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HEARING BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
ON

"BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES"

WEDNESDAY, MARCH 20, 2013

Chairman Coons, Ranking Member Grassley, and members of the Committee: thank you for holding today's hearing on the importance of preserving due process and constitutional values in our nation's immigration system. On behalf of The Leadership Conference on Civil and Human Rights, I am pleased to provide this written statement for inclusion in the record.

The Leadership Conference on Civil and Human Rights is the nation's oldest and most diverse coalition of civil and human rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, The Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. The Leadership Conference consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

Immigration is an extraordinarily complex issue, particularly in a coalition as large as ours, and a statement explaining all of our views relating to comprehensive legislation would be staggering in its scope. In previous hearings before the House and Senate Committees on the Judiciary, The Leadership Conference has urged Congress to: 1) establish a path to citizenship for the estimated 11 million unauthorized immigrants who are contributing to our economy and our culture; 2) ensure that our borders are firmly but fairly enforced; 3) fix longstanding problems in our family visa system, including the discriminatory barriers facing LGBT individuals; 4) adopt policies that protect immigrant and native-born workers alike; and 5) better protect the civil rights of workers subject to the employer verification requirements of the Immigration Reform and Control Act of 1986. Despite the narrow focus of today's statement, the above reforms remain important priorities for us.

Laws of Unintended Consequences

The Leadership Conference has long been concerned about the erosion of due process in our nation's immigration policies, particularly the imposition of "mandatory" detention and deportation and the elimination of judicial oversight. Our concerns have been heightened by the enactment of the sweeping changes included in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

What we have observed is extremely troubling. While the immigration enforcement policies we have today may have been motivated by a desire to reduce unauthorized immigration, fight crime, and protect

national security, the combined effects of AEDPA and IIRIRA have been a case study in the law of unintended consequences, as countless numbers of immigrants – many of them long-term, legal residents – have been ensnared by a harsh enforcement dragnet even though they posed no threat to the public or to our way of life.

Our sister organization, The Leadership Conference Education Fund, in conjunction with the American Bar Association, documented many of our findings in an extensive 2004 report, *American Justice Through Immigrants' Eyes*.[1] In this nearly 150-page analysis, we thoroughly explained how AEDPA and IIRIRA had changed immigration policy for the worse, and provided detailed examples of how immigrants and their families had been unjustly treated by an overzealous enforcement regime. The following is a summary of what we found:

- *Expanded grounds for deportation have created a dual system of justice in the United States, with far tougher penalties for those born outside its borders than for those born within*. Long-term, legal immigrants convicted of minor first offenses are labeled "aggravated felons" under immigration law – even without such offenses being "aggravated" or even felonies – and penalized just as harshly as more serious offenders; and face much more severe consequences than the native-born. By adopting a "zero tolerance" approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that "the punishment should fit the crime."

- *The option of discretionary relief has been eliminated, meaning that factors that weigh against an individual's deportation are now ignored.* In the vast majority of cases, immigration judges can no longer consider equities such as long U.S. residence, hardships to U.S. citizen spouses and children, employment history, military service, community ties, or evidence of rehabilitation. Without such discretion, immigration judges must deport immigrants who deserve a second chance. While deportation is an appropriate remedy in cases where immigrants have committed serious crimes, the "one size fits all" approach taken by current laws – which is in many respects similar to mandatory minimum sentencing in the criminal justice context – has led to countless deportations that simply were not necessary.

- *Many recent provisions of immigration enforcement laws have been applied retroactively, meaning that lawful permanent residents have been detained and deported for activities that occurred years ago, even if their acts were not deportable offenses when they occurred.* Many longtime immigrants have been permanently banished for youthful run-ins with the law, long after they had moved on with their lives and became contributing members of society. Such *ex post facto*, or after-the-fact, laws are unconstitutional under U.S. criminal law, but they have been tolerated under immigration law because of the legal fiction that deportation does not constitute "punishment."

- *Immigration laws are exceptionally complex, yet more often than not, people facing detention and deportation do not have the help of a lawyer*. Immigration court is an adversarial setting, presided over by an immigration judge and prosecuted by experienced government trial lawyers with the Department of Homeland Security. Despite the high stakes, asylum seekers, children, and lawful permanent residents facing deportation do not have the same Sixth Amendment right to government appointed counsel as individuals facing criminal charges.

