DISSENTING VIEWS

We believe that a strong border security policy is an absolute and immediate necessity for this Nation. However, without bipartisan comprehensive immigration reform to bring eleven million people out of the shadows with a path to legal immigration status and full integration in our society, the gaping hole in our border security will continue to grow unabated.

The Nation has an immediate crisis along the Southern border as evidenced by the recent declarations of emergency by the governors of those states. The Homeland Security Committee passed a border security bill to concerning these issues. On the way to our Committee, however, the legislation was made far worse and less effective by anti-immigrant provisions which have been hastily added to this legislation and have no bearing on security on the border.[1] This pursuit of short-term political gain will ultimately prove counter-productive, since the legislation will distract the Department of Homeland Security and divert it limited resources from the core mission of protecting this Nation against terrorism. Indeed, the bipartisan 9/11 Commission has not identified any of the excessive provisions that the Majority have included in this bill as necessary for homeland security. We recognize that Americans deserve real border security rather than the false sense of security offered by this bill. This is particularly true at a time when the present Administration is bringing but a handful of employer sanction cases per year. For all of the reasons set forth below in further detail, we respectfully dissent from H.R. 4437.

OVERVIEW

With this legislation, the Majority increases mandatory detention, expedited removal and criminal penalties for civil immigration violations for all aliens, including innocent undocumented children, who will now automatically be subject to being locked up behind bars without the right to see an immigration judge. Of the bill's most pernicious provisions, an alien's "unlawful presence" would become a federal felony punishable by over one year in jail time and an "aggravated felony" for immigration purposes which would permanently bar a person from securing lawful immigration status in the United States.

Ironically, or perhaps intentionally, the 11 million undocumented people in the United States would be excluded from a guest-worker program which President Bush and other Members of the Majority

[1] At the outset, we must object that Majority leadership provided Committee members with a copy of the 169-page bill only two days prior to the Committee hearing which necessarily limited both Republicans' and Democrats' ability to thoroughly review and debate the bill on its merits at the Committee hearing. Given the importance of the matters at hand, we believe that the Committee should have been given an opportunity for a full consideration and the opportunity to craft comprehensive legislation.

reportedly embrace. If history is any lesson, these get-tough policies have not proven effective in deterring violations under the Immigration and Nationality Act (INA). Over the last two decades, Congress has enacted 17 pieces of legislation to crack down on immigration violators. Instead, the undocumented population has swelled to a record level. There is a clear consensus within the mainstream American public that the INA needs to be fundamentally overhauled to recognize the reality of the American economy and American employer's real labor shortages and needs for foreign-born workers. Often compared to the Internal Revenue Service tax code given its arcane complexity, the INA is torturous for United States businesses, citizens and American families to navigate and secure status for employees and loved ones.

We also oppose the bill because it eviscerates due process protections fundamental to our legal system and the Constitution through the expanded use of expedited removal, limitations on judicial review and refugee protection. These provisions cannot be predicated on the belief that low-level bureaucrats are somehow infallible in their decision-making and thereby should not be subject to any further review of their decisions. This belief is fundamentally mistaken given the dismal track record of the Department of Homeland Security and the Executive Office for Immigration Review in administering justice in individual cases.

The lack of administrative and judicial review is particularly worrisome since even United States citizens and lawful permanent residents inevitably will become wrongfully ensnared by expedited removal and wrongfully deported to foreign countries by virtue of their ethnicity, appearance or not carrying and presenting their proper identification to border patrol agents. In virtually every other area of law, review of an administrative agency's decision is guaranteed. Instead of correcting the lack of justice in the underlying administrative system, the Majority instead seeks to immunize the system from any transparency, accountability and scrutiny.

Additionally, we believe that certain provisions in the bill are an insulting rebuke to the Supreme Court of the United States and the American public which trusts the Court to interpret the United States Constitution. One provision discussed below effectively reverses Supreme Court precedent prohibiting the Department's indefinite detention of aliens to now sanction the Department's indefinite detention of aliens. Another provision discussed below effectively reverses Supreme Court precedent protective of the due process rights of aliens when they accept pleas in state courts of law and are unapprised that their pleas will result in their removal by immigration authorities. Under this bill, corrective state court orders will be given no effect for immigration purposes despite Article IV to the United States Constitution which requires the Federal Government to give full, faith and credit to state court judgments.

