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"EXAMINING THE ADEQUACY AND ENFORCEMENT OF OUR NATION'S IMMIGRATION LAWS"

I. Introduction

I thank Chairman Goodlatte and all the members of the U.S. House of Representatives Committee on the Judiciary for the invitation and opportunity to testify today on the adequacy and enforcement of our nation's immigration laws.

I want to begin by stating that I do not consider our immigration system to be "broken", as it's frequently described by members of both political parties. That fact that we now have at least 11 million aliens illegally present in the United States is less the fault of "the system" than it is the unwillingness of many Americans and elected officials to make the basic, but difficult choice as to what kind of immigration system we want.

Do we want to allow unlimited immigration to the United States, as we did during the first century of our nation's history? Or alternatively, do we want to enforce a limit on the number of immigrants we allow every year, knowing that will mean turning away many people who resemble our own ancestors, who are neither criminals nor national security threats, and who only want to work and pursue the American dream of a better life for themselves and their families? And if those people enter in violation of our limit, maintenance of the limit will require us to try to remove them.

Too many Americans and elected officials cannot bring themselves to countenance the enforcement of immigration limits if it means excluding and removing aliens who remind us of our ancestors. But they also are unwilling to accept unlimited immigration to the United States either.

It's a binary choice. Either no limit on immigration, taking everyone who wants to come except criminals or national security threats or, alternatively, enforcement of a limit, turning away many even though they are neither criminals nor national security threats. If we could decide which option we wanted, then we could implement policies aimed at achieving that goal.

Too hard a choice, many are saying in effect. Give us a third choice. And that is the direction towards which President Obama and his administration are trying to lead the country, towards a third choice of leaving legal immigration limits on the books, but simply not enforcing them, and then providing legalization as needed whenever confronted with the results of large numbers of illegal immigrants. Does anyone think that will work? I call it a formula for permanent dysfunction.

II. The Abandonment of Deterrence in Immigration Enforcement

A former colleague of mine at Temple University used to say that the poor people of the world may be poor, but they are not stupid, that they are as capable "as anyone in this room", he used to say, of using cost-benefit analysis to determine what is in their own self-interest, and they do that all the time.

Large numbers of foreign persons would like to immigrate and work in the U.S. but are prevented from doing so by the limits on immigration enacted into U.S. law by Congress. If we wish to deter persons immigrating to the U.S. illegally in violation of our legally imposed limits, we should increase the costs of illegal immigration and lower the benefits. Conversely, if we want more illegal immigration, we should lower the costs and increase the benefits of illegal immigration. People are not stupid, and will use cost-benefit analysis to act on what they believe is in their best interest.

Deterrence is important to immigration law enforcement because border security alone cannot prevent large numbers of persons from illegally entering the country if they are determined to do so. For one thing, as many as half the illegal population of the U.S. may have entered legally on temporary visas and simply overstayed. Even as to those entering without inspection at the border, security is more effective if the numbers attempting to enter are smaller, and conversely less effective when the numbers attempting to enter are large.

Administration initiatives have affected the cost/benefit analysis of those contemplating illegal immigration to the U.S. in various ways. First the administration's endorsement of and advocacy for a broad legalization for illegal aliens in the U.S., such as the so-called "comprehensive immigration reform" passed by the U.S. Senate in the previous Congress, sends the message that, if only they can get themselves into the U.S., they will benefit from the

legislation when it passes, just as illegal immigrants present in the U.S. benefited from the broad amnesty enacted by Congress in 1986.

Second, the administration's announcement of "prosecutorial discretion" objectives and priorities, applied not case by individual case, but benefiting broad identifiable categories of illegal aliens, provided encouragement to those considering illegal entry into the U.S., that if they could avoid committing crimes and prompt detection, they might be viewed as low priorities for removal from the U.S.

Providing illegal immigrants with work authorization and other benefits, was enacted by unilateral presidential executive order in 2012 for "childhood arrivals" under the age of 31 as of June 15, 2012. By another unilateral presidential executive order announced on November 20, 2014, those benefits were extended to "childhood arrivals" regardless of age, and to parents of U.S. citizen or legal permanent resident children. It would seem reasonable for those considering illegal entry into the U.S. to anticipate that the categories of those qualifying for work authorization despite illegal presence might be expanded yet again by future executive order.

