several months, ICE has redoubled its efforts to ensure that employers comply with employment eligibility verification laws. Those

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employers found to have violated the law by hiring unauthorized workers may be subject to both civil and criminal penalties. By providing safe harbor for employers who properly use E-Verify, DHS could give employers a significant incentive to participate in the program.

Employers with a legal workforce are more likely to sign up for E-Verify. Registering illegal workers would encourage and accelerate employer use of E-Verify, especially in industries, like agriculture, with a large illegal workforce where there has been the greatest reluctance to use the program.

DHS could also step up efforts to expand the ongoing E-Verify outreach campaign, which is intended to demystify the process and promote voluntary enrollment by all sectors of U.S. employers in the E-Verify program. The initial messaging, which focused heavily on employer enrollment, highlighted the program's ease of use and benefits to employers. More recently, outreach has been expanded to encompass three distinct areas: awareness/education/enrollment, rights information and information solicitation. These areas are meant to target small to mid-size employers, employee associations and immigration advocacy groups, and federal contractors, respectively. The program is also set to allocate the largest media funding and resource allocation to target small to mid-size businesses.

Meanwhile, DHS should continue its efforts to address fraud and identity theft. Since June 2009, E-Verify users have been subject to routine monitoring through database analysis. Fraud is monitored by searching for multiple uses of a single Social Security number. USCIS has plans to undertake additional fraud detection efforts, including development of a Data Analytics System that will routinely search for violations and provide an automated solution, "locking" Social Security numbers (SSNs) that appear to be subject to fraudulent use, and allowing identity theft victims to lock their own SSNs. DHS could also establish an internal ICE/CIS anti-fraud task force for the purpose of developing additional recommendations for combating identity fraud in E-Verify.

Additional strategies should also be considered. The existing Photo Screening Tool can be expanded without legislation. It is currently used only for DHS-issued documents (i.e. resident alien cards and employment authorization documents). It will soon be expanded to include U.S. passport photos, but greater efforts need to be made to include DMV-issued driver's licenses and possibly state identification cards have thus far been met with great resistance by the states. Overcoming this resistance should be prioritized if this option is pursued, however, it may require legislation to convince states to participate. In addition, individuals should have the ability to verify their own employment eligibility data. If resources permit, the Social Security Administration should consider adopting a more secure social security card.

Pros

- Employers will have a strong incentive to participate in E-Verify and comply with the rules of the system.

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- More pervasive use of E-Verify would reduce unauthorized employment, shrink the underground economy and eventually decrease the future flow of undocumented workers.
- Undocumented workers will have an added incentive to do whatever they can to regularize their status or, alternatively, leave the country.
- DHS's outreach campaign is already underway.
- USCIS has already made substantial progress on many aspects of the proposed enhancements to address fraud/identity theft.
- Since the issuance of the federal contractor rule, the program has increased.
- Congress has already authorized funding for the self-verification function.

#### Cons

- Without legislation, employers cannot be required to participate in E-Verify, and nationwide coverage is therefore unlikely.
- Proponents of legalization will consider anything less than a full legalization program with a path to citizenship an unfair tradeoff to expanded or mandatory E-Verify.
- Immigrant advocates may call for stronger protections for employees who receive erroneous non-confirmations or experience discrimination. It would be difficult to add these measures without legislation.
- Some state privacy laws prohibit the sharing of DMV-issued driver's license information, which would prevent expanding the Photo Screening Tool to include this information. Again, legislation would be required to mandate that all incentivize states to comply and ensure adequate privacy protections are in place.

#### Political Considerations

Done right, a combination of benefit and enforcement-related administrative measures could provide the Administration with a clear-cut political win. If the Administration loses control of the message, however, an aggressive administrative proposal carries significant political risk. Key points in this strategy are as follow:

More modest administrative measures could be announced around the March 21<sup>st</sup> event. But more ambitious measures would have to be carefully timed. We would need to give the legislative process enough time to play out to deflect against charges of usurping congressional authority. In an effort not to preempt or impede legislative action, announcement of such measures would have to wait until it was evident that no legislative action on CIR was possible in the current Congress. This is likely to mean that the right time for administrative action will be late summer or fall, when the midterm election season is in full swing.

The Administration would have to boldly drive the narrative. President Obama and the Administration would assert that they are stepping into the breach created by congressional gridlock and moving aggressively to solve a vexing problem that three consecutive Congresses have tried but failed to fix. Flanked by Secretaries Napolitano, Solis, Locke, Holder, and Vilsack, the President could make the case that the nation's economic and national security can wait no longer for Congress. Administrative action is necessary to restore rule of law by ending illegal hiring, requiring individuals who are unlawfully present to pass background checks or get

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deported, and guaranteeing that all employers and workers are paying their fair share of taxes. Clearing backlogs of family-based visas would be an added bonus.

This message would have to be carefully crafted to avoid being met with hostility by Democratic members of Congress who are trying to defend their seats in the midterm election. A potential strategy to sell the most ambitious administrative proposal would be to combine them with a call for a vote on mandatory E-Verify. The President could join with Reid and Pelosi to challenge Congress to enact such legislation. This legislative strategy would give Democrats who fear the administrative amnesty charge the opportunity to say they disagree with the President on amnesty, but as legislators are ready to crackdown on illegal workers. It would also help insulate Democrats from the charge of being a "do-nothing Congress" on this issue. This also places Republicans in a difficult position: a vote for enforcement helps endorse the President's overall strategy while a vote against is a vote for the status quo.

In this scenario, the Administration and Congressional leadership would be viewed as breaking through the Washington gridlock in an effort to solve tough problems. Giving nervous Members of Congress something tough to vote for while providing Latino voters with something they could support would be a win-win for all.

On the other hand, Congress is likely to be particularly sensitive in the months leading up to the elections to an effort that could be perceived as reinforcing the narrative that Congress cannot get anything done. Republican members may react by pushing back strongly that this is a political ploy intended to pander to the Latino vote. Reform opponents will also likely criticize the Administration for giving amnesty to illegal immigrants and letting them compete for American jobs when unemployment is still high. Critics may also question why this drastic action is necessary immediately before an election and will suggest that the new Congress deserves a chance to try and solve this problem. There is also a risk that the immigrant advocacy community may fear how the information will be used and be unwilling to accept a registration scheme that could be revoked in the future. If this is the case, the Administration could be left with a proposal that no one supports.

If the American public reacts poorly to an administrative registration effort, Congress could be motivated to enact legislation tying the Administration's hands. This could result, in the worst case scenario, in legislation that diminishes the Secretary's discretion to use parole or deferred action in other contexts. A heated fight could also poison the atmosphere for any future legislative reform effort.