In our opinion, the bill is so extreme that it is beyond repair. Instead of reforming our immigration system to improve border security and effectively and realistically address undocumented immigration, this legislation destroys the system and creates untenable expectations for the Department of Homeland Security to successfully enforce every provision of this misguided bill. The Department

of Homeland Security does not have and will never be appropriated the detention capacity necessary to detain and deport all aliens subject to mandatory detention and expedited removal, thereby undermining their ability or willingness to arrest as many aliens as possible. The Department of Justice further will not be appropriated the resources necessary to prosecute and incarcerate all 11 million undocumented aliens, their American families and employers. As written, the bill betrays real border security as well as the moral values, economic priorities and the promise of America.

I. JURISDICTIONAL CONSIDERATIONS PRECLUDED OUR REVIEW OF FOUR PROBLEMATICAL SECTIONS OF THIS BILL THAT ELEVATE POLITICAL MESSAGING OVER SERIOUS REFORM.

The provisions of Titles I, III, IV, and V of H.R. 4437 were originally Titles I, II, III, and IV, respectively, of the House Homeland Security Committee-reported version of H.R. 4312, the "Border Security and Terrorism Prevention Act of 2005." Unfortunately, Chairman Sensenbrenner announced at the beginning of the Judiciary Committee's markup of H.R. 4437 that most of these provisions were outside of the scope of the Judiciary Committee and that, accordingly, amendments to most of these provisions in the Judiciary Committee would be ruled nongermane. This precluded the Minority from offering amendments to improve these important provisions of the bill. We must still, however, express our concern about several aspects of these provisions.

First, we are disappointed by the timidity of the Homeland Security Committee-reported provisions in addressing our problems on the United States border with Mexico and Canada, as is embodied by these provisions. The four titles contain several important provisions that we support and several that we oppose. However, on the whole, they repeat a well-worn pattern that has emerged over the last five years, wherein the President declines to ask Congress for the resources necessary to secure our border, the Majority, declines to authorize specific amounts of funding for those resources, and the Majority fails to appropriate adequate resources for those purposes.

We note that the Minority on the House Committee on Homeland Security offered a substitute for H.R. 4312 that would have more effectively addressed our Nation's border security needs. We believe that amendment was worthy of support, and we are disappointed that the Committee rejected it on a party-line vote. We wish to associate ourselves with the dissenting views presented by our colleagues on the House Committee on Homeland Security in H. Rept. 109-317, part 1, which expressed their view that their Substitute to H.R. 4312 would have "better secure[d] the border by taking steps in three main areas insufficiently addressed in the base bill: (1) stronger planning and coordination; (2) more accountability for struggling efforts to screen travelers and speed up commerce and travel; and (3) genuine commitments to provide the resources, training, and incentives needed by the people working everyday to secure the border."

We associate ourselves, as well, with the dissenting views expressed by our colleagues on the Homeland Security Committee that:

"The Democratic substitute provides for stronger border security planning and coordination by requiring the development and implementation of a national border security strategy that includes specific information on the personnel, infrastructure, technology and other resources needed to secure the border, including surveillance equipment necessary to monitor the entire northern and southern borders. The substitute also strengthens planning and coordination by establishing an Office of Tribal Security to help the Department coordinate with tribes along the border who are overwhelmed by illegal border crossings. It also creates northern and southern border coordinators who can be held accountable for the security of the border in their respective geographic areas.

"The Democratic substitute strengthens accountability for programs designed to screen travelers and speed commerce and travel by requiring regular reports on Smart Border accords with Mexico; expanding expedited land border traveler programs by putting their enrollment systems in more locations and reducing fees, creating a North American travel card usable by certain low-risk American, Canadian, and Mexican travelers; creating a pilot of a system for prescreening of U.S.-bound passengers before they get on a plane; developing a new tool to replace the Department's antiquated method for checking names against terrorist databases; requiring on-site verification of the security measures taken by entities participating in the Customs-Trade Partnership Against Terrorism (C-TPAT) program and the Free and Secure Trade (FAST) program; and requiring annual reporting on the implementation of the "One Face at the Border" initiative.

"Finally, the Democratic substitute makes genuine commitments to provide the tools and authority needed to better secure the border . . ."

Second, we are disappointed that several provisions that had been adopted by the Committee on Homeland Security in H.R. 4312, as it was reported to the House of Representatives, were left out of H.R. 4437. These include:

- Section 302 of H.R. 4312, as reported by the Homeland Security Committee, which would have authorized funding to carry out section 5204 of the Intelligence Reform and Terrorism Prevention Act of 2004, directing the Secretary of Homeland Security to increase detention bed space by 8,000 beds per year during that time.
- An amendment by Ranking Democrat Bennie Thompson, agreed to during the House Committee on Homeland Security markup of H.R. 4312, that would have established within the Department of Homeland Security an Office of Tribal Security.