And because President Obama had on many occasions publicly denied having the power to act unilaterally by executive order in the way that he did, professed limits on future presidential action like that found in the Office of Legal Counsel memo of November 19, 2004, on which President Obama relied, might also reasonably be ignored in the calculations of those contemplating illegal entry into the U.S.

An example of how administration policies dramatically shifted the cost/benefit analysis in favor of attempting illegal entry into the U.S. was the 2014 "surge" of alien minors and families across our southern border. According to Department of Homeland Security statistics, 68,541 unaccompanied alien minors were apprehended at the border in 2014, an increase of 945% over the 6,560 apprehended in 2011, before President Obama's DACA executive order was announced. In addition, 68,445 alien family members traveling together were apprehended at the border in 2014, an increase of 815% over the number apprehended in 2011.

Central American newspapers reported that U.S. government policies now permitted unauthorized alien minors to enter the U.S. and stay, and reported that such migrants received accommodations, food, and English classes before being reunited with family members in the U.S.[1]

[1] Chumley, Cheryl K., "El Salvador, Honduras newspapers tell youth: Go north—U.S. life is good," Washington Times, June 12, 2014. http://www.washingtontimes.com/news/2014/jun/12/el-salvador-honduras-media-tell-youth-go-north-us-/

Among the consequences of the 2014 border "surge" are growing backlogs and delays in removal hearings scheduled to be heard in the U.S. immigration court system. The Wall Street Journal reported last week that nonpriority cases are being bumped off the court docket and would get a November 29, 2019, court date, which it described as "a bureaucratic placeholder."[2] Such delays in U.S. efforts to remove illegal immigrants constitute another benefit tilting the cost/benefit analysis in favor of illegal immigration to the U.S.

I have criticized the president's unilateral deferred action executive orders in an article[3] and in testimony to the Judiciary Committee of the U.S. Senate on December 10, 2014.[4] My argument is, first, that the deferred action exceeds the statutory bounds of prosecutorial discretion:

In 1996, Congress enacted, and President Clinton signed into law, new Section 235(a)(1) of the INA (codified as 8 U.S.C. Section1225(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."

A large part of the November 19, 2014, 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 from the President's proposal to defer the detention and removal of nearly 5,000,000 illegal aliens. Some are also distinguishable as explicit exercises of broad presidential authority over foreign affairs, which is not the case, and not asserted, in President Obama's deferred action executive order.

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

[2] Barrett, Devlin, "Save the Date: Immigrants Face Judge in 2019", page A6, The Wall Street Journal, January 29, 2015.

[3] "President Obama's 'Deferred Action' Program for Illegal Aliens Is Plainly Unconstitutional", December 2014, http://www.cis.org/Obama-Deferred-Action-Amnest-Executive-Action-Unconstitutional

[4] http://www.judiciary.senate.gov/imo/media/doc/12-10-14TingTestimony.pdf

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."[5]

My second concern over the deferred action executive order is the availability of advance parole to deferred action beneficiaries.

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 circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories."[6]

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"? On USCIS Form I-131 issued in 2013 (on pages 4 and 8), the USCIS asserts "in its discretion" that DACA beneficiaries may be granted advance parole to travel outside the U.S. for educational or employment purposes, though not authorized by Congress in INA Section 212(d)(5).

[5] 343 U.S. 579, 635-636 (1952).

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

The reason the Administration wants to and will also abuse the parole statute in the case of 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:

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.[7]

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.[8]

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. [9]

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.[10]

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

[7] US citizen children cannot sponsor their parents for immediate relative green cards until the children attain age 21. INA Sec. 201(b)(2)(A)(i) (8 U.S.C. Sec. 1151(b)(2)(A)(i)).

[8] INA Sec. 212(a)(9)(B)(i)(II) (8 U.S.C. Sec. 1182(a)(9)(B)(i)(II))).

[9] INA Sec. 245(a) (8U.S.C. Sec. 1255(a)).

[10] 25 I&N Dec. 771 (BIA, 2012), http://www.justice.gov/eoir/vll/intdec/vol25/3748%20%28final%29.pdf .

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 most of the beneficiaries.

My third concern with the deferred action executive order is that 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 the number of aliens allowed to compete in the U.S. labor market.

