

Interior Immigration Enforcement Legislation
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INTRODUCTION

Good afternoon, Chairman Goodlatte, Ranking Member Conyers, and other Members of this Committee. Thank you for the opportunity to address the importance of immigration enforcement, not just at the border but also in the interior of the United States, and three key pieces of legislation that are being considered in that regard.

A colleague at the Center for Immigration Studies testified at a prior hearing before this committee a week ago, on the perilous state of interior immigration enforcement in our country today.¹ We are on the verge of having created a de facto “go-free zone” wherein almost everyone who manages to get past the first defenses of the Border Patrol directly at the border lives and works unlawfully, with almost nothing to fear in the way of consequence for their action.

By way of example, in the recent Senate confirmation hearings of Loretta Lynch, designated by the president to be the next attorney general, said this about aliens working illegally: “I believe 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 problem with this statement is that jobs are a primary magnet which draws aliens to cross the border illegally—or enter as tourists, students, or in other nonimmigrant categories and violate the conditions of admission by working without authority.

What good is a picket line at the border, whether human or technological or some combination of the two, if we are unwilling to enforce the immigration laws in the interior? Yet, in the past several years—specifically, since initiation of the “no workplace enforcement actions” policy of 2009²—immigration enforcement against employers, to ensure that only authorized workers are employed, which was unsteady and underutilized to begin with, has become a nullity.

¹ Statement of Jessica M. Vaughan, “Examining the Adequacy of Our Nation’s Immigration Laws”, U.S. House Judiciary Committee Hearing, February 3, 2015.

² Memorandum of Marcy Forman, Director of Investigations, Immigration and Customs Enforcement, “Worksite Enforcement Strategy”, Apr. 30, 2009. <http://www.docstoc.com/docs/18725768/ICE-Enforcement-Strategy-Memo-Marcy-Forman-April-30-2009>

The president in recent statements has said he wishes to focus on the plight of the middle class, which is increasingly squeezed and, although unemployment figures are down, finds itself working for less money, in less desirable jobs (often more than one to make ends meet), and with less benefits, because of many pressures—not least of which is having to compete against alien workers who have no right to be here in the first place. Yet, as recently discovered through Freedom of Information Act requests, the administration has granted more than 5.5 million employment cards to aliens since 2009³; a superabundance of those employment authorizations were granted to aliens who crossed the border illegally or overstayed their visas.

Whether by deliberation or inadvertent consequence on the part of the administration, as millions of aliens start receiving the cornucopia of benefits to be accorded them under the president's "executive action" programs, the position of the working middle class will be worsened. Aliens now working in the shadows and under the table will no longer be willing to accept such conditions when they receive their work authorizations. But this doesn't mean that employers addicted to cheap, exploitable labor will be weaned from their dependence; rather, they will turn to unscrupulous middle men and alien smugglers to replenish their work crews with new individuals who won't meet the criteria for the president's programs—at least, not until they can find vendors of bogus documents to help them establish a phony right to apply under the new programs.

In essence, the compound effect of the administration's acts will be to establish a giant slot system in which aliens moving up the "legalization ladder" will simply be replaced by other, newer border crossers and visa violators. Try as I might, I cannot reconcile the fundamental disconnect between an expressed concern for the middle class, which forms the backbone of America, versus the willingness and commitment of the administration to fundamentally undercut their wellbeing in the jobs market.

But it is not just in the area of worksite enforcement that interior immigration enforcement has suffered. In her testimony a week ago, Ms. Vaughan spoke eloquently and in detail to the dangers to public safety which have been engendered by misuse of prosecutorial discretion, which has been turned on its head from an occasional act of ministerial grace accorded to those few with significant mitigating circumstances, to one of requiring officers to justify, at length and in detail to their superiors, taking enforcement action in lieu of said "discretion".

What is more, a key public safety program that takes advantage of modern electronic technologies and connectivity—the same kind of technologies routinely used by citizens today in their multiplicity of computers, smart phones, tablets, and other devices—to quickly and

³ Jessica M. Vaughan, "Government Data Reveal 5.5 Million New Work Permits Issued Since 2009", Center for Immigration Studies, Feb. 2015. <http://cis.org/government-data-reveal-millions-of-new-work-permits>

effectively identify alien criminals in a cost-efficient and work-saving way, has been dismantled. I am speaking of course of the Secure Communities program. This dismantling pushes the efforts of ICE agents back to pre-electronics days, in which they have to rely on paper and faxes to obtain and exchange information in a laborious and time consuming manner.

Along with Secure Communities, the Secretary of the Department of Homeland Security (DHS) has also effectively ended the use of immigration detainers to hold such identified criminals, giving them the freedom to re-enter communities and re-offend, leaving in their wake many more innocent victims, and also putting at further risk the safety of the immigration officers who will be obliged to spend needless time, energy, and limited resources to find them in order to place them into immigration proceedings, rather than receive them in a secure custody setting such as the county jail in which they were being held.