The failure of the Majority to include these provisions that were in H.R. 4312 in the version of H.R. 4437 is emblematic of a long-standing pattern that the Majority is more interested in protecting the priorities of the current Administration than in protecting our borders.

Third, we are concerned that several provisions contained in the four titles that were originally reported by the House Committee on Homeland Security are actually counterproductive and could be more harmful than helpful in helping to combat illegal immigration. Among these are:

A. Use of Homeland Security Grants for Immigration Enforcement.[2]

We are deeply concerned about section 305 for two reasons. First, it would permit states to divert their homeland security grant funds to pay for border security functions that would normally be carried out by federal agencies. While we share the concern that an increasing amount of local government funds in border states are having to be spent to deal with the consequences of illegal immigration, we do not support forcing states and local governments to forgo funding they need to meet their traditional law enforcement and first responder missions.

We note that the Administration already has cut the State Homeland Security Grant program, one of the grants affected by section 305, in half, from $1.1 billion in FY 2005 to $550 million in FY 2006. Spreading thin the remaining dollars in this program will only weaken state and local government first responder and homeland security preparedness. We note that the International Association of Fire Fighters opposed section 305 in a letter stating: "If money is needed for immigration enforcement, then Congress should provide funding to the appropriate programs. Diverting funds from fire departments is not the solution."

We also oppose the Majority's unrelenting push to force states to enforce civil immigration law. Many State and local law enforcement agencies around the country have expressed grave concerns about undertaking a role in enforcing civil immigration law, contending that it would undermine the relationships they need to have with their communities and make their communities less safe. We agree with their views on this question.

B. Mandatory Detention.[3]

Section 401 is an overreaction to a flawed Administration policy of "catch and release" of aliens who it should have detained. While detention of aliens who are a danger to the community, a national security risk, or are in danger of absconding is a vital part of any strategy to secure our borders, expanding mandatory detention indiscriminately on such a broad scale as would occur under section 401 would be more harmful than helpful. Rather than enact section 401 into law, the Administration should seek and Congress should provide additional detention resources, better guidance on deten-

[2] Section 305 of H.R. 4437 would permit States to use State Homeland Security Committee grants, Urban Area Security Initiative grants, or Law Enforcement Terrorism Prevention Program grant funds for preventing or responding to the unlawful entry of an alien or providing support to another entity relating to preventing such an entity.

[3] Section 401 of H.R. 4437 would require the mandatory detention of an alien "who is attempting to enter the United States illegally and who is apprehended at a United States port of entry or along the international land and maritime border of the United States" until he or she is removed from the United States or until a final decision has been rendered granting the alien admission to the United States. During an interim period between the date of enactment of the bill and one year after the date of enactment, the provision would permit such aliens to be released, but only if they pay a minimum $5,000 bond and meet certain other conditions.

tion, and a more rational policy on who is detained and who is released.

Section 401, adopts a one-size-fits-all attitude that fails to prioritize scare detention resources. Coming on top of the failure of the Majority to provide adequate detention resources, it is a prescription for continued disaster. We do not have the physical capacity—even with greatly increased numbers of beds and facilities—to hold all illegal entrants for months or years. The logical solution to this problem is to focus on expediting the judicial process for captured aliens and detaining those who are a threat to our communities or at risk of flight.[4]

C. Denial of Entry to Citizens of Countries that Deny Admission of U.S. Deportees.[5]

We have serious concerns about the impact this section could have on citizens from certain countries who will be completely unresponsive to the pressure on their citizens that this new requirement might exert. To address this problem, Representative Lofgren introduced an amendment during the House Committee on Homeland Security markup requiring the Secretary of Homeland Security to deny admission not to average citizens, but rather to government officials traveling to the United States on official government business. This amendment would put the pressure on the government officials causing the problem, rather than on innocent foreign nationals merely wanting to come to the U.S. for travel, trade and family visits. This amendment was found non-germane in the Homeland Security Committee, and the opening announcement by Chairman Sensenbrenner about his view of germaneness implied that any amendment to deal with this unfortunate section would have been ruled nongermane in the Judiciary Committee, as well.

