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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Immigration laws can only be enforced by deterring attempts at illegal entry. Mere border enforcement alone is not enough, do matter how much money is appropriated and spend. The numbers of potential illegal immigrants can overcome any amount of border security alone. Without deterrence through interior enforcement, the increased benefits of illegal immigration through deferred actions such as announced by the President insures that the numbers of illegal immigrants will increase in the future, and that our immigration system will be in permanent dysfunction.

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

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

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

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

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

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

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

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

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

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

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

    The Board of Immigration Appeals, a branch of the U.S. Department of Justice, ruled in 2012 in Matter of Arrabelly, that despite prior illegal presence in the U.S., an alien departing from the U.S. with an advance parole allowing re-entry is not a departure under INA Sec. 212(a)(9)(B)(i)(II) which would trigger the 10-year inadmissibility bar.

    And, upon returning to the U.S. with an advance parole, the alien having been "paroled" now magically satisfies the threshold requirement of Section 245 and qualifies for adjustment

of status, and can claim the immediate relative visa or any other immediately available visa without leaving the U.S.

So the representations of the Administration that the deferred action initiative does not provide a pathway to citizenship will likely be false for many if not most of the beneficiaries of the latest deferred action through use of advance parole.