The directive from the Secretary followed an inexplicable and legally unsupported assertion from an acting director of Immigration and Customs Enforcement (ICE) that state and local compliance with such detainers was voluntary, although there are sound reasons to believe otherwise. As a consequence of this pronouncement, plus ICE's concomitant declination to weigh in on the side of law enforcement agencies who are sued for honoring detainers, over 300 state and local jurisdictions now elect not to honor them at all, or only under certain conditions, even as they collect millions of federal taxpayer dollars under the State Criminal Alien Assistance Program (SCAAP), which provided grants totaling more than \$161 million in federal fiscal year 2014 alone.⁴

Yet even before the Secretary's memorandum, DHS and ICE leaders had done incalculable damage to this critical tool in the apprehension of alien criminals through prosecutorial discretion and "prioritization" criteria. There are many reasons to believe that the rise in criminal alien removals was directly related to a robust Secure Communities program and effective use of detainers, and that the decline in those numbers that we are now witnessing is the result of policies initially designed to inhibit, and now to end them entirely.

Through its legislative prerogatives, Congress holds in its hands the capability to alter the current deleterious course of events, and restore balanced and effective immigration enforcement in the United States. However, bills focusing solely on border enforcement will prove ineffectual if the country is to regain control of immigration and establish a fair-but-lawful system of entry and residence, because a borders-only focus does not address the pull factors contributing so strongly to illegal immigration. Further, even in the context of border enforcement, there must be recognition of the importance of deterring migratory waves, including vulnerable minors, by dealing promptly with arrivals and rapid repatriation in all but the most pressing of cases such as

⁴ Source: U.S. Department of Justice, Bureau of Justice Assistance website, at <https://www.bja.gov/Funding/14SCAAPawards.xls>

those truly in fear of persecution. Credible fear claims made by border crossers in the thousands which are rubber-stamped by the bureaucracy encourage would-be migrants to make the trek in hopes of arriving at our borders, demean the asylum system, and put legitimate claimants at risk by creating a climate of compassion fatigue and cynicism on the part of the public.

There are three bills which were introduced into the House during the 113th Congress that merit careful consideration, because they would go far toward restoring a credible immigration policy—

- The Protection of Children Act (H.R. 5143);
- The Asylum Reform and Border Protection Act (HR. 5137); and
- The Strengthen and Fortify Enforcement Act (H.R. 2278), introduced by Immigration and Border Security Subcommittee Chairman Trey Gowdy.

THE PROTECTION OF CHILDREN ACT

This bill, H.R. 5143, was introduced by Representative John Carter on July 17, 2014 as a consequence of the surge of tens of thousands of Central Americans crossing into the United States over the course of months, primarily in the Rio Grande Valley of Texas. The bill aims to correct some of the deficiencies of existing law which came into sharp focus as a result of the surge.

The bill amends Section 235 of the Trafficking Victims Protection Reauthorization Act (otherwise known as the "Wilberforce Act"), dealing with unaccompanied alien children in several significant ways:

- First, it eliminates the invidious distinction between minors from countries that are contiguous versus noncontiguous to the United States, while at the same time authorizing the Secretary of State to engage in repatriation agreements with any appropriate countries, instead of limiting them to certain noncontiguous nations. This is significant because such agreements establish baseline standards for return and reintegration of children into the societies from which they came.
- Second, it establishes a "speedy trial" requirement for children who may be victims of severe forms of trafficking so that their cases will be fast-tracked before immigration judges without undue delay. This provision mandates that such cases be initiated within 14 days.
- Third, it specifies that although children in proceedings should be represented by counsel to the greatest extent possible, it must be "at no expense to the government."
- Fourth, this section establishes identification standards, as well as information sharing protocols between Homeland Security and Health & Human Services, to minimize the possibility that alien minors will be placed into the hands of inappropriate caregivers, abusers, or traffickers.

- Fifth, having eliminated the distinction between contiguous and noncontiguous countries, Section 2 clarifies the expectation as well as the legal basis for prompt return of minors to their countries of origin.

Significantly, the bill also amends Section 101(a)(27)(J) of the Immigration and Nationality Act (INA), dealing with the definition of special immigrant juveniles. The bill clarifies that only those juveniles who cannot be reunified with either parent (as opposed to both parents, under current law) may qualify for Special Immigrant Juvenile green cards.

Finally, the bill amends asylum law to divest asylum officers of initial jurisdiction in cases involving unaccompanied alien minors and instead invest jurisdiction solely with immigration judges. This is consistent with other provisions of the bill by introducing a streamlined procedure in which minors' asylum applications may be heard in a single forum, thus eliminating delays in full and final adjudication of their cases.