D. Training Program on Credible Fear.[6]

We are concerned about the impact of this provision on those seeking asylum. Current law requires persons to be referred for a credible fear determination if they indicate a fear of persecution. We would hope that the Administration will not interpret this pro-

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[4] We note that Representative Lofgren, Representative Jackson Lee, and Representative Meek offered numerous amendments during the House Committee on Homeland Security markup of H.R. 4312 that would have enacted a more rational policy than that contained in section 401. Among them were amendments that would have sped the judicial process by requiring the Department to make a determination of whether an individual should be detained within seven days of arrest; put into place better controls to ensure that an alien released will appear at future proceedings; mandated a legal orientation program for aliens in removal proceedings to increase the efficiency and effectiveness of removal proceedings; and exempted vulnerable populations, such as the elderly, unaccompanied alien children, pregnant women, and the critically ill from the mandates of section 401. Unfortunately, these amendments were either defeated or ruled nongermane.

[5] Section 404 of H.R. 4437 would repeal current law, which *requires* the Secretary of State to deny visas to nationals of countries that deny or delay accepting their citizens, nationals, or residents whom the United States wishes to deport. It would insert in its place a provision that would *authorize* the Secretary of Homeland Security, after consultation with the Secretary of State, to deny the admission of nationals of countries that deny or delay accepting their citizens, nationals, or residents whom the United States wishes to deport.

[6] Section 406 of H.R. 4437 would require that, not later than six months after the date of enactment, the Secretary of Homeland Security review and evaluate the training provided Border Patrol agents and port of entry inspectors in the exercise of their duties with respect to referring aliens to asylum officers for credible fear determinations. The section would, further, require the Secretary to "take necessary and appropriate measures" to ensure consistency in their referrals of aliens to asylum officers for determinations of credible fear.

vision as a signal that there should be fewer referrals of aliens for credible fear determinations.

E. Expansion of Expedited Removal.[7]

We are deeply concerned by the implications of Section 501. Current law already gives the Administration flexibility to expand or contract expedited removal as it sees fit in order to fit circumstances that it confronts at any given time. Expanding expedited removal statutorily in this manner would permanently tie the Administration's hands and force it to use the procedure, even when it might deem it unwise, and when it believes that the use of expedited removal would pose more of a burden than it is worth.

Moreover, once amended by this section, expedited removal would give the Secretary the power to remove from the country, without hearing, any immigrant thought to be illegally in the United States caught within 100 miles of the border and within 2 weeks of the person crossing into the United States. Imposing expedited removal on all aliens apprehended at or between all land borders and within 100 miles of that border will apply expedited removal to thousands of people who are currently subject to regular immigration proceedings. Suddenly, thousands of people will go from having rights to appeal removal orders, rights of release from detention by immigration judges, and other due process rights in regular immigration proceedings to no appeal option and no opportunity for counsel. The only proceeding these individuals will receive is an on-the-spot decision by a Border Patrol Agent as to whether they should be removed. Furthermore, these individuals will face 5-year bars on reentering, all based on a very quick decision by a Border Patrol agent.

We also feel strongly that the rule of law must be paramount in our practices, and expedited removal should be a method of last resort. It is far more preferable to hold a hearing to ascertain the status and intentions of a detained alien than to remove the person without trial for two reasons. First, security may be threatened by expedited removal as it may lead to the removal of an alien who, if detained for a longer period or subjected to a judicial hearing, may be discovered to be a terrorist. Second, removing individuals without at least some sort of hearing undermines the perception that the United States is a Nation that believes in a fair judicial process governed by the rule of law. At a time when we are engaged in a War on Terror where our respect for fairness and the law is one of the most important principles we can export abroad, we should not take steps to eliminate these principles in our immigration enforcement process—even for those caught here illegally.

[7] Section 501 of H.R. 4437 would make the use of expedited removal mandatory against aliens suspected of having entered the United States without inspection who are neither Mexican nor Canadian, who are apprehended within 100 miles of the U.S. international border, and have been in the United States for 14 days or fewer.

II. H.R. 4437 WILL FUTHER EXPAND THE MANDATORY DEPORTATION PROVISIONS IN CURRENT LAW TO INCLUDE CATEGORIES OF MINOR OFFENSES FOR WHICH NO EXTENUATING CIRCUMSTANCES MAY BE CONSIDERED.

