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Testimony on

"Comprehensive Immigration Reform in 2009, Can We Do It and How?"

Before the

Senate Committee on Judiciary

Subcommittee on Immigration, Border Security and Refugees

Mr. Chairman and Members of the Subcommittees, it is an honor and privilege to appear before you today. I come before in my capacity as former Counsel to the U.S. Attorney General during 2001-2003,[1] at which time I served as the Attorney General's chief adviser on immigration law and border security. I am also a Professor of Constitutional Law and Immigration Law at the University of Missouri (Kansas City), where I teach immigration law and constitutional law. As my university does not take official positions on legislation, I offer my testimony solely in my personal capacity.

Because there is no specific piece of legislation currently before the Committee, I will assume for the sake of this hearing that by "comprehensive immigration reform," the Committee means a legislative initiative that similar in basic respects to the proposed Comprehensive Immigration Reform Act (S. 1348) that was before the U.S. Senate in 2007. At the center of that bill was a broad amnesty—whereby the vast majority of the 12-20 million illegal aliens in the country could become lawfully present relatively quickly after filing an application, renew their newly-acquired visas, apply for adjustment of status to legal permanent resident, and thereafter become U.S. citizens. The basic qualifications for receiving this amnesty were that an alien had to have entered before a date certain,[2] and have remained in the United States since that date. In addition, the alien had to possess a job or be the parent, child, or spouse of someone who possessed a job. Finally the alien had to pay a fine to be eligible for the amnesty. Assuming that these basic contours of the amnesty remain the same, there are two general reasons why pursuing such a course of action would be ill-advised: (1) the inability of U.S.

[1] I served as White House Fellow to the U.S. Attorney General during 2001-02.
[2] January 1, 2007, was the date specified in S. 1348.

Citizenship and Immigration Services (USCIS) to implement the amnesty, and (2) the national security risks that would result.

I. Resource Constraints in the Implementation of an Amnesty

Central to the 2007 bill was the probationary Z visa, which was issued to amnesty applicants shortly after they applied for the amnesty and received a "background check" that had to be completed by the end of the next business day. Regardless of what this status platform is called, it is a common attribute of most comprehensive immigration reform proposals. It provides the previously-illegal alien immediate lawful status, protecting him from deportation, authorizing him to work, and allowing him to exit and re-enter the country. Under the 2007 bill, this probationary visa was then converted to a non-probationary visa.

U.S. Citizenship and Immigration Services (USCIS) simply does not have the resources at this time to effectively implement an amnesty of the scale contemplated by the 2007 bill. To understand this problem, consider a few numbers.

On top of the 12-20 million illegal aliens who are already in the United States and who would be eligible for the amnesty, there would be a mass influx of millions of newly-arriving illegal aliens who would fraudulently apply for the amnesty by presenting records suggesting that they had actually been present in the United States before the cut-off date. According to the 2007 bill, any bank statement, pay stub, remittance receipt, or similarly forgeable record would suffice. This is exactly what happened with the 1986 amnesty. Hundreds of thousands streamed across the border to fraudulently apply for it.

The Immigration and Naturalization Service (INS) discovered 398,000 cases of fraud in connection with the 1986 amnesty. No one knows how many cases went undetected.

Assume for the sake of argument that 12 million illegal aliens apply for the amnesty. The 2007 bill required that the aliens' initial applications be received within one year. There are 250 days in the calendar year on which the federal government is open for business. That means that there would have been an average of 48,000 applications for the amnesty every day. As of September 30, 2008, there were 3,638 status adjudicators at USCIS.[3] This number cannot be increased quickly, due to the difficulty of hiring new people, the delay of training them, and the attrition of existing status adjudicators.

48,000 applications spread among 3,638 status adjudicators means an average of 13 amnesty applications per adjudicator per day. Of course, on some days, the number of applications might well be double that amount. And under the 2007 bill, with each application, the adjudicator had only until the next business day to determine if the alien is a criminal or a national security threat.