This bill confronts the reprehensible fact that through its policies and practices, the federal government has become a major facilitator in the business of smuggling minors. In a scenario repeated thousands of times, it goes something like this: Central American parents living and working illegally in the U.S. send remittances back to their home country for the express purpose of having their children smuggled northward. Smugglers move them through the perilous journey and, if nothing untoward happens, deliver them on the U.S. side to be united with relatives. If the children are apprehended, then the government itself moves the children onward to be united with relatives, no questions asked. This has become so well known that, for their part, smugglers are just as likely to deposit their loads of minors or families at crossroads proximate to the border so that they can be found by Border Patrol agents, thus conveniently relieving the smugglers from the burden of transporting the children on American highways, with the concomitant chance of exposure and arrest such ventures carry. And, because the illegal parents face no consequence for their part in having initiated the enterprise, word spreads and others do the same, at great risk to the children.⁵

How many perish in the jungle lowlands and highlands in Central America, or in the heat of the Mexican desert because they can't keep up? We don't know. How many die from illness, dehydration, hypothermia, accidents or murder? We don't know. In the shadowy world of commerce in human beings, there is a thin line between smuggling and trafficking: how many children whose smuggling is arranged by parents end up being diverted into lives of abuse in the sex or drug trades? We don't know. On this side of the border, we don't always even know with

⁵ For examples, see my blogs for the Center for Immigration Studies, "The Reality of Childhood Arrivals: Seamy, not Dreamy" <http://www.cis.org/cadman/reality-childhood-arrivals-seamy-not-dreamy>, Dec. 16, 2013; "Uncle Sam, Coyote Extraordinaire" <http://www.cis.org/cadman/uncle-sam-coyote-extraordinaire>, Dec. 19, 2013; and "Criminals Without Borders" <http://cis.org/cadman/criminals-without-borders>, Jan. 2, 2014

certainty whom the children are being tendered to. The bill requires an inquiry into the status of those persons, and initiation of proceedings if they are unlawfully in the U.S. Critics will say this will deter parents from coming forward. Perhaps. But the alternative is for the United States to continue facilitating the movement of human beings as cargo, even while we lecture the rest of the world as to their obligations to halt human smuggling and trafficking. The moral imperative is clear: our government should undertake no policy or practice that puts more children at risk.

There appear to be two ways in which the bill might be improved, however. One is by amending the definition of “immediate relative” in the INA to exclude the parents of any individual who is accorded special immigrant juvenile status. This would prevent such special immigrants, once reaching the age of majority, from petitioning for the parents who abandoned them.

The other is by adding to the identity requirements the bill imposes on individuals who will assume custody of minors to include biometric data. Our nation is awash in a sea of fraudulent documents, many of them used by aliens, but biometric data is inescapable. Consider that when an American citizen seeks to adopt a foreign child, he or she is subjected to a battery of homesite studies, fitness examinations, and submission of fingerprints and photographs with which to conduct background checks. Why should the standards be any less rigorous for unaccompanied minors, or minors who are to be tendered into the hands of ostensible parents or relatives?

THE ASYLUM REFORM AND BORDER PROTECTION ACT

This bill, H.R. 5137, was introduced by Representative Jason Chaffetz, Chairman Goodlatte, and others, on July 17, 2014.

Unaccompanied Minors and Surges

The bill shares common goals with the previously-discussed Carter bill in that both take significant legislative steps to ensure that any future surges are met with a more effective response than was the case occurring most recently in the Rio Grande Valley. Both bills share many common features although they sometimes take a different approach. For instance, H.R. 5137—

- Also eliminates the distinction between contiguous and noncontiguous countries, but uses the word “shall” rather than “may” in discussing the authority of the Secretary of State to negotiate repatriation agreements with other nations.
- Amends the abysmally low standard presently used by asylum officers in finding a “credible fear” of return for purposes of claiming asylum – a standard that has been susceptible to fraud and abuse in recent years. This section of the bill would require a finding threshold of “more probable than not”, and would apply to all aliens claiming a fear of return, not just unaccompanied alien minors. (This approach differs from that of the Carter bill, which divests asylum officers of credible fear reviews.) One wonders whether the change of language will suffice. Credible fear was established in the law as a way to filter fraudulent

claims, not to foster them, yet as the bill's sponsors observe, in 2013, 92% of claims were approved. The percentage has since dropped, but whether adequately to reestablish the worth of this pre-test remains an open question.