Instead of enacting long-needed reforms of the Nation's deportation laws to give immigrants facing deportation a chance to show why their deportation would be unfair and contrary to the Nation's interests, H.R. 4437 increases the unfairness and harshness of the current immigration laws relating to non-citizens accused of past violations of the law. We are aware of the serious immigration consequences of a conviction for an aggravated felony are: mandatory detention and deportation, as well as permanent bars to immigration relief and future legal entry. Taken together, we are deeply concerned that Sections 203 and 201 of H.R. 4437 make criminals of the 11 million individuals living in this country without legal status, including 1.6 million children.[8] The overwhelming majority of these people are not here to commit crimes, but rather to work and provide for their families. Turning them all into felons with the stroke of a pen is counterproductive.[9]

Significantly, Sections 201 and 203 would also criminalize millions of *legal* non-immigrants and immigrants, including lawful permanent residents and non-immigrants who accrue technical violations of immigration regulations. Section 203 makes being "present in the United States in violation of the immigration laws or the regulations prescribed thereunder" a federal crime punishable by a prison sentence of one year and one day. But such violations would include lawful permanent residents who fail to report a change of address to the Department of Homeland Security (DHS) within ten days, as well as university students on an F-1 visa who drop below a full course load or H-1B workers who lose their jobs and take too long to find another job. Section 201 would make such "crimes" an "aggravated felony," subject to mandatory detention and virtually no relief from deportation."

We consider it ironic that many of the lead authors of H.R. 4437 recently announced their support for a temporary worker program.[10] Their legislation here, however, will make undocumented immigrants who are convicted of the new crime of unlawful presence ineligible for any type of temporary program, legalization, or

[8] Section 203 of H.R. 4437 modifies section 275 of the Immigration and Nationality Act to make "unlawful presence" in the United States a misdemeanor. Section 201 makes a conviction for this new crime an "aggravated felony" for immigration purposes.

[9] Making criminals out of undocumented people makes them vulnerable to state and local police arrest. The inclusion of section 203 in this legislation is a sly attempt by the bill's authors to enact the CLEAR Act (H.R. 3137) without calling it such. We reject the bills' premise that all undocumented immigrants are criminals that should be rounded up by state and local police agents. State and local law enforcement have many more serious concerns on their hands, including protecting our communities from violent criminals and keeping our streets safe. If this provision passes as part of H.R. 4437, undocumented immigrants and their families will no longer know whether contacting the local police will be a help or a hurt. In addition, police officers attempting to implement this provision will no doubt use dubious strategies to determine who to question and detain. Racial profiling is an inevitable outcome, as police will focus greater scrutiny on people who look or sound "foreign." Such a policy would most certainly lead to civil rights violations and expensive lawsuits when police question and detain legal residents and citizens who happen to be of Latin American, Asian, or other descent.

[10] President Bush has also indicated that he envisions such a program to facilitate legal immigration based on employment to reduce undocumented migration. He would extend this program to the current 7 million undocumented workers making up 5% of the Nation's labor force, in addition to future workers.

future immigration status. The question we raised during Committee consideration of H.R. 4437 remains—does the Majority wish to find a solution for the 11 million undocumented immigrants living among us? If so, can they agree on what it is? Is it making them all criminals and organizing mass deportations, or is it a registration and vetting process along the lines proposed in H.R. 2330 by Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ), and Luis Gutierrez (D-IL) ? We support earned legalization, not criminalization and mass deportation.

III. OVERBROAD SMUGGLING PROVISIONS IN SECTION 202 COULD SEVERELY PENALIZE INNOCENT ACTS

This section goes well beyond the traditional scope of alien smuggling and has the great potential to implicate many Americans under the broadened definition of smuggling.[11] We believe that the "assists, encourages, directs, or induces" standard is so broad that the Government could prosecute almost any American who has regular contact with undocumented immigrants.

With 11 million undocumented immigrants currently residing and working in the this country, millions of American have direct and casual contact with undocumented immigrants. For example, a church group that provides food aid, shelter, or other assistance to members of its community could be penalized for "assisting or encouraging." The aid worker who finds an illegal entrant suffering from dehydration in the desert and drives that person to a hospital could be penalized for "transporting." Even driving an undocumented worker to work could be interpreted to "aid or further in any manner the person's illegal presence in the U.S." And any U.S. citizen living with an undocumented spouse could be considered to be "assisting or encouraging" a spouse's presence.

Certainly alien smuggling and trafficking for profit are activities that need to be sanctioned, and existing law already provides for harsh penalties. However, H.R. 4437 goes far beyond increasing penalties for these heinous activities and jeopardizes the well-being of millions of Americans—neighbors, family members, faith institutions, and others—who live and work with undocumented immigrants.