It is a bleak picture. Unfortunately, it gets worse. Those numbers assume that the adjudicators are not doing anything at the moment. In fact, they are already swamped. The backlog of pending applications for benefits at USCIS is approximately 3 million cases at present.[4] On top of that backlog USCIS typically receives 4-6 million applications for benefits each year.[5] USCIS is stretched to the breaking point. According to a 2006 Government Accountability Office (GAO) study, because adjudicators must go

[3] U.S. Citizenship and Immigration Services, *2008 Comprehensive Response to the DHS CIS Ombudsman Report*, Sept. 30, 2008, p. 16
[4] As of February 2009, USCIS reported 2,900,273 pending cases.
[5] In FY 2008, USCIS reported receiving 4,319,134 new applications for benefits.

through so many applications for benefits (green card applications, asylum applications, etc.) every day, they spend too little time scrutinizing them.[6] As a result, the GAO concluded, the failure to detect fraud is already "an ongoing and serious problem."

The back-breaking workload results in what the GAO called a "high pressure production environment." It is widely known that an unofficial "six minute rule" applies—spend no more than six minutes looking at any single application. It is a bureaucratic sweatshop.

The 2006 GAO study found that according to adjudicators, their managers were consumed with meeting "production goals," driving them to process applications too quickly and increasing the risk that fraud will go undetected. As a result, USCIS routinely fails to engage in commonsense verification with outside agencies—for example, calling a state's DMV to see of two people claiming to be married actually live at the same address. And many adjudicators are actually *discouraged* from requesting more information from aliens who submit suspicious applications.

The agency is already dangerously overburdened and is unable to effectively detect fraud. So what would an amnesty do? *More than triple* the workload by adding 12 million amnesty applications in a single year, on top of the 4 million-plus applications that the agency already receives. Not only that, under the 2007 bill, the 12 million provisional visa holders would have had to come back in four years to renew their status and convert to non-provisional visas. The 6-minute rule would have become a 3-minute rule. Fraudulent applications would have been accepted by the millions. It is a recipe for bureaucratic collapse.

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[6] GAO 06-259, *IMMIGRATION BENEFITS Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud*, March 2006.

It must also be remembered that the much smaller amnesty of 1986 took years to implement. As recently as FY 2003, USCIS was still granting adjustments of status based on the 1986 amnesty.[7] In other words, that amnesty for 2.7 million aliens took 17 years to complete. This Committee is now contemplating an amnesty four times larger.

In the past, whenever an amnesty has been on the table, USCIS has indicated that it would attempt to deal with the surge in applications by hiring contractors to do the work. This is a highly problematic approach, for two reasons. First, it is unlikely that the necessary background checks on the contractors themselves could be completed in time. There is already a back-up of hundreds of thousands of pending background checks at the Office of Personnel Management. The 2007 bill completely ignored this problem. Had it been enacted, the contractors either could not have been hired in time, or the background checks would have been skipped entirely. Second, USCIS status adjudicators go through extensive training in immigration law before they are deemed competent to detect fraud and properly apply the law. Contractors lack this expertise.

Finally, it must be stated the pressure created by any time limits in an amnesty bill, either for background checks or for processing adjudications generally, will force all amnesty applicants to the top of the pile. The statement that "illegal aliens will go to the back of the line" is an empty promise, for two reasons. First, a rapidly-implemented amnesty with processing deadlines like that proposed in the 2007 bill necessarily forces amnesty applications to the top of the pile. Other applications, *which do not have statutorily-imposed deadlines*, must wait. Second, as long as the illegal alien is allowed to stay in the United States, he has by definition "jumped to the front of the line"—he has

[7] In FY 2003, USCIS granted 39 adjustments of status based on the 2006 amnesty.

gained lawful presence while millions of others must continue to wait. And their wait would only grow longer because of the amnesty.

II. National Security Vulnerabilities Created by an Amnesty

An additional flaw in the 2007 bill was that it would have made it extremely difficult for the federal government to prevent criminals and terrorists from obtaining the probationary visa. The most obvious problem in this respect was that the bill allowed the federal government *only until the end of the next business day* to conduct a so-called "background check" to determine if the applicant is a criminal or terrorist. If the USCIS adjudicator couldn't find any terrorist connection in time, then the alien would have to be provided with a probationary visa on the next business day. Twenty-four hour background checks might suffice if the U.S. government had a single, readily-searchable database of all the world's terrorists. But we don't. Much of the relevant information exists only on paper, while foreign governments are the source for other data. It is simply not feasible to expect thorough background checks to occur in 24 hours, or even in the period of one week.