**Application for Travel Document**  
 Department of Homeland Security  
 U.S. Citizenship and Immigration Services



**USCIS**  
**Form I-131**  
 OMB No. 1615-0013  
 Expires 03/31/2016

<b>For USCIS Use Only</b>	<b>Receipt</b>	<b>Action Block</b>	<b>To Be Completed by an Attorney/ Representative, if any.</b>
	<input type="checkbox"/> <b>Document Hand Delivered</b> By: _____ Date: ____/____/____		<input type="checkbox"/> Fill in box if G-28 is attached to represent the applicant.  Attorney State License Number: _____
	<b>Document Issued</b> <input type="checkbox"/> Re-entry Permit (Update "Mail To" Section) <input type="checkbox"/> Refugee Travel Document (Update "Mail To" Section) <input type="checkbox"/> Single Advance Parole <input type="checkbox"/> Multiple Advance Parole (Valid Until: ____/____/____)	<b>Mail To (Re-entry &amp; Refugee Only)</b> <input type="checkbox"/> Address in Part 1 <input type="checkbox"/> US Consulate at: _____ <input type="checkbox"/> Intl DHS Ofc at: _____	

► **Start Here.** Type or Print in Black Ink

**Part I. Information About You**

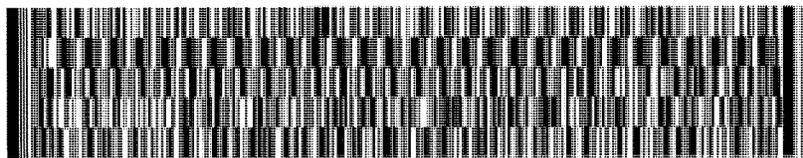
1.a. Family Name (Last Name)   
 1.b. Given Name (First Name)   
 1.c. Middle Name

**Physical Address**

2.a. In Care of Name   
 2.b. Street Number and Name   
 2.c. Apt.  Ste.  Flr.    
 2.d. City or Town   
 2.e. State  2.f. Zip Code   
 2.g. Postal Code   
 2.h. Province   
 2.i. Country

**Other Information**

3. Alien Registration Number (A-Number) ► A-   
 4. Country of Birth   
 5. Country of Citizenship   
 6. Class of Admission   
 7. Gender  Male  Female  
 8. Date of Birth (mm/dd/yyyy) ►   
 9. U.S. Social Security Number (if any) ►



**Part 2. Application Type**

1.a.  I am a permanent resident or conditional resident of the United States, and I am applying for a reentry permit.

1.b.  I now hold U.S. refugee or asylee status, and I am applying for a Refugee Travel Document.

1.c.  I am a permanent resident as a direct result of refugee or asylee status, and I am applying for a Refugee Travel Document.

1.d.  I am applying for an Advance Parole Document to allow me to return to the United States after temporary foreign travel.

1.e.  I am outside the United States, and I am applying for an Advance Parole Document.

1.f.  I am applying for an Advance Parole Document for a person who is outside the United States.

If you checked box "1.f." provide the following information about that person in 2.a. through 2.p.

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

2.d. Date of Birth (mm/dd/yyyy) ▶

2.e. Country of Birth

2.f. Country of Citizenship

2.g. Daytime Phone Number (  )  -

**Physical Address (If you checked box 1.f.)**

2.h. In Care of Name

2.i. Street Number and Name

2.j. Apt.  Ste.  Flr.

2.k. City or Town

2.l. State  2.m. Zip Code

2.n. Postal Code

2.o. Province

2.p. Country

**Part 3. Processing Information**

1. Date of Intended Departure (mm/dd/yyyy) ▶

2. Expected Length of Trip (in days)

3.a. Are you, or any person included in this application, now in exclusion, deportation, removal, or rescission proceedings?  Yes  No

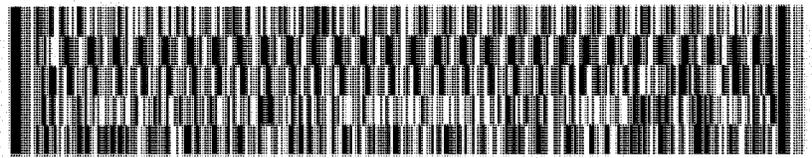
3.b. If "Yes", Name of DHS office:

4.a. Have you ever before been issued a reentry permit or Refugee Travel Document? (If "Yes" give the following information for the last document issued to you):  Yes  No

4.b. Date Issued (mm/dd/yyyy) ▶

4.c. Disposition (attached, lost, etc.):

If you are applying for a non-DACA related Advance Parole Document, skip to Part 7; DACA recipients must complete Part 4 before skipping to Part 7.



**Part 3. Processing Information (continued)**

Where do you want this travel document sent? (Check one)

5.  To the U.S. address shown in Part 1 (2.a through 2.i.) of this form.

6.  To a U.S. Embassy or consulate at:

6.a. City or Town

6.b. Country

7.  To a DHS office overseas at:

7.a. City or Town

7.b. Country

If you checked "6" or "7", where should the notice to pick up the travel document be sent?

8.  To the address shown in Part 2 (2.h. through 2.p.) of this form.

9.  To the address shown in Part 3 (10.a. through 10.i.) of this form.:

10.a. In Care of Name

10.b. Street Number and Name

10.c. Apt.  Ste.  Flr.

10.d. City or Town

10.e. State  10.f. Zip Code

10.g. Postal Code

10.h. Province

10.i. Country

10.j. Daytime Phone Number (  )  -

**Part 4. Information About Your Proposed Travel**

1.a. Purpose of trip. (If you need more space, continue on a separate sheet of paper.)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

1.b. List the countries you intend to visit. (If you need more space, continue on a separate sheet of paper.)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

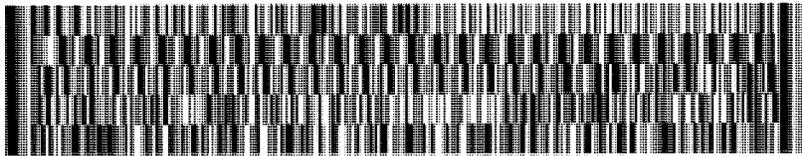
**Part 5. Complete Only If Applying for a Re-entry Permit**

Since becoming a permanent resident of the United States (or during the past 5 years, whichever is less) how much total time have you spent outside the United States?

- 1.a.  less than 6 months    1.d.  2 to 3 years  
 1.b.  6 months to 1 year    1.e.  3 to 4 years  
 1.c.  1 to 2 years    1.f.  more than 4 years

2. Since you became a permanent resident of the United States, have you ever filed a Federal income tax return as a nonresident or failed to file a Federal income tax return because you considered yourself to be a nonresident? (If "Yes" give details on a separate sheet of paper.)

Yes     No

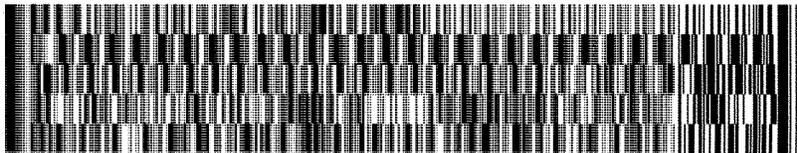


**Part 6. Complete Only If Applying for a Refugee Travel Document**

1. Country from which you are a refugee or asylee:
- If you answer "Yes" to any of the following questions, you must explain on a separate sheet of paper. Include your Name and A-Number on the top of each sheet.**
2. Do you plan to travel to the country named above?  Yes  No
- Since you were accorded refugee/asylee status, have you ever:
- 3.a. Returned to the country named above?  Yes  No
- 3.b. Applied for and/or obtained a national passport, passport renewal, or entry permit of that country?  Yes  No
- 3.c. Applied for and/or received any benefit from such country (for example, health insurance benefits)?  Yes  No
- Since you were accorded refugee/asylee status, have you, by any legal procedure or voluntary act:
- 4.a. Reacquired the nationality of the country named above?  Yes  No
- 4.b. Acquired a new nationality?  Yes  No
- 4.c. Been granted refugee or asylee status in any other country?  Yes  No