- Establishes standards for recording and preservation of interviews of aliens by arresting and processing officers who initiate expedited removal, as well as by asylum officers conducting credible fear interviews.
- Establishes a mandatory information-sharing protocol by requiring HHS officers to provide information on the whereabouts of children it has placed, and the caregivers with whom they have been placed, but does not establish baseline standards for identifying those caregivers prior to giving them custody of the child.
- Streamlines the repatriation requirements levied by Wilberforce, but does not require commencement of immigration judge hearings for unaccompanied minors within 14 days.
- Modifies the special immigrant juvenile provisions to make clear that a child with one parent capable of providing care is ineligible for that status, and also specifies that minors will not be considered as “unaccompanied” if there are responsible family members (such as grandparents, aunts and uncles, older siblings) available and able to care for the child. This is significant in closing another loophole of existing law, through recognition that there are often extended family members of aliens, just as there are with citizens, who are capable caregivers.
- Clarifies and emphasizes that legal representation of aliens, including unaccompanied minors, shall be at no expense to the government, but does so by modifying existing Section 292 of the INA, rather than embedding the language inside the Wilberforce provisions as the Carter bill does.
- Levels the playing field by specifying that unaccompanied minors will have their asylum claims examined and granted or denied in exactly the same manner as any other asylum applicants, whether those applicants are adults or minors.
- Affirms the concept of “safe third country” removals, without the necessity of bilateral agreements, so that aliens may be placed into the care of other nations, e.g. to seek asylum or other possible benefits, as an alternative to repatriation to their country of nationality on one hand, or remaining in the U.S. on the other.
- Incrementally provides, over the course of three federal fiscal years, for an increase in the number of immigration judges and trial attorney prosecutors available to conduct removal proceedings in relation to the border surge.
- Requires the Secretary of State to halt foreign aid to nations which are the source countries of large flows of aliens, particularly unaccompanied minors under the Wilberforce Act, when those countries either refuse to negotiate a repatriation agreement or decline to accept the return of their nationals. Many will agree with this proviso; others will object vigorously to tying of foreign aid assistance to immigration policies. One possible middle-ground approach is to amend the language to exempt certain forms of fundamental humanitarian aid such as medical supplies, or, alternatively, to require a halt only to certain forms of foreign

aid such as the Central American Regional Security Initiative (CARSI) or other similar programs.

Considered in sum, there are a substantial number of unaccompanied minor and surge-related provisions within this bill and the Carter bill that make them well worth reintroduction but the conflicting approaches (such as the elimination of initial jurisdiction of asylum officers in one bill, but not the other) will need resolved.

Parole

In an area unrelated to unaccompanied alien minors and cross-border surges, the bill redefines immigration parole consonant with its original, limited statutory intent and usage, making it harder for this, or any, administration to rely on a dubious interpretation of the parole authority as however broad the executive branch asserts it to be.

Critically, the bill states clearly that grant of parole does not constitute admission to the United States. This technical amendment is designed to close the interpretive loophole by which aliens granted parole seek to adjust status to permanent residence even though their initial parole was ostensibly limited in scope and purpose and never intended to provide the opening to remain permanently or indefinitely. Some courts have already construed parole to equate to an admission in their decision-making. Without this technical fix, many of the thousands of aliens who are or will be recipients of liberal grants of parole will seek to adjust status contrary to Congressional intent.

The bill also requires the Attorney General and the DHS Secretary to provide periodic reports to Congress on use of the parole authority. (This provision might be strengthened by also requiring the independent Government Accountability Office to provide periodic reports on the subject matter.)

Designated Criminal Gangs

The bill establishes new and specific grounds of inadmissibility and deportability for aliens who are members or associates of designated criminal gangs. The designation process is similar to that in current law relating to designation of terrorist organizations (Section 219 of the INA). This section also ensures that gang members and supporters will be ineligible for a host of other immigration benefits such as asylum withholding of removal, temporary protected status, special immigration juvenile visas, etc.

The bill also provides for mandatory detention of members of designated criminal gangs during removal proceedings, although the title of this section varies in describing them as “criminal *street* gangs”, as does one other portion of this provision. It is a small point, but use of the word “street” is contextually anomalous and should perhaps be eliminated as unnecessary since it

could be construed to imply some kind of distinction between street gangs and equally violent and notorious criminal gangs not transparently operating on the street.

It is gratifying to see that H.R. 5137 addresses the existence of ultraviolent transnational criminal gangs in American communities—many of which are heavily populated with alien members, such as Mara Salvatrucha (MS-13)—in such a comprehensive manner. It is past time for legislative action in this regard. For instance, various judicial rulings in recent years have created opportunities for dangerous individuals, such as gang members and cartel operatives, to qualify for asylum or withholding of deportation, despite involvement in crime and violence that would otherwise be grounds for exclusion or deportation, if they allege that they have “defected” and are therefore members of a “particular social group.”⁶ There is something decidedly wrong, almost perverse, about according the privilege of asylum, or even withholding of removal, to persons who have participated in criminal organizations, whether or not they have themselves been caught at, and convicted of, particularly serious offenses. These are individuals who have by their own admission supported organizations whose violence against others is horrific, well-documented, systematic, and widespread.

Prohibitions on Restrictions of Access for Patrolling the Border

The language of this section appears to be fundamentally the same as language found in the “Secure Our Borders First Act” recently introduced, and then withdrawn, in the House Homeland Security Committee. This provision removes prohibitions on access by border agents to federal lands controlled by the U.S. Departments of Agriculture and Interior, when those lands are within 100 miles of the border. Such prohibitions have had the functional effect of providing safe havens and passage corridors to alien and drug smugglers, while crippling enforcement and interdiction efforts. However, the provision in both bills would be better crafted if a) the portion forbidding entry onto state, tribal or private lands carved out the “within 25 miles” exception already existing in INA Section 287(a)(3); and b) permitted the Customs and Border Protection Commissioner to negotiate agreements with states, tribes and private landowners permitting access for the purpose of patrolling the borders.