[1] Available at http://www.civilrights.org/publications/american-justice/.

- *Mandatory detention costs U.S. taxpayers massive amounts of money, and disrupts the lives of American families*. Immigrants and refugees are routinely incarcerated even if they do not present a flight risk or danger, are not charged with any crime, have lived in the United States for many years, have U.S. families to support, or have strong defenses to their immigration cases. These individuals often are locked up with criminals in state and local jails or private for-profit detention facilities, and often at great distances from their homes and families, where their rights may not be adequately protected and where it is difficult for them to obtain proper legal assistance.

- *Low-level immigration officers frequently make what can be life-and-death decisions, with no minimal standards of due process, and no oversight by an immigration judge.* In procedures such as "expedited removal," life-altering decisions that were previously made only by immigration judges are now made by enforcement officers in the Department of Homeland Security, who frequently do not have the qualifications or factual information on which to render individual decisions. Eligible asylum seekers and even U.S. citizens have erroneously been turned away.

- *The laws have severely curtailed administrative and federal court review, further increasing the possibility of erroneous and disastrous outcomes.* The 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which the nation's legal system was founded. Without judicial oversight, laws are applied inconsistently and sometimes incorrectly, with serious consequences for immigrants and their families. Reforms to the administrative appeals system beginning in 2002, coupled with the high number of individuals in proceedings without lawyers, have further reduced the chances that mistakes will be detected and corrected.

- *Overzealous immigration enforcement compounds the dangerous inadequacy of the nation's confusing and conflicting immigration laws and administrative practices, at great risk to citizens' and legal immigrants' civil rights.* State and local police, including in states such as Arizona and Alabama, have been drawn into enforcing complex federal laws without proper authority or training. Experience has shown that the involvement of state and local police in immigration enforcement strains police-community relations and undermines public safety.

- *Protecting national security, in the aftermath of September 11, has often come at immigrants' expense and has deprived populations of their basic civil rights and liberties.* Policy changes both before and after the passage of the USA PATRIOT Act resulted in extended precharge immigration detention, closed hearings, special registration programs, and severe consequences for technical violations of law that previously were routinely waived or forgiven. The measures have focused on members of Arab and Muslim communities and created a climate in which suspicion, discrimination, and hate crimes flourish.

Unfortunately, we have observed only marginal improvements since we began documenting the impact of the 1996 laws in our report. In 2001, the Supreme Court ruled in *INS v. St. Cyr*[2] that some long-term legal residents could seek a discretionary waiver of deportation, formerly known as "212(c) relief" (referring to a provision in the Immigration and Nationality Act prior to its repeal), if they had pled guilty to a deportable offense that would have maintained their eligibility for relief. While *St. Cyr* has been helpful to

[2] 533 U.S. 289 (2001).

many immigrants, the rule implementing the decision expressly left out any immigrant who had already been wrongly deported under a retroactive application of the 1996 laws. The rule also excluded any immigrant from seeking 212(c) relief if he or she had been convicted at trial, as opposed to having pled guilty, in effect penalizing immigrants for having exercised their right to a jury trial.[3]

In addition, as the unintended consequences of the 1996 laws became clear, federal immigration authorities – partly in response to significant pressure from Congress – issued guidelines in late 2000 to encourage the greater use of prosecutorial discretion in cases where low-level offenses did not warrant deportation. The so-called "Meissner Memo"[4] has, to varying degrees, been followed by the Bush and Obama administrations, and has resulted in some deserving immigrants being allowed to remain in the United States.

Yet the reliance on prosecutorial discretion alone is a poor substitute for legislative reform of the 1996 laws. First, there are some instances in which the Immigration and Nationality Act does not allow for the exercise of discretion. Second, the use of prosecutorial discretion is, of course, highly controversial – indeed, some of the very members of Congress who urged the Clinton administration to adopt prosecutorial discretion guidelines have reversed their position.[5] Finally, because immigration laws do not have applicable statutes of limitations, the exercise of prosecutorial discretion does not provide any finality or closure to immigrants or their families. Cases can be reinstated at any time, leaving immigrants in a legal limbo and unable to fully move on with their lives, even decades after paying their debts to society.