**Part 7. Complete Only If Applying for Advance Parole**

- On a separate sheet of paper, explain how you qualify for an Advance Parole Document, and what circumstances warrant issuance of advance parole. Include copies of any documents you wish considered. (See instructions.)
1. How many trips do you intend to use this document?  
 One Trip  More than one trip
- If the person intended to receive an Advance Parole Document is outside the United States, provide the location (City or Town and Country) of the U.S. Embassy or consulate or the DHS overseas office that you want us to notify.
- 2.a. City or Town
- 2.b. Country
- If the travel document will be delivered to an overseas office, where should the notice to pick up the document be sent?:
3.  To the address shown in Part 2 (2.h. through 2.p.) of this form.
4.  To the address shown in Part 7 (4.a. through 4.i.) of this form.
- 4.a. In Care of Name
- 4.b. Street Number and Name
- 4.c. Apt.  Ste.  Flr.
- 4.d. City or Town
- 4.e. State  4.f. Zip Code
- 4.g. Postal Code
- 4.h. Province
- 4.i. Country
- 4.j. Daytime Phone Number (  )  -



**Part 8. Signature of Applicant** (Read the information on penalties in the Form instructions before completing this Part.) If you are filing for a Re-entry Permit or Refugee Travel Document, you must be in the United States to file this application.

1.a. I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it is all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking.

Signature of Applicant

1.b. Date of Signature (mm/dd/yyyy) ▶

2. Daytime Phone Number (  )  -

NOTE: If you do not completely fill out this form or fail to submit required documents listed in the instructions, your application may be denied.

**Part 9. Information About Person Who Prepared This Application, If Other Than the Applicant**

NOTE: If you are an attorney or representative, you must submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, along with this application.

**Preparer's Full Name**

Provide the following information concerning the preparer:

1.a. Preparer's Family Name (Last Name)

1.b. Preparer's Given Name (First Name)

2. Preparer's Business or Organization Name

**Preparer's Mailing Address**

3.a. Street Number and Name

3.b. Apt.  Ste.  Flr.

3.c. City or Town

3.d. State  3.e. Zip Code

3.f. Postal Code

3.g. Province

3.h. Country

**Preparer's Contact Information**

4. Preparer's Daytime Phone Number Extension  
 (  )  -

5. Preparer's E-mail Address (if any)

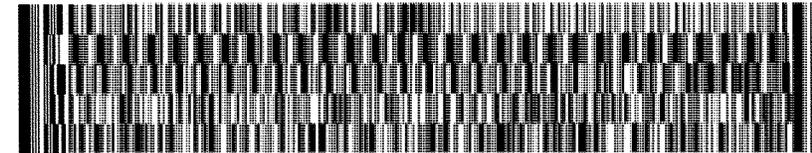
**Declaration**

To be completed by all preparers, including attorneys and authorized representatives: I declare that I prepared this benefit request at the request of the applicant, that it is based on all the information of which I have knowledge, and that the information is true to the best of my knowledge.

6.a. Signature of Preparer

6.b. Date of Signature (mm/dd/yyyy) ▶

NOTE: If you require more space to provide any additional information, use a separate sheet of paper. You must include your Name and A-Number on the top of each sheet.





**Instructions for Application for Travel Document**  
**Department of Homeland Security**  
**U.S. Citizenship and Immigration Services**

**USCIS**  
**Form I-131**  
 OMB No. 1615-0013  
 Expires 03/31/2016

**What Is the Purpose of This Form?**

This form is for applying to U.S. Citizenship and Immigration Services (USCIS) for the following travel documents:

**1. Reentry Permit**

A Reentry Permit allows a permanent resident or conditional resident to apply for admission to the United States upon returning from abroad during the permit's validity without the need to obtain a returning resident visa from a U.S. Embassy or consulate.

**2. Refugee Travel Document**

A Refugee Travel Document is issued to a person in valid refugee or asylee status, or to a permanent resident who obtained such status as a refugee or asylee in the United States. Persons who hold asylee or refugee status and are not permanent residents must have a Refugee Travel Document to return to the United States after travel abroad, unless they possess an Advance Parole Document. A Department of Homeland Security (DHS) officer at the U.S. port-of-entry will determine your admissibility when you present your travel document.

**3. Advance Parole Document**

Parole allows an alien to physically enter into the United States for a specific purpose. A person who has been "paroled" has not been admitted to the United States and remains an "applicant for admission" even while paroled.

DHS, as a matter of discretion, may issue an Advance Parole Document to authorize an alien to appear at a port-of-entry to seek parole into the United States. The document may be accepted by a transportation company in lieu of a visa as an authorization for the holder to travel to the United States. An Advance Parole Document is not issued to serve in place of any required passport.

**WARNING:** The document does not entitle you to be paroled into the United States; a separate discretionary decision on a request for parole will be made when you arrive at a port-of-entry upon your return.

**WARNING:** DHS may revoke or terminate your Advance Parole Document at any time, including while you are outside the United States, in which event you may be unable to return to the United States unless you have a valid visa or other document that permits you to travel to the United States and seek admission.

**NOTE:** Generally, if you are in the United States and have applied for adjustment of status to that of a lawful permanent resident, your application will be deemed abandoned if you leave the United States without first obtaining an Advance Parole Document. Your application for adjustment of status generally will not be deemed abandoned, even if you do not apply for an Advance Parole Document before traveling abroad while an adjustment application is pending, if you currently are in one of the following nonimmigrant classifications, and remain eligible for and would be admissible in one of the following categories upon applying for admission at a port-of-entry:

- a. An H-1 temporary worker, or H-4 spouse or child of an H-1;
- b. An L-1 intracompany transferee, or L-2 spouse or child of an L-1;
- c. A K-3 spouse, or K-4 child of a U.S. citizen; or
- d. A V-1 spouse, or V-2/V-3 child of a lawful permanent resident.

**NOTE:** Upon returning to the United States, most individuals must present a valid H, L, K, or V nonimmigrant visa and must continue to be otherwise admissible. If you do not have a valid or unexpired H, L, K, or V nonimmigrant visa, then you generally need to obtain an H, L, K, or V nonimmigrant visa at a U.S. Department of State (DOS) visa issuing post. Individuals will need a valid nonimmigrant visa, advance parole, or other travel document to present for reentry.

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**4. Advance Parole for Individuals Outside the United States**

The granting of an Advance Parole Document for individuals outside the United States is an extraordinary measure used sparingly to allow an otherwise inadmissible alien to the United States and to seek parole into the United States for a temporary period of time due to urgent humanitarian reasons or for significant public benefit (significant public benefit parole is typically limited to law enforcement or homeland security-related reasons). An Advance Parole Document cannot be used to circumvent normal visa-issuance procedures and is not a means to bypass delays in visa issuance.

**Who May File Form I-131?**

Each applicant must file a separate application for a travel document.