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."[11] 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."[12] 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.

According to the November 19, 2014, 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 22), 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."[13] 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

[11] Codified as 8 U.S.C. Section 1324a(a).

[12] 8 U.S.C. Section 1324a(h)(3).

[13] http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf .

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." [14]

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 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." [15]

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.[16] 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

[14] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988).

[15] 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 .

[16] E.g., INA Sec. 208(c)(1)(B) (asylum), 244(a)(1)(B) (temporary protected status), 8 U.S.C. Sec. 1738 (refugees).

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." [17] 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 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." [18]

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[19] and Sure-Tan[20] 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 successful evasion of

[17] 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).

[18] Mendoza v. Peres, 754 F.3d 1002, 1017 (2014).

[19] Karmuth v. United States, 279 U.S. 231, 244 (1929).

[20] Sure-Tan v. United States, 467 U.S. 883, 893 (1984).

apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." [21]

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."[22] 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."[23]

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." [24]

In 2014, 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 Executive Branch procedure that exposed American workers to substandard wages and working conditions "cannot be the result Congress intended." [25]

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

[21] 535 U.S. 137, 138, 140-141, 148 (2002).

[22] 761 F.2d 798, 804 (D.C. Cir. 1985).

[23] Int'l Union of Bricklayers v. Meese, 616 F.Supp. 1387 (1985).

[24] 891 F.2d 1374, 1384 (9th Cir. 1989).

[25] 754 F.2d 1002, 1017 (2014).

Alliance of Technology Workers v. USDHS,[26] 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."

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.

III. Asylum Abuse and Expedited Removal

When I last testified in this hearing room on February 11, 2014, my subject was "Asylum Fraud: Abusing America's Compassion?"[27] In that testimony I suggested that making asylum claims has become commonplace as a path to an immigrant green card for aliens without other alternatives, and that false asylum claims have become common and often deceive the U.S. asylum adjudicators into granting asylum status. The perception that false asylum claims often work and at least delay removal of illegal aliens from the U.S., sometimes for long periods, adds to the benefit side of the cost/benefit analysis attracting illegal immigration to the U.S.

Convictions for and exposures of false asylum claims are difficult and expensive to attain. The difficulties are compounded when the number of asylum applications is increasing.[28] The total number of affirmative asylum applications has more than doubled in five years, exceeding 80,000 in FY2013. Over the same five years, so-called "credible fear" asylum applications made at the border have increased sevenfold from less than 5,000 to more than

[26] Civil Action No. 14-529, U.S. District Court for the District of Columbia.

[27] http://judiciary.house.gov/_cache/files/ce51425e-3e89-4007-a98d-7153ac6f2b4c/jan-c-ting-asylum-fraud-testimony-final.pdf

[28] For a story of how aliens are smuggled into the U.S. to make asylum claims, and the pressures on immigration judges who reject those claims, see Frances Robles, "Tamils' Smuggling Journey to U.S. Leads to Longer Ordeal: 3 Years of Detention", New York Times, Feb. 2, 2014, http://www.nytimes.com/2014/02/03/us/tamils-smuggling-journey-to-us-leads-to-longer-ordeal-3-years-of-detention.html

36,000 in FY2013.[29] Statistics from USCIS Asylum Division show an approval rate of 92% for credible fear claims in FY 2013.[30] Those statistics were compiled before the 2014 border surge.

The concept of "credible fear" was instituted by the former Immigration and Naturalization Service as an informal screening out device for the large numbers of Haitian people interdicted via boats on the high seas headed for the United States after the Haitian coup of 1991. The idea was that people interdicted via boats who could not articulate a credible fear that could qualify them for asylum would be repatriated to Haiti without further deliberation.

When Congress enacted "expedited removal" in 1996 for certain arriving and recently arrived aliens who lack documentation authorizing legal admission, it incorporated the concept of "credible fear" into the statute, in the hope that it could also be used as a screening out device for such aliens making asylum claims. [31] Unfortunately the high approval rate for credible fear claims, and the resulting backlog in the immigration court system, have meant that in practice "credible fear" has served to screen into the U.S. undocumented aliens wishing to make asylum claims. That explains why many illegal border crossers don't run from the U.S. Border Patrol, but instead seek them out to make asylum claims subject only to the low threshold of credible fear.