THE STRENGTHEN AND FORTIFY ENFORCEMENT ACT

H.R. 2278 was introduced by Immigration and Border Security Subcommittee Chairman Trey Gowdy on June 6, 2013. Of the three bills under discussion, it is the most focused upon revivifying interior immigration enforcement, and does so in a thorough, systematic manner in six titles—

Federal, State and Local Cooperation in Immigration Law Enforcement.

⁶ See, for instance, Gathungu, et al, v. Holder, United States Court of Appeals for the Eighth Circuit, No. 12-2489, decided August 6, 2013 <http://media.ca8.uscourts.gov/opndir/13/08/122489P.pdf> and Martinez v. Holder, United States Court of Appeals for the Fourth Circuit, No. 12-2424, decided January 23, 2014, revised January 27, 2014. <http://www.ca4.uscourts.gov/opinions/published/122424.p.pdf>

This bill clearly acknowledges the interplay of the federal, state, and local governments, where the subject of immigration is concerned. It recognizes that state and local governments have a right to take a hand in controlling the force of illegal immigration given its adverse impact on their limited police, health, fire, emergency, and social service resources; and, conversely, that ICE agents have the right to expect cooperation instead of being confronted with a host of state and municipal sanctuary laws, policies and procedures that obstruct and impede them in performing their duties.

Title I of the bill institutionalizes coordination between Immigration and Customs Enforcement (ICE), and state and local law enforcement agencies (LEAs) by requiring them to exchange information on criminals and share systems access. State and local LEAs may also apply for grants to obtain technology that facilitates information and biometric data transfers. ICE must take custody of removable aliens when requested to do so by LEAs which, on the other hand, must honor ICE detainers to hold individuals for a reasonable period of time so that ICE can make arrangements for pick-up. ICE, and state and local governments, are also encouraged to establish agreements for jails meeting U.S. Marshals Service standards to hold aliens on ICE's behalf.

ICE is directed to continue and expand its program for identifying and removing criminal aliens, and to ensure they are not released into communities. Unfortunately, the language as presently written does not ensure that the now-ended Secure Communities will be restarted; it is likely that DHS will assert that the Secretary's replacement program meets statutory requirements, even though the details of that replacement program are unknown, and its efficacy untested. This is a setback to the rapid gains achieved in the past few years by leveraging electronic technology and communications interoperability.

Title I restores the integrity of the 287(g) partnership program permitting state and local LEAs to enforce immigration laws under appropriate federal oversight, by eliminating the politics from decisions as to which LEAs may participate and for what purpose. Those LEAs must abide by the rules and standards, but ICE must articulate specific reasons for denying a request to participate or for ejecting program participants, and denied or ejected LEAs would have the right to appeal in an administrative hearing.

States and their political subdivisions are permitted to enact and enforce criminal or civil penalties for conduct also prohibited by federal immigration laws as long as the criminal and civil penalties don't exceed the relevant Federal criminal penalties; and State and local LEAs may investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens for the purposes of enforcing the immigration laws of the United States to the same extent as Federal law enforcement personnel; and State and local officers are granted immunity to the same extent as that enjoyed by federal officers in the performance of immigration duties.

Title I also ensures that disbursements made under the SCAAP and other federal LEA assistance programs only go to state and local governments which do not impede or obstruct national immigration enforcement efforts and requires the DHS Secretary to report annually on violators.

The cumulative importance of these provisions can hardly be overstated. For example, providing immunity to sheriffs and correctional departments, and clarifying their obligation and authority to hold aliens upon filing of an immigration detainer, is fundamental to the federal obligation to removal alien criminals from our communities nationwide. From 2011 to 2014, the use of ICE detainees has declined nationwide by a precipitous 50%, no doubt a reflection of the impediments thrown in the path of ICE agents from their leaders' policies on one hand, and increasingly restive state and local governments on the other—many of whom want to honor detainees but are unwilling to be sued to do so, particularly when they are left to deal with the suit alone because the federal government abandons them.⁷

National Security.

Title II of the Gowdy bill takes a fresh look at the intersection where national security interests collide with immigration and naturalization programs, and provides new tools to be used in countering threats from terrorists or foreign intelligence organizations, by prohibiting aliens involved in espionage or terrorism from receiving benefits such as asylum, cancellation of removal, or voluntary departure, and removing restrictions on the designation of countries to which dangerous spies or terrorists can be removed. It also precludes a finding of good moral character for any alien determined to have been involved in acts of terror or espionage, thus denying them adjustment of status or naturalization.

