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"Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program"

I.

I first want to thank Chairman Sessions, and all members of the Subcommittee on Immigration and the National Interest for the invitation and opportunity to testify on the Obama administration's Central American Minors (CAM) Refugee/Parole Program and its Haitian Family Reunification Parole Program (HFRP), both announced in late 2014.

Both programs arise in the larger context of expanding use of parole power by the executive branch over many decades, and efforts by the Congress to limit the exercise of that power. Both programs also arise in the immediate context of President Obama's executive orders for deferring immigration enforcement action against certain childhood arrivals announced in 2012, and a larger deferred action announced in 2014 for parents of citizen or legal resident children, and expanding the category of childhood arrivals qualifying for deferred action.

Immigration parole was codified in the 1952 Immigration and Nationality Act. Both after that enactment, and before as administrative practice, parole was used mainly to permit the temporary release of aliens in exclusion proceedings

pending a final decision on their admissibility or inadmissibility. The 1952 Act authorized the Attorney General to parole aliens "temporarily under such conditions as he may prescribe for emergent reasons or reasons deemed strictly in the public interest."

In 1958 the U.S. Supreme Court explained that, "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted."[1] By that time, however, President Eisenhower had begun the practice of using the parole power to bring 30,000 Hungarian refugees to the U.S. whose entry was not otherwise authorized, after the failed 1956 Hungarian uprising. Later presidents used the parole power to allow the entry of large numbers of refugees from Cuba and Indochina after communist revolutions there.

Congress responded to this generous use of the parole power by enacting in the Refugee Act of 1980 an explicit ban on the paroling of refugees except for compelling reasons in the public interest pertaining to particular individual aliens.[2] Congress felt that other provisions of the 1980 Refugee Act were sufficient protection for refugees.

After 1980, presidents continued to use the parole power to admit large numbers of Cubans, Haitians, and Soviet nationals who did not qualify as refugees. Congress responded to that practice in 1996 by restricting the parole power to "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit".[3]

According to the report of the House Judiciary Committee in 1996 when that 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 law-enforcement-related activity. *It should not be used to*

[1] Leng May Ma v. Barber, 357 U.S. 185 (1958).

[2] INA Section 212(d)(5)(B).

[3] INA Section 212(d)(5)(A).

circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration policies (emphasis added). [4] Judicial notice of this reason for the 1996 change restricting the parole power appears in a 2011 opinion from the U.S. 2nd Circuit Court of Appeals which states that Congress' concern in enacting this legislation was that "parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy."[5]

By executive order in 2012, President Obama offered illegal aliens work authorization and other benefits if they qualified for "deferred action" as "childhood arrivals" (DACA) under the age of 31 as of June 15, 2012. By another executive order announced on November 20, 2014, those deferred action benefits were extended to "childhood arrivals" regardless of age, and to parents of U.S. citizen or legal permanent resident children (DAPA). Operation of the second executive order has been temporarily enjoined by Federal judge Andrew Hanen of the Southern District of Texas.

In 2014 the United States experienced a "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

[4] Section 523, House REPT. 104-469 on HR 2202 (March 4, 1996), https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf .

[5] Cruz-Miguel v. Holder, 650 F.3d 189, 198-200 (2nd Cir. 2011), footnote 15.

such migrants received accommodations, food, and English classes before being reunited with family members in the U.S.[6]

As a result of the border "surge", the Wall Street Journal has reported growing backlogs and delays in removal hearings scheduled to be heard in the U.S. immigration court system. "Nonpriority" cases are being bumped off the court docket and assigned a November 29, 2019, court date as "a bureaucratic placeholder."[7]

II.

Both the CAP and HFRP appear to exceed the parole authority under INA Section 212(d)(5) as enacted and as intended by Congress. Both programs contemplate the availability of parole for broad categories of beneficiaries defined by nationality who would not qualify as refugees or for admission under established immigration admission policies.

Legal precedent is claimed for HFRP, but not for CAP, in the 2007 Cuban Family Reunification Parole program.[8] Perhaps this is because the Cuban and Haitian parole programs require family sponsors who are either U.S. citizens or legal permanent residents. In sharp contrast, CAP allows as sponsors qualifying parents who are "lawfully present in the United States", which is defined as not limited to U.S. citizens and legal permanent residents, but also includes parolees

[6] 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-/ .

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

[8] USCIS press release, October 17, 2014, "DHS To Implement Haitian Family Reunification Parole Program".

and beneficiaries of deferred action, and even beneficiaries of withholding of removal.[9]

Although President Obama's DACA and DAPA executive orders have been defended as mere exercises of prosecutorial discretion, it is clear that they are more than that. They offer work authorization, allowing illegal immigrants to compete legally and directly with U.S. citizens and permanent residents for jobs in the United States. They offer social security numbers allowing access to social security, medicare, and other benefits.

And while proponents say deferred action beneficiaries will pay income taxes, the reality particularly for DAPA beneficiaries is that many will instead take revenue from the federal treasury in the form of refundable Earned Income Tax Credits (EITC) available only to low-income taxpayers with social security numbers. The Internal Revenue Service has ruled that illegal aliens who are disqualified from receiving the EITC can retroactively receive EITC benefits for years worked without a valid Social Security number if, after receiving a valid Social Security number, they file an amended return for the previous years worked.[10]

We now also know that among the benefits that illegal immigrant DAPA beneficiaries may receive is the ability through CAP to bring children from their home countries to join them in the United States through parole, even though those children like their sponsoring parents do not otherwise qualify for admission under established legal immigration policies.