Congress enacted "expedited removal" into U.S. law to facilitate prompt removal of undocumented aliens. That congressional intent has been frustrated by the presence of the low-threshold "credible fear" screening-in device. But Congress can and should amend INA Section 235(b)(1) to remove the role of credible fear in frustrating expedited removal.

All Border Patrol and other Customs and Border Protection agents should be mandated to receive training in asylum law as part of their basic training. Such trained agents should be authorized to make asylum adjudications as part of the expedited removal process. All references to credible fear and further hearings by an immigration judge should be removed from the statute. INA Section 235(b)(1)(B)(iii)(I) could then be amended to read: "If an asylum-trained officer determines that an alien does not have a well-founded fear of persecution pursuant

[29] Cindy Chang and Kate Linthicum, "U.S. seeing a surge in Central American asylum seekers", Los Angeles Times, Dec. 15, 2013, http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215

[30] Data provided by U.S. Citizenship and Immigration Services (USCIS) on December 9, 2013.

[31] INA Section 235(b)(1). (8 U.S.C. Section 1225(b)(1)).

to section 208, the officer shall order the alien removed from the United States without further hearing or review."[32]

Additionally, just as the credible fear standard may have lost value as alien smugglers game the system and spread the stories that "work" in demonstrating credible fear, so the asylum statute itself, INA Section 208, while a useful addition to our immigration law when added in 1980, may have lost value as the stories have been spread that "work" in convincing an adjudicator to grant asylum.

How did the U.S. meet its obligations under the Convention and Protocol on the Status of Refugees before 1980? The answer is through withholding of deportation, now withholding of removal, INA Section 241(b)(3), 8 U.S.C. Section 1231(b)(3). That statute prevents the removal of an alien to any country if, "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

I would like to see Congress consider enhancing Section 241(b)(3) by adding to it some of the benefits of asylum, like adjustment of status to legal permanent resident, and following to join of spouses and minor children, under certain specified conditions, with the goal of replacing the asylum statute with a single enhanced withholding of removal statute for the protection of refugees. That statute has and will have a higher burden of proof than the asylum statute,[33] and should therefore be less susceptible to fraud.

IV. Conclusion: Why we should enforce immigration laws.

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." 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."

[32] For comparison, INA Section 235(B)(1)(B)(iii)(I) as currently enacted says: "Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review."

[33] See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

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. 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 1986 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 successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[34]

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."[35] 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."[36]

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." [37]

In 2014, 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

[34] 535 U.S. 137, 138, 140-141, 148 (2002).

[35] 761 F.2d 798, 804 (D.C. Cir. 1985).

[36] Int'l Union of Bricklayers v. Meese, 616 F.Supp. 1387 (1985).

[37] 891 F.2d 1374, 1384 (9th Cir. 1989).

employment of foreign labor might have on domestic wages and working conditions" and that an Executive Branch procedure that exposed American workers to substandard wages and working conditions "cannot be the result Congress intended." [38]

In contrast, we should note the January 28 statement of President Obama's nominee for Attorney General, Loretta Lynch, in response to a question from Senator Sessions:

SESSIONS:

"Let me ask you this: In the workplace of America today when we have a high number of unemployed, we've had declining wages for many years, we have the lowest (percentage?) of Americans working, who has more right to a job in this country? A lawful immigrant who's here, a green-card holder or a citizen, or a person who entered the country unlawfully?"

LYNCH:

"Well, Senator, I believe that the right and the obligation to work is one that's shared by everyone in this country regardless of how they came here. And certainly, if someone (is?) here, regardless of status, I would prefer that they be participating in the workplace than not participating in the workplace."

The statement of Attorney General nominee Loretta Lynch, not only shows an unfamiliarity with a basic tenet of U.S. immigration law, but a fundamental lack of understanding of why we have immigration law. Which brings us back to the first basic question I raised today, which so many Americans cannot or will not answer, whether we should allow unlimited immigration, or alternatively enforce a limit on immigration.

Clarity on this question will make clear which immigration policies we should and should not be pursuing.

This concludes my testimony, and I again thank Chairman Goodlatte and all the members of the committee for the invitation and opportunity to testify today.

[38] 754 F.3d 1002, 1017 (2014).