Title II limits access to the courts to file writs seeking to force granting of benefits while adverse actions are pending against national security threats; and prohibits them from filing applications or petitions on behalf of others while such actions are pending, or before all necessary background checks have been completed and results received.

The bill strengthens and streamlines existing procedures for stripping citizenship from naturalized individuals who later prove by their acts and conduct that they were not truly attached to the principles embedded in their oath of citizenship. This is an extremely powerful provision, for example, that could be used against naturalized citizens who seek to join terrorist groups such as al Shabaab or ISIS in foreign lands.

Title II also makes available for intelligence and national security purposes the otherwise-out-of-bounds files of aliens who benefited from the amnesty of 1986, but whose information is deemed confidential by the language of the act which granted them legalization.

⁷ Mark Metcalf and Dan Cadman, "Disabling Detainers: How the Obama administration has trashed a key immigration enforcement tool", Center for Immigration Studies, Jan. 2015. <http://cis.org/disabling-detainers>

Removing Criminal Aliens.

Title III of the bill begins by addressing amendments to the definition of “aggravated felony” found in the INA, to clarify the reach of some offenses (including various forms of homicide, rape and sexual conduct with minors), as well as to include additional offenses such as child pornography. It also clarifies Congressional intent with regard to length and type of sentences imposed for crimes meeting the statutory definition, and expands the reach of crimes to include not just substantive offenses and conspiracy and attempt, but also aiding and abetting and the like. The title also specifies that refugees or asylees who become aggravated felons are ineligible for waivers or adjustment of status.

The title expands the exclusion and deportation grounds to include sex offenders who fail to register as required; and prohibits citizen and permanent resident sex offenders from petitioning to bring in aliens except when there is a specific finding that the intended petitioner represents no danger to the alien beneficiary.

Where questions arise as to whether a criminal offense meets the statutory definition of an aggravated felony or a crime involving moral turpitude, Title III provides the Attorney General and DHS Secretary the authority to review such legal documents as are needed to resolve the issue. This is a salutary, common-sense provision that will aid enforcement officers, trial attorneys and immigration judges alike in arriving at appropriate decisions in such cases.

Title III also establishes language providing that post-facto attempts to vacate, expunge, pardon or otherwise alter criminal convictions for the purpose of evading removal from the United States shall have no force and effect for purposes of federal immigration law. This is an important proviso that reestablishes federal preeminence and supremacy in determining what actions and offenses merit deportation. Some states have instituted policies of parole, clemency and pardon board reviews for the sole purposes of substituting their own judgments as to whether or not an alien should face the consequence of removal for his crimes.

The title expands and clarifies grounds of inadmissibility under INA Section 212, and deportability under INA Section 237, to include aliens convicted of identity theft crimes; unlawful procurement, or conspiracies or attempts to procure naturalization. The title adds various firearms offenses and aggravated felonies; and domestic violence, child abuse and stalking offenses to the list of exclusion grounds, while concurrently establishing a waiver commensurate with that found in deportation grounds for individuals who have been victims of domestic violence. The title also expands and clarifies the exclusion grounds relating to espionage, theft of sensitive or classified information, and similar offenses, and it creates a new, specific removal ground for convicted drunk drivers.

Title III amends federal law governing possession and use of firearms by aliens through restricting their possession and use to lawful permanent residents; aliens admitted as nonimmigrants for the specific temporary purpose of a hunting trip; and a handful of other nonimmigrant classifications involving foreign officials and diplomats.

The title provides new detention authority to the DHS Secretary to hold dangerous aliens during the period of appeals from orders of removal, or in the event such an alien impedes his own removal. It also establishes a new review board to consider requests for release by aliens who cooperate with the government's efforts to remove them, on such conditions as the board deems appropriate for public safety and consistent with the removal process. It further provides for a periodic certification process to be conducted by the Secretary to hold dangerous aliens when no conditions of release are adequate to ensure the public safety but removal cannot be achieved.

Importantly Title III of the Gowdy bill contains provisions for designation of criminal gangs, and denial of admission, or removal of gang members. The provisions closely parallel those previously described which are a part of the Chaffetz-Goodlatte bill, and is equally welcome.

The bill also provides for technical amendment of certain criminal offenses involving identity theft, as well as the battery of crimes involving passport, visa and naturalization fraud (18 U.S.C. Sections 1541 through 1548); it additionally renders forfeitable the fruits and instrumentalities of these crimes. The bill includes new predicate offenses such as peonage and alien smuggling for the crime of money laundering; and it enhances sentencing penalties in aggravated cases of alien smuggling. These changes will be welcomed by enforcement officers in their struggle against the often violent criminal syndicates, such as the zetas, who have become enmeshed in the trade of human beings due to the fantastic profits to be made, including through extortion of family members of those being smuggled.

Visa Security.

The provisions in this title of the bill have been carefully thought-out; are well-crafted; and exhibit a detailed knowledge of the strengths and weakness of U.S. visa processes, as well as their susceptibility to political decisions that are not always in the national interest.