**1. Reentry Permit**

**a. If you are in the United States** as a permanent resident or conditional permanent resident, you may apply for a Reentry Permit. You must be physically present in the United States when you file the Reentry Permit application and complete the biometrics services requirement. After filing your application for a Reentry Permit, USCIS will inform you in writing when to go to your local Application Support Center (ASC) for your biometrics services appointment. See **General Requirements, Item Number 3, "Biometrics Services Requirement"**.

**NOTE:** A Reentry Permit may be sent to a U.S. Embassy or consulate or DHS office abroad for you to pick up, if you make such a request when you file your application.

With the exception of having to obtain a returning resident visa abroad, a Reentry Permit does not exempt you from compliance with any of the requirements of U.S. immigration laws. If you are in possession of a valid unexpired Reentry Permit, you will not be deemed to have abandoned your status as a permanent resident or conditional permanent resident based solely on the duration of your absence(s) from the United States while the permit is valid.

An absence from the United States for 1 year or more will generally break the continuity of your required continuous residence for the purpose of naturalization. If you intend to remain outside the United States for 1 year or more, you may be eligible to file Form N-470, Application to Preserve Residence for Naturalization Purposes. For further information, contact your local USCIS office.

**b. Validity of Reentry Permit**

(1) Generally, a Reentry Permit issued to a permanent resident is valid for 2 years from the date of issuance. See 8 CFR section 223.3(a)(1). However, if you have been outside the United States for more than 4 of the last 5 years since becoming a permanent resident the permit will be limited to 1 year, except that a permit with a validity of 2 years may be issued to the following:

- (a) A permanent resident whose travel is on the order of the U.S. Government, other than an exclusion, deportation, removal, or rescission order;
- (b) A permanent resident employed by a public international organization of which the United States is a member by treaty or statute; or
- (c) A permanent resident who is a professional athlete and regularly competes in the United States and worldwide.

(2) A Reentry Permit issued to a conditional resident is valid for 2 years from the date of issuance, or to the date the conditional resident must apply for removal of the conditions on his or her status, whichever date comes first.

(3) A Reentry Permit may not be extended.

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**c. A Reentry Permit may not be issued to you if:**

- (1) You have already been issued such a document, and it is still valid, unless the prior document has been returned to USCIS or you can demonstrate that it was lost; or
- (2) A notice was published in the *Federal Register* that precludes the issuance of such a document for travel to the area where you intend to go.

**NOTICE to permanent or conditional permanent residents concerning possible abandonment of status:** If you do not obtain a Reentry Permit, lengthy or frequent absences from the United States could be factors supporting a conclusion that you have abandoned your permanent resident status. If DHS determines, upon your return to the United States, that you have abandoned your permanent resident status, you may challenge that determination if you are placed in removal proceedings.

**2. Refugee Travel Document**

- a. If you are in the United States** in valid refugee or asylee status, or if you are a permanent resident as a direct result of your refugee or asylee status in the United States, you may apply for a Refugee Travel Document. You should apply for a Refugee Travel Document **BEFORE** you leave the United States. **If biometrics services are required and you fail to appear to have the biometrics collected, the application may be denied.**

After filing your application for a Refugee Travel Document, USCIS will inform you in writing when to go to your local USCIS ASC for your biometrics services appointment. Unless you have other appropriate documentation, such as a Permanent Resident Card and passport, you must have a Refugee Travel Document to return to the United States after temporary travel abroad. A Refugee Travel Document may be sent to a U.S. Embassy or consulate or DHS office abroad for you to pick up, if you request it when you file your application.

- b. If you are outside of the United States** and:

- (1) Have valid refugee or asylee status; or
- (2) You are a permanent resident as a direct result of your refugee or asylee status in the United States, you may be permitted to file Form I-131 and apply for a Refugee Travel Document. The USCIS Overseas District Director with jurisdiction over your location makes this decision in his or her discretion.

Your application must be filed within one year of your last departure from the United States and should include an explanation of why you failed to apply for a Refugee Travel Document before you departed from the United States.

**Travel Warning Regarding Voluntary Re-availment**

**WARNING** to asylees who travel to the country of claimed persecution: If you applied for asylum on or after April 1, 1997, your asylum status may be terminated if the U.S. Government determines that you have voluntarily availed yourself of the protection of your country of nationality or, if stateless, country of last habitual residence. See section 208(c)(2)(D) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(c)(2)(D).

**c. Validity of Refugee Travel Document**

- (1) A Refugee Travel Document is valid for 1 year.
- (2) A Refugee Travel Document may not be extended.

**d. A Refugee Travel Document may not be issued to you if:**

- (1) You have already been issued such a document and it is still valid, unless the prior document has been returned to USCIS or you can demonstrate that it was lost; or
- (2) A notice was published in the *Federal Register* that precludes the issuance of such a document for travel to the area where you intend to go.

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**NOTE:** You should apply for a Refugee Travel Document before you leave the United States. However, a Refugee Travel Document may be sent to a U.S. Embassy or consulate or DHS office abroad for you to pick up, if you make such a request when you file your application. Departure from the United States before a decision is made on the application usually does not affect the application decision. However, if biometric collection is required and the applicant departs the United States before biometrics are collected, the application may be denied.

**NOTICE to permanent residents who obtain permanent residence as a result of their refugee or asylee status:** If you do not obtain a Reentry Permit (see Reentry Permit information in section 1. above) and remain outside the United States, lengthy or frequent absences from the United States, could be factors supporting a conclusion that you have abandoned your permanent resident status. With the exception of having to obtain a returning resident visa abroad, a Reentry Permit does not exempt you from compliance with any of the requirements of U.S. immigration laws. If you are in possession of a valid unexpired Reentry Permit, you will not be deemed to have abandoned your status as a permanent resident or conditional permanent resident based solely on the duration of your absence(s) from the United States while the permit is valid.

An absence from the United States for 1 year or more will generally break the continuity of your required continuous residence for purpose of naturalization. If you intend to remain outside the United States for 1 year or more, you may be eligible to file Form N-470, Application to Preserve Residence for Naturalization Purposes. For further information, contact your local USCIS office.

If DHS determines, upon your return to the United States, that you have abandoned your permanent resident status, you may challenge that determination if you are placed in removal proceedings, and seek a determination whether you may retain asylum status even if you cannot retain permanent resident status.

### 3. Advance Parole Document for Individuals in the United States

#### a. If you are in the United States and seek an Advance Parole Document, you may apply if:

- (1) You have a pending application to adjust status, Form I-485, and you seek to travel abroad for "urgent humanitarian reasons" or in furtherance of a "significant public benefit," which may include a personal or family emergency or bona fide business reasons.
- (2) You have a pending application for Temporary Protected Status (TPS) (Form I-821), have been granted TPS, or have been granted T or U nonimmigrant status. Whether you are permitted to retain TPS upon your return will depend on whether you continue to meet the requirements for TPS. If you have TPS and leave and reenter the United States during the validity period of your Advance Parole Document, you will not break the continuous physical presence requirement for maintaining your TPS.

**Important:** If you have a TPS or other application *pending* and you leave the United States on advance parole, you may miss important notices from USCIS regarding your application, including requests for additional evidence. If you do not respond timely to these notices, USCIS may deem your application abandoned and you will not receive the benefit you seek. It is very important that you make appropriate arrangements to ensure that you do not miss any such important notices.