There is already a significant backlog at the FBI of approximately 60,000 name checks for USCIS adjustment of status applications. The ultimate objective of the FBI and USCIS in addressing this persistent backlog is to eventually reach a state of affairs in which most name checks are completed within 30 days and all name checks are completed within 90 days.[8] But we are not there yet. Considering that the agencies are not even aspiring to complete all name checks within 30 days, it is clear that the one-day

[8] See U.S. Citizenship and Immigration Services, *2008 Comprehensive Response to the DHS CIS Ombudsman Report*, Sept. 30, 2008, p. 3.

background check requirement in the 2007 bill was a significant threat to the national security of the United States.

Even if the reckless provision requiring that background checks be completed within one business day were removed from the next amnesty, it is still highly likely that many terrorists would succeed in using their real names to obtain amnesty. Seeking amnesty under one's real name is a promising option for any terrorist who has operated completely underground during his terrorist career. This is also a likely choice for a terrorist who has been recruited into a terrorist organization only recently. Such an individual will not have a record of past terrorist activity maintained by any government.

Even when the federal government has had as much time as it needs to perform background checks, such terrorists have had little difficulty obtaining amnesties. Case in point: Mahmud "the Red" Abouhalima. He fraudulently obtained legal status under the 1986 amnesty that was supposed to be limited to seasonal agricultural workers. He was actually driving a cab in New York City. He was also a ringleader in the 1993 terrorist attacks against the World Trade Center, and he used his new legal status to travel abroad for terrorist training. His brother Mohammed—a fellow terrorist in the plot—also obtained legal status under the 1986 amnesty.

These are not isolated instances. A 2005 study by Janice Kephart, Counsel to the 9/11 Commission, found that 59 out of 94 foreign-born terrorists (about 2/3) successfully committed immigration fraud to acquire or adjust legal status.[9] With his newly acquired legal status, a terrorist can operate with a great deal more freedom, secure in the knowledge that a traffic violation won't lead to deportation. He can also exit and re-enter

[9] Janice Kephart, *Immigration and Terrorism: Moving Beyond the 9/11 Staff Report on Terrorist Travel,* Center for Immigration Studies, Sept. 2005.

the country, allowing international terrorist networks to support him more easily.

However, the terrorist alien has another option that is even more troubling—inventing a new, entirely "clean" identity. The 2007 bill failed to provide any safeguards against terrorists who choose to create a new identity with the help of the U.S. government. Because the bill contained no requirement that the alien produce a secure foreign passport proving that he is who he says he is, terrorists would have had little trouble gaming the system. A terrorist could have walked into any USCIS office and offered a completely fictitious name—one that does not have any negative information associated with it. In other words, a terrorist could declare that his name is "Rumpelstiltskin," and most likely, walk out the next day with a probationary visa, complete with a government-issued ID card backing up his false identity.

All that the terrorist needed to do under the 2007 bill was provide two easily-forged pieces of paper indicating that a person of that name was in the country before January 1, 2007. A pay stub, a bank receipt, or a remittance receipt would have sufficed, as would a declaration from one of the terrorist's associates that he was in the country before January 1, 2007.

With this newly-minted identity backed up by an ID card issued by the federal government, the alien terrorist would be armed with the perfect "breeder document," allowing him to obtain drivers licenses and just about any other form of identification that he desires. This is similar to what the nineteen 9/11 hijackers did. They used their passports and visas as breeder documents to obtain 63 drivers licenses. With these valid identity documents, they were able to travel openly and board airplanes easily.

This particular terrorist loophole in the 2007 bill could be corrected in future

legislation—by requiring that *every* applicant for the amnesty produce a secure passport that contains embedded biometrics in the document. This is not a trivial requirement. Most of the countries that issue secure passports and meet these standards only started issuing these enhanced passports in the last few years. And many of the home countries of illegal aliens do not yet issue secure passports with embedded biometrics. If the authors of any comprehensive immigration bill in the future are truly serious about national security, then they must include this requirement: presentation of a secure passport and nothing less.

Of course, closing this one terrorist loophole would not stop terrorists with "clean" identities from using their true names and obtaining the benefit of amnesty in that fashion. Nor would it solve the administrative capacity problems faced by USCIS. In conclusion, the U.S. government lacks the ability to implement a large-scale amnesty at this time. And the security risks inherent in attempting to do so are unacceptable.