Among other things, Title IV provides for a cascading effect that cancels all nonimmigrant visas, when any nonimmigrant visa held by an alien is cancelled by the U.S. government. This provision seals a loophole that could permit an alien whose student visa has been cancelled for violations, for instance, to turn right around and reenter the U.S. using a still-valid tourist visa.

The title expands the bases under which the Secretary of State may share otherwise-confidential information contained in visa application files, including for additional criminal or civil offenses committed by the applicant as well as to foreign governments when it is in the U.S. national

interest, and requires a higher level of consultation between the Secretaries of State and Homeland Security in policies and regulations governing visa issuance, including when or not to conduct in-person interviews of applicants. It additionally grants the DHS Secretary authority to refuse or revoke visas to any alien or class of aliens, with the exception of diplomats and members of international organizations; and prohibits the Secretary of State from overriding a decision by the DHS Secretary to deny, refuse or revoke a visa.

Title IV places the Homeland Security Visa Security Program on a sound fiscal footing by providing that a portion of the visa fees collected by the State Department will be used to fund DHS Visa Security Officers (VSOs) at American embassies and consulates abroad; requires the Secretaries of State and DHS to jointly establish a list of the top 30 high-risk posts abroad for expansion of the Visa Security Program; and requires review of visa applications at those posts by Visa Security Officers (VSOs) before they may be adjudicated by consular officers. It also makes clear that Chiefs of Mission (usually ambassadors) of the 30 designated high-risk posts are required to cooperate and participate in ensuring that the DHS VSOs are cleared and in place on a priority basis, not to exceed one year after enactment into law. In the past, chiefs of mission reluctant to accept VSOs have invoked NSDD-38, a presidential decision directive, as their authority to decline, or to slow down to a crawl, assignment of VSOs to their posts. This provision specifically cites NSDD-38 as inappropriate to attempt such a maneuver.

Title IV enhances the criminal penalties for violation of Title 18 U.S. Code Section 1546 (visa fraud) when committed by officials of schools authorized to accept foreign students and exchange visitors, and plugs two massive loopholes in the foreign student program by requiring that participating schools and institutions demonstrate that they have been accredited by an agency recognized by the U.S. Department of Education, or if engaged in flight training, certified by the Federal Aviation Administration; and requires notification to DHS when accreditation of a school or institution is revoked, at which time access to Student and Exchange Visitor's Information System (SEVIS) must be suspended, which effectively precludes the school or institution from issuing documentation required to grant a visa to enter the U.S.

Title IV provides that if the DHS Secretary suspects that fraud, or attempted fraud, has been committed by an authorized school or institution, he or she may suspend its access to the SEVIS. It also provides that if an official of a school or institution is convicted of visa fraud, he or she is permanently disqualified from participation in any activities related to foreign students or exchange visitors, and requires national security and criminal history background checks of school and institution officials before they may be permitted to act as "designated officials" for purposes of issuing documents to prospective foreign students or exchange visitors.

Aid to U.S. Immigration and Customs Enforcement Officers.

Under Title V, the bill directs the DHS Secretary to authorize Immigration Enforcement Agents (IEAs) to exercise all of the powers afforded them by law in the Immigration and Nationality Act, provided they have appropriate training; and amends the pay and grade of these officers to be commensurate with that of Deportation Officers (DOs). This section is important because the Secretary has not accorded to officers who are a part of ICE Enforcement & Removal Operations (ERO), the division which daily enforces the immigration laws, the same authorities as special agents who are a part of ICE Homeland Security Investigations, although in recent statements made by the Secretary in one of his memoranda of November 20, 2014, he asserted his support for pay equity within ICE ERO. Enacting the Gowdy bill would ensure that this comes to pass.

Title V establishes a cadre of Detention Enforcement Officers whose sole job is to act as the functional equivalent of jail and transportation officers for alien detention facilities. This section recognizes that the role of a detention officer in a facility is fundamentally different than that of an officer who works the streets to locate and apprehend suspects, and creates job classifications to distinguish them accordingly. It also requires the Secretary to provide reliable body armor and weapons to IEAs and DOs. Again, this section is important because it will rectify the disparity in treatment and equipment between those officers and Special Agents in the Homeland Security Division of ICE.

The bill creates an ICE Advisory Council which includes representatives from Congress and the ICE prosecutors' and agents' unions, "to advise the Congress and the Secretary" on issues including the status of immigration enforcement, prosecutions and removals, the effectiveness of cooperative efforts between DHS and other law enforcement agencies, improvements that should be made to organizational structure, and the effectiveness of enforcement policies and regulations. This provision provides Congress and the Secretary an avenue to hear directly from line prosecutors and officers on those programs and issues which are effective, and which are ineffective or downright detrimental to enforcement of the nation's immigration laws. It also protects ICE participants against retaliation for voicing their views as council members.