Although the deferred action executive orders have been described as not providing a pathway to citizenship, the reality is that even that benefit is available to DACA and DAPA beneficiaries. Many DACA beneficiaries will eventually qualify for green cards either through marriage to a U.S. citizen or through

[9] USCIS, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), last updated 02/09/2015.

[10] Chief Counsel Advice No. 200028034, June 9, 2000, http://www.irs.gov/pub/irs-wd/0028034.pdf (last accessed 4/22/2015).

employer sponsorship or in some other way like the green card lottery. Many DAPA beneficiaries will qualify for green cards when their U.S. citizen minor children attain the age of 21, at which they can sponsor their parents as immediate relatives.

Any alien who qualifies for an immigrant visa which is currently available (always the case for immediate relatives) can apply for and claim it at a U.S. consulate abroad. But if deferred action beneficiaries try to do that, most will 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 after their departure from the United States.[11]

There is a statute that allows some aliens who are in the U.S. already to claim an available immigrant visa 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.[12]

Generous exercise of the parole power may clear the pathway to citizenship for deferred action beneficiaries when they qualify for an immigrant visa. 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 later re-entry is not a departure under INA Sec. 212(a)(9)(B)(i)(II) which would trigger the 10-year inadmissibility bar.[13]

So upon returning to the U.S. under an advance parole, the alien having been "paroled" now magically satisfies the threshold requirement of INA Section 245 and qualifies for adjustment of status, and can claim the immediately available immigrant visa without leaving the U.S.

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

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

[13] 25I&N Dec. 771 (BIA, 2012), http://www.justice.gov/eoir/vll/intdec/vol25/3748%28final%29.pdf .

USCIS has made clear its expansive interpretation of the parole power. In USCIS Form I-131, "Instructions for Application for Travel Document", the agency specifies on page 4 for DACA beneficiaries that "USCIS may, in its discretion, grant advance parole if you are traveling outside the United States for *educational* purposes, *employment* purposes, or humanitarian purposes (emphasis added)." Does this seem consistent with the language of and congressional intent behind INA Sec. 212(d)(5) authorizing parole into the United States "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit"?

Although the administration has not yet mentioned the possibility of advance parole for DAPA beneficiaries, it seem likely that the expansive interpretation of parole power will also be available to DAPA beneficiaries, another benefit awaiting them if and when the temporary injunction blocking that program is lifted. Possession of an immigrant visa/green card is the essential prerequisite for naturalization as a U.S. citizen.[14]

III.

I remain puzzled by the administration's dogged efforts to bring more immigrants into the United States in the face of restrictions enacted by Congress. Ever since Congress started limiting the numbers of immigrants, our courts have repeatedly found that protecting the jobs and wages of Americans was one of "great" and "primary" purposes of Congress for limiting immigration.[15]

In 2002, in Hoffman Plastic Compounds v. NLRB, the Supreme Court found "combatting the employment of illegal aliens in the United States central to the policy of immigration law."[16] In overturning the decision of an executive branch

[14] INA Sections 316, 319 (8 U.S.C. Sec.1427, 1430).

[15] See, for example, Karmuth v. United States, 279 U.S. 231, 244 (1929) and Sure-Tan v. United States, 467 U.S. 883, 893 (1984).

[16] 535 U.S. 137 (2012).

agency to provide benefits to illegal aliens, the high court said that allowing such benefits 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."

But that is what President Obama is doing by ordering executive branch agencies to issue work authorization to millions of illegal aliens so they can compete directly with American workers for jobs.

The latest official jobs report shows 8.6 million Americans unemployed and looking for work, plus 6.7 million involuntary part-time workers counted as employed but who can't find full-time work, and 2.1 million marginally attached to the labor force and not looking for work, many discouraged by long unemployment. Nearly 47 million Americans are receiving food stamps, almost one in six.

Lack of jobs with good wages is at the root of most of America's social problems. Jobs have been outsourced and lost to automation. Does anyone think the technology and globalization revolutions have ended? But business leaders want more immigration to hold down labor costs and keep profits and the stock market rising.

It is the job of Congress to balance the interests of business and labor, to set limits on immigration that allow the economy to innovate and expand, while also allowing American workers to share in the prosperity of a growing economy. Congress has enacted immigration limitations that, in its judgment, strike the right balance, and it can modify those limitations at any time. But because President Obama has failed to get lawmakers to enact the modifications he wanted, he feels justified to unilaterally promulgate new immigration rules.

Low-wage American workers are organizing to demand a $15/hour wage. Good luck with that since employers know that President Obama will issue 5 million new work authorizations to illegal immigrants if the courts allow him to.

The courts should not allow him to. In 1952 the Supreme Court ruled that President Truman lacked authority to seize steel mills even in wartime in the absence of authority in the Constitution or conferred by Congress. As Justice Robert Jackson famously explained, "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."[17]

Even the 33-page Nov. 19, 2014, opinion of the Office of Legal Counsel, on which President Obama relied in issuing his DAPA executive order, warned that "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences." [18] The opinion also noted that, "Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws."[19]

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

[17] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[18] At page 6.

[19] At page 7.