- (3) You have been granted parole pursuant to INA section 212(d)(5), **AND** you seek to travel outside the United States for urgent humanitarian reasons or a significant public benefit. Humanitarian reasons include travel to obtain medical treatment, attend funeral services for a family member, or visit an ailing relative.

Check **Item Number 1.d.** in **Part 2.** of the form.

- (4) USCIS or U.S. Immigration and Customs Enforcement (ICE) has deferred action in your case as a childhood arrival based on the guidelines described in the Secretary of Homeland Security's memorandum issued on June 15, 2012 ("Deferred Action for Childhood Arrivals" (DACA)). USCIS may, in its discretion, grant advance parole if you are traveling outside the United States for educational purposes, employment purposes, or humanitarian purposes.

- (a) Educational purposes include, but are not limited to, semester abroad programs or academic research;
- (b) Employment purposes include, but are not limited to, overseas assignments, interviews, conferences, training, or meetings with clients; **and**
- (c) Humanitarian purposes include, but are not limited to, travel to obtain medical treatment, attend funeral services for a family member, or visit an ailing relative.

Check **Item Number 1.d.** in **Part 2.** of the form.

Travel for vacation is not a valid purpose. *You must **NOT** file Form I-131 with your deferred action request or your package will be rejected and returned to you.*

- (5) USCIS has granted you IMMACT 90 or LIFE Act Family Unity Program benefits, **AND** you seek to travel outside the U.S. temporarily for urgent humanitarian reasons or in furtherance of a significant public benefit, which may include a personal or family emergency or bona fide business reasons.
- (6) You have a pending application for temporary resident status pursuant to INA section 245A, and you seek to travel abroad temporarily for urgent humanitarian reasons or in furtherance of a significant public benefit, which may include a personal or family emergency or bona fide business reasons.
- (7) You have been granted V status in the United States, **AND** you seek to travel abroad for urgent humanitarian reasons or in furtherance of a significant public benefit, which may include a personal or family emergency or bona fide business reasons.

**b. Travel Warning**

**Before you apply for an Advance Parole Document, read the following travel warning carefully.**

For any kind of Advance Parole Document provided to you while you are in the United States:

- (1) Leaving the United States, even with an Advance Parole Document, may impact your ability to return to the United States.
- (2) If you use an Advance Parole Document to leave and return to a port-of-entry in the United States, you will, upon your return, be an "applicant for admission."
- (3) As an applicant for admission, you will be subject to inspection at a port-of-entry, and you may not be admitted if you are found to be inadmissible under any applicable provision of INA sections 212(a), 235, or any other provision of U.S. law regarding denial of admission to the United States. If DHS determines that you are inadmissible, you may be subject to expedited removal proceedings or to removal proceedings before an immigration judge, as authorized by law and regulations.
- (4) As noted above, issuance of an Advance Parole Document does *not* entitle you to parole and does *not* guarantee that DHS will parole you into the United States upon your return.
- (5) As noted above, DHS will make a separate discretionary decision whether to parole you each time you use an Advance Parole Document to return to the United States.
- (6) If, upon your return, you are paroled into the United States, you will remain an applicant for admission.
- (7) As noted above, DHS may revoke or terminate your Advance Parole Document at any time, including while you are outside the United States. Even if you have already been paroled, upon your return to the United States DHS may also revoke or terminate your parole in accordance with 8 C.F.R. 212.5.

If you are outside the United States, revocation or termination of your Advance Parole Document may preclude you from returning to the United States unless you have a valid visa or other document that permits you to travel to the United States and seek admission.

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- (8) If you are in the United States when DHS revokes or terminates your parole, you will be an unparoled applicant for admission, and may be subject to removal as an applicant for admission who is inadmissible under INA section 212, rather than as an admitted alien who is deportable under INA section 237. In addition to the above, if you received deferred action under DACA, you should also be aware of the following:
- (a) Even after USCIS or ICE has deferred action in your case under DACA, you should not travel outside the United States unless USCIS has approved your application for an Advance Parole Document. Deferred action will terminate automatically if you travel outside the United States without obtaining an Advance Parole Document from USCIS.
  - (b) If you obtain an Advance Parole Document in connection with a decision to defer removal in your case under DACA and if, upon your return, you are paroled into the United States, your case will generally continue to be deferred. The deferral will continue until the date specified by USCIS or ICE in the deferral notice given to you or until the decision to defer removal action in your case has been terminated, whichever is earlier.
  - (c) If you have been ordered excluded, deported, or removed, departing from the United States without having had your exclusion, deportation, or removal proceedings reopened and administratively closed or terminated will result in your being considered excluded, deported, or removed, even if USCIS or ICE has deferred action in your case under DACA and you have been granted advance parole.

**c. If you are in the United States and seek an Advance Parole Document, a document may not be issued to you if:**

- (1) You hold a nonimmigrant status, such as J-1, that is subject to the 2-year foreign residence requirement as a result of that status. Exception: If you are someone who was subject to this requirement but are now eligible to apply for adjustment of status to lawful permanent resident, USCIS may consider your application for advance parole; or
- (2) You are in exclusion, deportation, removal, or rescission proceedings, unless you have received deferred action under DACA. You may, however, request parole from ICE. See NOTE below.

**d. If you depart from the United States before the Advance Parole Document is issued, your application will be considered abandoned.**

**NOTE:** Do not use this form if you are seeking release from immigration custody and you want to remain in the United States as a parolee. You should contact your local ICE office about your request ([www.ice.gov/contact/ero](http://www.ice.gov/contact/ero)).

**4. Advance Parole Document for Individuals Outside the United States**

**If you are outside the United States and need to visit the United States temporarily for an urgent humanitarian reason or for significant public benefit:**

- a. You may apply for an Advance Parole Document; however, your application must be based on the fact that you cannot obtain the necessary visa and any required waiver of inadmissibility. Under these conditions, an Advance Parole Document is granted on a case-by-case basis for temporary entry, according to conditions as prescribed.
- b. A person in the United States may file this application on your behalf. This person must complete **Part 1** of the form with information about him or herself.
- c. If you entered the United States with an Advanced Parole Document and need to remain in the United States beyond the authorized parole period to accomplish the purpose for which parole was approved, you must re-file Form I-131 with all supporting documentation.

**NOTE:** Do not use this form if you are seeking release from immigration custody and you want to remain in the United States as a parolee. You should contact ICE about your request.

**General Instructions**

If you are completing this form on a computer, the data you enter will be captured using 2D barcode technology. This capture will ensure that the data you provide is accurately entered into USCIS systems. As you complete each field, the 2D barcode field at the bottom of each page will shift as data is captured. Upon receipt of your form, USCIS will use the 2D barcode to extract the data from the form. Please **do not damage the 2D barcode** (puncture, staple, spill on, write on, etc.) as this could affect the ability of USCIS to timely process your form.

USCIS provides most forms in PDF format free of charge through the USCIS Web site. In order to view, print, or fill out our forms, you should use the latest version of Adobe Reader, which can be downloaded for free at <http://get.adobe.com/reader/>.

Each application must be properly signed and accompanied by the appropriate fee. (See the section entitled "What is the Filing Fee?") A photocopy of a signed application or a typewritten name in place of a signature is not acceptable. If you are under 14 years of age, your parent or legal guardian may sign the application on your behalf.