One immigrant whose life might have been saved by the use of prosecutorial discretion – but it was not, because it was never exercised – was Joao Herbert:

> Nancy Saunders and James Herbert always had thought that their son Joao Herbert was a U.S. citizen. They had adopted him at the age of eight from an orphanage in San Paulo, Brazil. He grew up in Wadsworth, Ohio, playing soccer and basketball alongside his Medina County classmates. When Joao was seventeen, his parents learned that he was not a citizen, and that his naturalization process needed to be completed before he turned eighteen. The INS accepted his application and the fee, but the application was not processed on time.

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[3] Executive Office for Immigration Review; *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57826 (Sept. 28, 2004).

[4] Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000).

[5] Rep. Lamar Smith (R-TX), for instance, who chaired the House Subcommittee on Immigration in 1999, helped organize a bipartisan letter to former INS Commissioner Doris Meissner urging her to implement guidelines to encourage the use of prosecutorial discretion. *Letter from Lamar Smith and 27 other U.S. Representatives to Janet Reno, Attorney General, U.S. Department of Justice, and Doris Meissner, Commissioner, Immigration and Naturalization Service* (Nov. 4, 1999) (available at bit.ly/kndJKX). In 2003, however, Rep. Smith attacked the memo as "yet another disturbing example of the INS' refusal to enforce the law . . . The Meissner memo only encourages more illegal aliens to cross our borders. Our country will not be safe from terrorists and our borders will not be secure unless our immigration laws are enforced." Terrence A. Jeffrey, A Gift to Criminal Aliens, Washington Times (Feb. 1, 2003) (available at bit.ly/144JqCF).

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> Shortly after his 18th birthday, Joao was arrested for selling 7.5 ounces of marijuana to a police informant. He pleaded guilty and was sentenced to probation and participation in a drug treatment program. Because he was not a citizen, the INS was alerted and placed him in removal proceedings. Although it was his first and only offense, and he did not receive any jail time, the INS charged him with having an aggravated felony conviction for which no relief was available. Therefore, the fact that his father was a quadriplegic, that Joao had lived his entire life in the United States, and that he neither knew any one in Brazil nor spoke Portuguese were irrelevant in immigration court. After 20 months in INS detention, Joao was deported back to Brazil. His father, who could not make the trip to Brazil due to his physical condition, feared he would never see his son again. Several years after returning to Brazil, Joao was murdered at the age of 26.[6]

Joao might also have been spared this tragic outcome if he had pled guilty to a lesser offense that would not have resulted in him facing deportation for an "aggravated felony" conviction. In 2010, the Supreme Court held in *Padilla v. Kentucky* that due to "the severity of deportation—'the equivalent of banishment or exile,'"[7] defense attorneys must properly advise their non-citizen clients about the potential immigration consequences of a guilty plea. *Padilla* involved a legal resident who had lived in the United States for more than forty years, and had served honorably in the U.S. Army during the Vietnam War, but who had been wrongly advised by his defense counsel that pleading guilty in 2002 to a marijuana trafficking charge would not result in his deportation. The ruling is particularly important in instances in which a plea might trigger mandatory detention and deportation proceedings. Last month, however, the Court placed some limitation the impact of its encouraging ruling in *Padilla*, when it held that it did not apply retroactively to deportation cases that were already final on direct review.[8]

Deportations – particularly those that could be avoided – take a devastating toll not only on those who are deported, but also on those who are left behind. A study found that between April 1997 and August 2007, the United States deported 87,884 legal permanent residents for criminal convictions. Of these, 53 percent had at least one child living with them prior to deportation, resulting in an estimated 103,055 children under age 18 – and 44,422 children under the age of 5 – affected by the deportation of one of their parents. While there is little data regarding the impact on the children of a deported parent, there is ample evidence of the impact on the children of an incarcerated parent. Children of incarcerated parents are much more likely to experience psychological disorders, develop behavioral problems, and perform far more poorly in school.[9] Even if there are no reliable statistics indicating how many legal immigrants have been deported for "minor" crimes, because this is an inherently subjective call, the existing statistics on children left behind by deported parents do show that there are serious consequences to deportation that call for a far more individualized, case-by-case approach than we have today.