Title V creates a pilot program for electronic production of arrest and charging documents by officers operating in the field or at locations remote from ICE offices. Such a capacity is critical to ensuring that field officers work at their most efficient while also ensuring that charging documents are issued and served on the arrestee in a timely manner.

Finally this title of the Gowdy bill authorizes, subject to appropriations, augmentation of the existing 2013 manpower levels of deportation officers (by 5,000), support staff (by 700) and, an augmentation of ICE prosecutors (by 60). Collectively, these officer, prosecutor and support staff enhancements are an acknowledgement that nearly half of the aliens illegally in the United States did not enter as border crossers, and that the overwhelming majority of illegal aliens in the

United States, regardless of how they originally entered, work and reside in the interior where ERO officers work and must have the resources to perform their duties.

Miscellaneous Enforcement Provisions.

This title of the bill amends existing statutes relating to the grant of voluntary departure in lieu of formal removal, both before and after the initiation of immigration hearings, by:

- limiting grants of this privilege to no more than 120 days pre-hearing and 60 days after commencement;
- authorizing the government to require the posting of a voluntary departure bond by the alien to ensure that he or she actually departs;
- requiring the alien to affirmatively agree to voluntary departure in writing, with the stipulation that in so doing he/she waives further appeals, motions, requests for relief, etc.;
- providing civil penalties for aliens who renege on their voluntary departure agreements or fail to depart, preclude them from seeking reopening of their cases, and bar them from a variety of forms of relief from removal;
- precluding the repeated grant of voluntary departure to an alien; and
- authorizing the Secretary (for DHS officers) or the Attorney General (for immigration judges) to establish regulations imposing additional reasonable limitations on use of voluntary departure.
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These are welcome amendments because voluntary departure, originally envisioned as a method of streamlining the expulsion of aliens charged with less-serious, non-criminal offenses, has become the subject of much abuse, both by government (which has been overly generous in its grants of voluntary departure— increasingly even to aliens with criminal histories), and by aliens (who accept the offer and then, instead of departing, abscond or file repeated frivolous motions to reopen their case with the immigration courts in order to buy more time to remain in the U.S.).

Title VI restructures the bars for reentry of inadmissible aliens who fail to depart after being ordered removed, and provides that they are ineligible for relief. The language of the section is intended to deter aliens from fleeing instead of obeying lawful removal orders, by strengthening and extending the “shelf-life” of penalties for failing to depart, and making clear that aliens who become fugitives will be entitled to no future consideration or benefits under the law.

The title also expands the conditions under which prior orders of removal may be reinstated (in lieu of new/additional proceedings) when aliens are found to have subsequently illegally reentered the U.S.; prohibits any grant of relief to such aliens; and limits the use of judicial review and habeas corpus proceedings to contest reinstated orders. Reinstating previously-issued orders of removal, against aliens who reenter the U.S. illegally, results in a tremendous savings of officer, prosecutor, and court resources. It is also a prudent means of preserving limited

taxpayer funds while deporting recidivist alien offenders. This section augments the existing authority for its use, and ensures that there are few, if any, loopholes for aliens to exploit in avoiding expulsion through reinstatement of prior orders, when caught in the United States again.

Title VI clarifies that an adjustment of status to permanent residence under the INA constitutes an admission to the United States—the functional equivalent of a lawful physical entry. This is a technical but highly desirable amendment because it ensures that if an alien violates his resident alien status after adjustment (for instance, through criminal conviction), the “date of entry” will be calculated only back as far as his adjustment, not his original entry. This will prevent many undeserving aliens from claiming that they have accrued enough time after “entry” to merit relief from deportation even in the face of unlawful conduct.

Title VI establishes a mandatory reporting requirement to Congress on use—and abuse—of discretion by executive branch officials. (This provision appears to be a direct response to administration activities curtailing immigration law enforcement and granting the equivalent of an administrative free pass to thousands of aliens who are in the country illegally.)

Title VI also contains a section similar to that previously mentioned in the Chaffetz-Goodlatte bill, prohibiting the Secretaries of Interior or Agriculture from establishing rules or policies that prevent patrolling within 100 miles of the borders on federal lands, and waives certain rules relating to creating roadways, fences, dragstrips and the like, which are used by federal officers in their border patrol efforts. The comments earlier in my testimony with regard to the Chaffetz-Goodlatte bill are the same as I would offer here.

CONCLUSION

I would like to conclude my testimony by offering an observation. With important and complex issues such as immigration, it is important, and much more far-sighted, to legislate a few quality portions of law at a time, in digestible chunks, than to create a chameleon-like bill that is the thickness of a telephone directory, has the kind of small print you would expect in a used-car ad, and which purports, falsely, to be all things to all people, all at the same time.

It is important that such bills do not maunder, it do not double-talk, and it do not compromise on the security of the nation or the safety of American communities. I believe these bills, if reintroduced with minor modifications, meet that test.

Thank you, Mr. Chairman, Ranking Member Conyers, and the other honorable members of the Committee for the chance to share my views.