**Evidence.** You must submit all required initial evidence along with all the supporting documentation with your application at the time of filing. If you are electronically filing this application, you must follow the instructions provided on the USCIS Web site, [www.uscis.gov](http://www.uscis.gov).

**Biometrics Services Appointment.** After receiving your application and ensuring completeness, USCIS will inform you in writing when to go to your local USCIS Application Support Center (ASC) for your biometrics services appointment. Failure to attend the biometrics services appointment may result in denial of your application.

**Copies.** Unless specifically required that an original document be filed with an application, a legible photocopy may be submitted. Original documents submitted when not required may remain a part of the record, and will not be automatically returned to you.

**Translations.** Any document containing foreign language submitted to USCIS must be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

**How To Fill Out Form I-131**

1. Type or print legibly in black ink.
2. If extra space is needed to complete any item, attach a continuation sheet, write your name and Alien Registration Number (A-Number) (if any), at the top of each sheet of paper; indicate the **Part** and **Item Numbers** to which your answer refers; and date and sign each sheet.
3. Answer all questions fully and accurately. If an item is not applicable or the answer is none, print or type *N/A*.

**General Requirements****1. Initial Evidence**

All applications must include a **copy of an official photo identity document showing your photo, name, and date of birth**. (Examples: Your current Employment Authorization Document, if available; a valid government-issued driver's license; passport identity page; Form I-551, Permanent Resident Card, or any other official identity document.) The copy must **clearly** show the photo and identity information. **Form I-94, Arrival-Departure Document, is not acceptable as a photo identity document.**

You must file your application with all required evidence. Not submitting required evidence will delay the issuance of the document you are requesting. We may request additional information or evidence, or we may request that you appear at a USCIS office for an interview or for fingerprinting (See this section "**Biometric Services Requirement**" of these instructions).

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If you are applying for:

**a. Reentry Permit**

You **must** attach:

- (1) A copy of the front and back of your Form I-551; or
- (2) If you have not yet received your Form I-551, a copy of the biographic page(s) of your passport and a copy of the visa page showing your initial admission as a permanent resident, or other evidence that you are a permanent resident; or
- (3) A copy of the Form I-797, Notice of Action, approval notice of an application for replacement of your Form I-551 or temporary evidence of permanent resident status.

**b. Refugee Travel Document**

You **must** attach a copy of the document issued to you by USCIS showing your refugee or asylee status and the expiration date of such status.

**c. Advance Parole Document**

If you are in the United States, you **must** attach:

- (1) A copy of any document issued to you by USCIS showing your present status, if any, in the United States; and
- (2) An explanation or other evidence showing the circumstances that warrant issuance of an Advance Parole Document; or
- (3) If you are an applicant for adjustment of status, a copy of a USCIS receipt as evidence that you filed the adjustment application; or
- (4) If you are traveling to Canada to apply for an immigrant visa, a copy of the U.S. consular appointment letter; or
- (5) If USCIS has deferred action in your case under DACA, you must include a copy of the Form I-797, Notice of Action, showing that the decision on your Form I-821D was to defer action in your case. If ICE deferred action in your case under DACA, submit a copy of the approval order, notice or letter issued by ICE.

**You must complete *Part 4* of the form indicating how your intended travel fits within one of the three purposes below.** You must also provide evidence of your reason for travel outside of the United States including the date(s) of travel and the expected duration outside the United States. If your Advance Parole application is approved, the validity date(s) of your Advance Parole Document will be for the duration of the documented need for travel. Below are examples of acceptable evidence:

**Educational Purposes**

- (a) A letter from a school employee acting in an official capacity describing the purpose of the travel and explaining why travel is required or beneficial; or
- (b) A document showing enrollment in an educational program requiring travel.

**Employment Purposes**

A letter from your employer or a conference host describing the need for the travel.

**Humanitarian Purposes**

- (a) A letter from your physician explaining the nature of your medical condition, the specific medical treatment to be sought outside of the United States, and a brief explanation why travel outside the U.S. is medically necessary; or
- (b) Documentation of a family member's serious illness or death.

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**d. Advance Parole Document for individuals outside the United States**

*If you are applying for an Advance Parole Document for a person who is outside the United States, you must attach:*

- (1) A complete description of the urgent humanitarian or significant public benefit reason for which an Advance Parole Document is requested and include copies of any evidence you wish to be considered, which indicate the length of time for which the parole is requested;
- (2) If an Advance Parole Document is requested for medical reasons, evidence from medical professionals that establishes the medical need, a statement of how and by whom medical care, transportation, housing, and other expenses and subsistence needs will be met;
- (3) An Affidavit of Support (Form I-134), with evidence of the sponsor's occupation and ability to provide necessary support;
- (4) A statement explaining why a U.S. visa cannot be obtained, including when and where attempts were made to obtain a visa, or an explanation of why a visa was not sought to enter the United States;
- (5) A statement explaining why a waiver of inadmissibility cannot be obtained to allow issuance of a visa, including when and where attempts were made to obtain a waiver, and a copy of any DHS decision on your waiver request, or an explanation of why a waiver has not been sought; and
- (6) A copy of any decision on an immigrant petition filed for the person seeking to enter the United States, and evidence regarding any pending immigrant petition.

**2. Photographs****a. If you are outside the United States and filing for a Refugee Travel Document, or if you are in the United States and filing for an Advance Parole Document:**

You must submit 2 identical color photographs of yourself taken within 30 days of the filing of this application. The photos must have a white to off-white background, be printed on thin paper with a glossy finish, and be unmounted and unretouched.

**NOTE: Because of the current USCIS scanning process, if a digital photo is submitted, it needs to be produced from a high-resolution camera that has at least 3.5 mega pixels of resolution.**

Passport-style photos must be 2" x 2." The photos must be in color with full face, frontal view on a white to off-white background. Head height should measure 1" to 1 3/8" from top of hair to bottom of chin, and eye height is between 1 1/8" to 1 3/8" from bottom of photo. Your head must be bare unless you are wearing headwear as required by a religious denomination of which you are a member. Using pencil or felt pen, lightly print your name and A-Number on the back of the photo.

**b. If applying for an Advance Parole Document for individuals outside the United States:**

- (1) If you are applying for an Advance Parole Document, and you are outside the United States, submit photographs with your application.
- (2) If you are filing an Advance Parole Document on behalf of another person who is outside the United States, submit the required photographs of the person to be paroled.

**3. Biometrics Services Requirement**

- a. All applicants for a Refugee Travel Document or a Reentry Permit must complete biometrics at an ASC or if applying for a Refugee Travel Document while outside of the U.S. at an overseas USCIS facility. If you are between ages 14 through 79 and you are applying for a Refugee Travel Document or Reentry Permit, you must also be fingerprinted as part of USCIS biometrics services requirement. After you have filed this application, USCIS will notify you in writing of the time and location for your biometrics services appointment. Failure to appear to be fingerprinted or for other biometrics services may result in a denial of your application.

- b. All applicants for Reentry Permits and/or Refugee Travel Documents between the ages of 14 through 79 are required to pay the additional **\$85** biometrics services fee. (See the section entitled "**What Is the Filing Fee?**")
- c. If you are outside the U.S. and are applying for an Advance Parole Document for humanitarian reasons or for significant public benefit, USCIS will notify you in writing whether biometric collection is required. If required, USCIS will advise you of the location for your biometrics services appointment.