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[6] *See* Susan Levine, *On the Verge of Exile: For children Adopted From Abroad, Lawbreaking Brings Deportation*, Wash. Post, Mar. 5, 2000, at A1; *see also* Terry Oblander, *Parents Say Son May Agree To Deportation*, The Plain Dealer, Aug. 29, 2000, at 1B; *see generally* Stephen Buckley and Susan Levine, *A Young Man's Homecoming to a Brazil He Does not Know*, Wash. Post, Nov. 29, 2000, at A01; Kevin G. Hall, *After Arrest, U.S. Sent Ohio Man To Brazil And Death*, Orlando Sentinel, May 30, 2004.

[7] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390-391 (1947)).

[8] Chaidez v. United States, 133 S. Ct. 1103 (2013).

[9] International Human Rights Clinic, University of California, Berkeley School of Law, *et al.*, *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* (March 2010), at 4-5.

Mandatory detention and deportation, and other arbitrary provisions in our immigration laws, have also had devastating consequences in another respect: they have betrayed the values that make our nation's system of justice such a compelling model for the rest of the world. One of the most fundamental principles underlying our system of justice is that important decisions are made following a fair process. The concept of due process of law is so central to our national identity that we have long invoked it to distinguish our government from authoritarian regimes, and it has proven essential in developing the rule of law in emerging democracies around the world.

Consistent with this philosophy, the guarantees of fairness and due process have long been important features of U.S. immigration policy, in the same way that they have been crucial to the respect and protection of civil rights. Throughout most of our history, these guarantees have also ensured a certain baseline of protections when deportation is at stake: the right to be notified of charges; timely, impartial, and individualized consideration of one's case; the right to examine and rebut evidence; the right to legal representation and confidential conversations with counsel; the right to appeal an adverse decision; and federal court review of the implementation of the law by the Executive Branch.

Since the enactment of AEDPA and IIRIRA, these rights – and the values behind them – have been severely compromised. The Leadership Conference believes that we all, citizens and immigrants alike, have lost something as a result, as the manner in which we treat the least powerful, and least popular groups among us ultimately serves as the yardstick by which we measure our commitment to the rights of all individuals.

Bringing Immigration Reform in Line with American Values

As Congress continues its efforts to craft legislation that would overhaul our immigration policies, we could not be more grateful for the Committee's interest in examining the devastating impact of the 1996 immigration reforms, and in considering ways to ensure due process and fairness throughout the system. In the remainder of our statement, we would like to outline our recommendations.

Some of the reforms we suggest have been included in the draft legislation that was leaked from the White House last month. The administration's provisions allowing the use of judicial discretion in deportation cases involving legal residents are extraordinarily welcome, and would help address one of the most troubling aspects of existing law. Equally importantly, because these provisions are being floated by the administration, they also serve as an important acknowledgement that the use of prosecutorial discretion, alone, is simply not sufficient to prevent extreme hardships. We do note, however, that the administration's draft could be improved in some respects, and some other aspects of the bill are troubling.

These recommendations are not exhaustive, but taken together, they would greatly improve any comprehensive immigration reform legislation. As legislative proposals emerge from the bipartisan negotiations taking place in the House and Senate, we would be pleased to offer more detailed analysis.

1. Ensure due process and judicial discretion in immigration cases.
Congress should provide immigration judges with the authority to examine the circumstances of a person's case and to grant relief from inadmissibility and deportability grounds, if warranted, and the decisions of immigration judges should be subject to judicial review in order to provide a backstop

against abuse of discretion. Sections 122 through 124 of the leaked White House bill make a number of laudable improvements in this respect. The provisions could be improved by ensuring the 1996 provisions are not applied retroactively.

- Congress should affirm that the Attorney General may appoint and pay for counsel in cases where the interest in fair resolution or effective adjudication would be served by it. The appointment of counsel should be required in cases involving unaccompanied minors, individuals with mental disabilities, and others deemed vulnerable.
- Any attempt to restrict judicial review or access to the courts must be rejected, however, including the expansion of expedited removal, as well as revisions to fee-shifting in immigration cases under the Equal Access to Justice Act and other civil rights statutes.
- Our badly overburdened immigration courts need significantly more resources to hire more immigration judges and staff, invest in additional training for court personnel, and improve access to legal information for immigrants.