#### 4. Invalidation of Travel Document

Any travel document obtained by making a material false representation or concealment in this application will be invalid. A travel document will also be invalid if you are ordered removed or deported from the United States.

In addition, a Refugee Travel Document will be invalid if the United Nations Convention of July 28, 1951, shall cease to apply or shall not apply to you as provided in Articles 1C, D, E, or F of the Convention.

#### Expedite Request Instructions

To request expedited processing of an application for a Reentry Permit, Refugee Travel Document, or an Advance Parole Document for an individual outside the United States, write the word **EXPEDITE** in the top right corner of the application in black ink. We recommend providing e-mail addresses and a fax number with any expedite request for the Reentry Permit, Refugee Travel Document, or Advance Parole Document.

Include a written explanation of the reason for the request to expedite with an supporting evidence available. The burden is on the applicant to demonstrate that one or more of the expedite criteria have been met. The criteria are as follows:

1. Severe financial loss to company or individual;
2. Extreme emergent situation;
3. Humanitarian situation; or
4. Non-profit status of requesting organization in furtherance of the cultural and social interests of the United States Department of Defense or National Interest Situation. (Note: The request must come from an official United States Government entity and state that a delay will be detrimental to our Government.

#### What Is the Filing Fee?

**Reentry Permit:** The filing fee for a Reentry Permit is **\$360**. A biometrics services fee of **\$85** is required for applicants ages 14 through 79.

**Refugee Travel Document:** The filing fee for a Refugee Travel Document for an applicant **age 16 or older** is **\$135**. The fee for a child **younger than 16** is **\$105**. A biometrics services fee of **\$85** is required for applicants ages 14 through 79.

**Advance Parole Document** (including individuals whose cases were deferred pursuant to DACA): The filing fee for Advance Parole is **\$360**. The biometrics services fee is not required.

**Advance Parole Document for Individuals Outside the United States:** The filing fee for an Advance Parole Document for an individual who is outside the United States is **\$360**. The biometrics services fee is not required. The filing fee may be waived based upon a demonstrated inability to pay. Applicants should file Form I-912, Fee Waiver Request when filing this form to ensure such requests are supported in accordance with 8 CFR 103.7(c).

**NOTE:** If you filed Form I-485 on or after July 30, 2007, and you paid the I-485 application fee required, then no fee is required to file a request for an Advance Parole Document or Refugee Travel Document on Form I-131 if your Form I-485 is still pending, if:

1. You now hold U.S. refugee or asylee status, and are applying for a Refugee Travel Document (see **Form I-131, Part 2., Application Type, Item Number 1.b.**); or
2. You are applying for an Advance Parole Document to allow you to return to the United States after temporary foreign travel (see **Form I-131, Part 2., Application Type, Item Number 1.d.**).

Under these circumstances, you may file Form I-131 together with your Form I-485, or you may submit Form I-131 at a later date. If you file Form I-131 separately, you must also submit a copy of your Form I-797, Notice of Action, receipt as evidence that you filed and paid the fee for Form I-485 required on or after July 30, 2007.

**Replacement Travel Document:** If you are filing to replace a travel document that was lost, stolen, mutilated, or contains erroneous information, such as a misspelled name, a filing fee is required.

**NOTE:** If you are requesting a replacement Advance Parole Document as an adjustment applicant filed under the fee structure implemented July 30, 2007, then the full filing fee will be required; however, no biometrics services fee is required.

**Incorrect Card:** No fee is required if you are filing to correct a USCIS error on your travel document. If USCIS did not cause the error, you must pay the application fees.

**Use the following guidelines when you prepare your check or money order for the Form I-131 fees:**

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; **and**
2. Make the check or money order payable to **U.S. Department of Homeland Security**.  
**NOTE:** Spell out U.S. Department of Homeland Security; do not use the initials "USDHS" or "DHS."
3. If you live outside the United States, contact the nearest U.S. Embassy or consulate for instructions on the method of payment.

**Notice to Those Making Payment by Check**

If you send us a check, it will be converted into an electronic funds transfer (EFT). This means we will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will usually take 24 hours and will be shown on your regular account statement.

You will not receive your original check back. We will destroy your original check, but we will keep a copy of it. If the EFT cannot be processed for technical reasons, you authorize us to process the copy in place of your original check. If the EFT cannot be completed because of insufficient funds, we may try to make the transfer up to two times.

**How to Check if the Fees Are Correct**

The filing and biometrics services fees on this form are current as of the edition date appearing in the lower left corner of this page. However, because USCIS fees change periodically, you can verify if the fees are correct by following one of the steps below:

1. Visit the USCIS Web site at [www.uscis.gov](http://www.uscis.gov), select "FORMS," and check the appropriate fee; or
2. Telephone the USCIS National Customer Service Center at **1-800-375-5283** and ask for the fee information. For TDD (hearing impaired) call: **1-800-767-1833**.

**Where to File?**

Please see our Web site at [www.uscis.gov/I-131](http://www.uscis.gov/I-131) or call our USCIS National Customer Service Center at **1-800-375-5283** for the most current information about where to file this benefit request. For TDD (hearing impaired) call: **1-800-767-1833**.

**Address Changes**

If you have changed your address, you must inform USCIS of your new address. For information on filing a change of address go to the USCIS Web site at [www.uscis.gov/addresschange](http://www.uscis.gov/addresschange) or contact the USCIS National Customer Service Center at **1-800-375-5283**. For TDD (hearing impaired) call: **1-800-767-1833**.

**NOTE:** Do not submit a change of address to the **USCIS Lockbox** facilities because the **USCIS Lockbox** facilities do not process change of address requests.

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**Processing Information**

Any Form I-131 that is not signed or accompanied by the correct fee(s) will be rejected with a notice that Form I-131 is deficient. You may correct the deficiency and resubmit Form I-131. An application or petition is not considered properly filed until accepted by USCIS.

**Initial Processing**

Once a Form I-131 has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form, or file it without required initial evidence, you will not establish a basis for eligibility, and we may deny your Form I-131.

**Requests for More Information, Including Biometrics, or Interview**

We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer required.

At the time of any interview or other appearance at a USCIS office, USCIS may require you to provide biometrics information (e.g., photographs, fingerprints) to verify your identity and update your background information.

**Decision**

The decision on Form I-131 involves a determination of whether you have established eligibility for the requested document. You will be notified of the decision in writing.

**What If You Claim Nonresident Alien Status on Your Federal Income Tax Return?**

If you are an alien who has been admitted as an immigrant or adjusted status to that of an immigrant, and are considering the filing of a nonresident alien tax return or the non-filing of a tax return on the ground that you are a nonresident alien, you should carefully review the consequences of such actions under the INA.

If you file a nonresident alien tax return or do not file a tax return, you may be regarded as having abandoned residence in the United States and as having lost your permanent resident status under the INA. As a consequence, you may be ineligible for a visa or other document for which permanent resident aliens are eligible.

You may also be inadmissible to the United States if you seek admission as a returning resident, and you may become ineligible for adjustment of status as a permanent resident, or naturalization on the basis of your original entry.

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**USCIS Forms and Information**

To ensure you are using the latest version of this form, visit the USCIS Web site at [www.uscis.gov](http://www.uscis.gov) where you can obtain the latest USCIS forms and immigration-related information. If you do not have internet access, you may order USCIS forms by calling our toll-free number at **1-800-870-3676**. You may also obtain forms and information by telephoning our USCIS National Customer Service Center at **1-800-375-5283**. For TDD (hearing impaired) call: **1-800-767-1833**.

As an alternative to waiting in line for assistance at your local USCIS office, you can now schedule an appointment through the USCIS Internet-based system, **InfoPass**. To access **InfoPass**, please visit the USCIS Web site. Use the **InfoPass** appointment scheduler and follow the screen prompts to set up your appointment. **InfoPass** generates an electronic appointment notice that appears on the screen.

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**Penalties**

If you knowingly and willfully falsify or conceal a material fact or submit a false document with this request, we will deny your Form I-131 and may deny any other immigration benefit.

In addition, you will face severe penalties provided by law and may be subject to criminal prosecution.

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**USCIS Privacy Act Statement**

**AUTHORITIES:** The information requested on this form, and the associated evidence, is collected under the Immigration and Nationality Act, section 101, et seq.

**PURPOSE:** The primary purpose for providing the requested information on this form is to determine if you have established eligibility for the immigration benefit for which you are filing. The information you provide will be used to grant or deny the benefit sought.

**DISCLOSURE:** The information you provide is voluntary. However, failure to provide the requested information, and any requested evidence, may delay a final decision or result in denial of your form.

**ROUTINE USES:** The information you provide on this form may be shared with other Federal, State, local, and foreign government agencies and authorized organizations following approved routine uses described in the associated published system of records notices [DHS-USCIS-007 - Benefits Information System and DHS-USCIS-001 - Alien File, Index, and National File Tracking System of Records, which can be found at [www.dhs.gov/privacy](http://www.dhs.gov/privacy)]. The information may also be made available, as appropriate, for law enforcement purposes or in the interest of national security.

**Paperwork Reduction Act**

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Special Report

## Immigration Doublespeak

More evidence Obama appointees talk enforcement in public and administrative amnesty in private.

By W. James Antle III – 9.21.10

In public, the Obama administration boasts of being tough on illegal immigration. "We're trying to put our money where our mouth is," Immigration and Customs Enforcement (ICE) director John Morton told the *Washington Post* in a [story](#) claiming that deportations are rising. "You've got to have aggressive enforcement against criminal offenders. You have to have a secure border. You have to have some integrity in the system."

Yet in private, the discussion among Obama appointees often turns to ways they can use their administrative powers to give illegal immigrants work permits and an interim legal status, even if Congress does not go through the formality of passing "comprehensive immigration reform." In fact, getting around the democratically elected legislative branch's intransigence seems to be the point.

This first became apparent when Sen. Charles Grassley (R-IA) released a [draft memo](#) prepared for the director of the U.S. Citizenship and Immigration Services (USCIS) outlining ways the existing law could be interpreted to provide "alternatives to comprehensive immigration reform." The immigration bureaucrats pondered "administrative relief options" to "reduce the threat of removal for certain individuals present in the United States without authorization" -- that is, to implement an amnesty for illegal immigrants without Congress actually enacting one.

Now *TAS* has [obtained](#) an early draft of a memo prepared in the Department of Homeland Security (DHS), a version of which sources say made it all the way up to Secretary Janet Napolitano, contemplating a "bold" program "using administrative measures to sidestep the current state of Congressional gridlock and inertia." Translation: an amnesty for people -- described as "the current unauthorized population or selected subsets" -- Congress has repeatedly decided not to grant amnesty.

Maybe that amnesty would affect "the entire potential legalization population" with the exception of "individuals who pose a security risk." Maybe it would be "narrowly tailored" and extend only to "individuals eligible for relief under the DREAM Act, AgJOBS, or other specifically defined subcategories." For English, press 1: that means illegal immigrants who would have benefited from mini-amnesty legislation that Congress has also pointedly declined to pass.

The two drafts are very similar in substance. They both propose expanding the use of deferred action, parole in place, and other acts of administrative discretion for hardship cases to a much broader number of illegal immigrants. That would allow these immigrants to remain in the country indefinitely even if no legislation changing their status ever reaches the president's desk. The DHS memo gets a little deeper into the weeds of U.S. immigration law and features a more interesting discussion of the political ramifications for such actions.

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Its authors fret that Congress might come in and undo their handiwork. "Registration would have to be completed quickly, in order to reduce incentives for individuals to enter the U.S. unlawfully in the hope of applying for the program," the document reads. "To create an operationally feasible application program, DHS would require up-front funding and sufficient time to a ramp-up and the need for upfront funding may provide Congress an opportunity to block this initiative if it objects."

Even worse, from the bureaucrats' perspective, Congress could react to the idea by reining them in even further: legislation could advance on Capitol Hill to "bar or greatly trim back" DHS's discretion in deferred action and humanitarian parole even more than it is already limited by current law.

Amnesty supporters on the Hill may bail: "Even many who have supported a legislated legalization program may question the legitimacy of trying to accomplish the same end via administrative action, particularly after five years in which the two parties have treated this as a matter to be decided by Congress."

The voters might be even peskier than Congress: "The Secretary would face criticism that she is abdicating her charge to enforce the immigration laws." People who have dedicated their careers to enforcing those laws might also cause annoying problems: "Internal complaints of this type from career DHS officers are likely and may also be used in the press to bolster the criticism." Finally: "Opponents of the registration program will characterize it as 'amnesty'" and complain that it is "being proposed to pander to Latino voters."

What good could come of any of this? "A registration program can be messaged as a security measure to bring illegal immigrants out of the shadows." And Democrats should be awfully pleased: Both the president and congressional leaders will "be viewed as breaking through the Washington gridlock in an effort to solve tough problems. Giving nervous Members of Congress something tough to vote for while providing Latino voters with something they can support will be a win-win for us all."

The key, of course, is to "boldly drive the narrative": "President Obama and the Administration would assert that they are stepping into the breach created by congressional gridlock and moving aggressively to solve a vexing problem that three consecutive Congresses have tried but failed to fix."

When the USCIS memo came out, the Obama administration wisely dismissed the babble as mere internal deliberations that don't reflect actual policy: "To be clear, DHS will not grant deferred action or humanitarian parole to the nation's entire illegal immigrant population." The reaction was much the same here, with a robust defense of the administration's enforcement record thrown in for good measure.

"DHS will not grant deferred action or humanitarian parole to the nation's illegal immigrant population," DHS spokesman Matt Chandler told *TAS*. "In fact, DHS has engaged in overall record breaking immigration enforcement, including the removal of 130,000 convicted criminals in 2009 and over 170,000 convicted criminals this year -- a record number. To be clear, we are not engaged in a 'backdoor' amnesty and are on pace to place more people in immigration proceedings this year than ever before."

Indeed, the document *TAS* has seen called for all sorts of things that have not happened. Cooler heads within the administration likely decided a major announcement of "administrative action" to be made "when the midterm election season is in full-swing" was not such a hot idea. Maybe they will ultimately conclude that the right time for such a move is "Never."

But given the fact that such deliberations have been taking place -- and the administration's own clear preference to avoid removing illegal immigrants who are not convicted criminals -- members of Congress would be wise to try to find out.

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