2. End "mandatory detention."

Each year, mandatory custody laws result in the jailing of tens of thousands of people who pose no danger to their communities and are not a flight risk. According to 2009 ICE data, 66 percent of detained immigrants were subject to mandatory detention, but only 11 percent had committed violent crimes (for which they had already served out their sentences). Such practices also sweep up primary caretakers, thus harming the families and children of those detained.

- Mandatory custody laws should be repealed. DHS and DOJ should have the discretion to determine when it is necessary to detain an individual based on an assessment of flight risk and threat to public safety.
- Those subject to mandatory custody should be screened for eligibility for Alternatives to Detention programs and placed in such programs.

3. Improve the Alternatives to Detention (ATD) programs.

ATD programs bear great promise, but frequently, DHS improperly uses ATD programs on individuals who should be released without any supervision. ATD programs that retain custody over the person, such as electronic monitoring, should be reserved for individuals who do not meet the requirements for other less restrictive release options but who can otherwise be released from jail. Substantial cost-savings can be achieved by improving the custody determinations process and ensuring that individuals are not kept in institutional detention any longer than is necessary to achieve the government's legitimate interest in ensuring public safety and appearances at court hearings.

- The White House bill section on alternatives to detention, Sec. 160, codifies the ATD program, but otherwise does little to correct problems with ATD because it does not: 1) designate ATD use for those subject to mandatory custody; 2) restrict the use of ATD supervision to situations where such methods are shown to be necessary; or 3) provide for community-based pilot programs.
- Section 160 could also do harm, as it includes the term "is subject to mandatory detention by law" instead of "mandatory custody." As a result, the section could foreclose the use of non-jail alternatives to detention for those subject to mandatory custody.

4. Ensure timely bond hearings.

Detention without a bond hearing is contrary to basic due process and U.S. human rights commitments, yet individuals awaiting civil immigration proceedings are frequently detained for weeks without a

hearing or never receive one. Prompt bond hearings by immigration judges should be guaranteed for everyone in immigration detention.

5. Ensure that only serious, violent offenses preclude eligibility for legalization.

The most vital imperative in immigration reform is to encourage as many aspiring citizens as possible to come forward, from their current vulnerability, and embrace American citizenship. Only the most serious, violent convictions – and only those recent enough to be reasonable proxies for a current public safety threat – should bar someone from the possibility of legalization.

- Misdemeanors must not be disqualifying, because these include minor offenses like status, driving, and drug crimes that are unsuitable as permanent barriers to family unity and American citizenship.
- A meaningful waiver must be provided for any crime-related eligibility criteria as well as for the inadmissibility criteria, to allow for individualized attention to cases in which hardship would arise from exclusion.

6. Racial profiling should be prohibited.

We are grateful that the Senate "Gang of 8" principles' include a commitment to "strengthen prohibitions against racial profiling." As the Department of Justice's vital investigations of jurisdictions like Maricopa County, AZ, and Alamance County, NC, demonstrate, racial profiling has become troublingly intertwined with immigration and border enforcement. Congress should build on the DOJ's strong and worthy litigation stands against Arizona S.B. 1070-type state racial profiling laws by advocating for a broad profiling prohibition, building on the substance of DOJ's important consent decrees with law enforcement agencies such as the New Orleans Police Department. Legislation should also include provisions guaranteeing non-discrimination based on immigration and citizenship status, along with a private right of action, protection which is missing from existing civil rights statutes. Irrespective of legislation, it is vital that the DOJ move forward with its revision of the 2003 guidance on the use of racial profiling.

7. Operation Streamline should not be expanded.

The "zero-tolerance" prosecution of border-crossers apprehended at the Southwest border has distorted federal court caseloads and strained the Bureau of Prisons. It has also caused a humanitarian crisis, characterized by an unacceptable assembly-line model of prosecution and sentencing for persons who are not public safety threats. Especially because Customs and Border Protection does not want more resources to be allocated to Operation Streamline prosecutions, Congress should oppose any attempts to expand the program as part of immigration reform. We encourage legislators to visit border courts for a personal inspection of immigration court hearings, and to observe how U.S. Attorneys and Marshals are implementing Operation Streamline and other enforcement programs that contribute to mass incarceration.

Thank you again for holding today's hearing, and for giving us the opportunity to share our views. We look forward to working with the Committee in this and many other aspects of immigration policy as the debate over comprehensive reform moves forward.