IV. TITLE VI OF H.R. 4437 WOULD BAR A GRANT OF LAWFUL RESIDENT STATUS TO MILLIONS OF IMMIGRANTS CURRENTLY WORKING IN THE U.S., INCLUDING MANY IMMIGRANTS WITH U.S. CITIZEN SPOUSES OR CHILDREN OR FLEEING PERSECUTION ABROAD.

The Federal Government has an obligation to protect the freedoms enshrined in the Constitution at the same time we protect the security of our borders. America's democratic principles of fair-

[11] Section 202 amends Section 274 of the INA in a manner that greatly expands the scope of criminal smuggling, harboring, and transporting aliens to "whoever assists, encourages, directs, or induces a person to come to or enter the U.S., or to attempt to come to or enter the U.S., knowing or in reckless disregard of the fact that such person is an alien who lacks authority to come to or enter the United States." H.R. 4437 also goes beyond the current language of Section 274 to include "whoever assists, encourages, directs, or induces a person to reside in or remain in the United States, or to attempt to reside in or remain in the United States" H.R. 4437 further expands the transporting provisions as well to include the clause "where the transportation or movement will aid or further in any manner the person's illegal entry into or illegal presence in the United States."

ness are essential to our way of life. We must, therefore, oppose many provisions in Title VI because they undermine these principles. Instead of getting tough on dangerous individuals and terrorists as the disingenuous titles of the sections imply, provisions in Title VI targets those hardworking families who want to be part of American society and refugees who fled persecution for hope and opportunity in America.

We believe that Section 601 has the potential to deny individuals who face death, torture or abuse in their home countries from obtaining relief under withholding of removal. This is inconsistent with America's obligations under international law and the plain meaning of the Immigration and Nationality Act.[12]

We are also alarmed by the sweeping nature of Section 602, disingenuously titled as "Detention of Dangerous Aliens" because it expands the Government's authority to jail people for an infinite period of time. Two recent Supreme Court decisions expressly found that the Government cannot indefinitely detain of individuals who have final removal orders, but cannot be returned to their home country, due to no fault of their own. The question raised in these cases, and by this section, is a simple one: is it lawful for an executive branch employee, essentially the warden in these cases, to give a person a life sentence merely because the Government is unable to remove the person? The answer was a resounding no.[13]

A statute permitting indefinite detention would raise serious constitutional questions. Freedom from imprisonment lies at the heart of the liberty protected by the Due Process Clause." This bill's attempt to exclude "inadmissible" aliens entirely from a review process contradicts *Clark v. Martinez,* which extended the protections outlined in *Zadvydas* to "inadmissible aliens" from Cuba whose deportation was not "foreseeable." The Court held, "Even if the statutory purpose and constitutional concerns influencing the *Zadvydas* construction are not present for inadmissible aliens, that cannot justify giving the same statutory text a different meaning depending on the characteristics of the aliens involved."[14] Even asylum seekers and individuals with no criminal convictions have been, and could be, subject to indefinite detention under this section.[15] Similarly, we are concerned about the fact that the removal period can be "tolled" for immigrants who are transferred to another Federal, state or local agency—his appears to be a stalling tactic to

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[12] Withholding of removal is a form of protection given to immigrants whose life or freedom would be threatened because of the alien's race, religion, nationality, membership in a social group, or political opinion. Similarly, immigrants who would face torture in their home countries can apply for withholding of removal protection through the Convention Against Torture. The applicant for withholding must show a *clear probability* of persecution or that it is *more likely than not* that her or she would be persecuted if removed to his home country. Unlike asylum, withholding of removal is "mandatory," which means that a judge is required to grant relief to individuals who meet the statutory requirements.

[13] In *Zadvydas v. Davis,* et al., 121 S. Ct. 2491 (June 28, 2001) the Court found, "The post-removal-period detention statute, read in light of the Constitution's demands, implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States, and does not permit indefinite detention.

[14] *Clark v. Martinez,* 125 S.Ct. 716 (Jan 12, 2005), the Court held that the prohibition in *Zadvydas* against indefinite detention of removable aliens also applied to inadmissible aliens given canons of statutory construction requiring that the removal statute be construed consistently for both classes.

[15] For example, an individual who arrives from China, fails to attend a removal proceeding because he never got notice of the hearing and thus has a final order of removal, could be become a "lifer" and detained indefinitely if his home country is unwilling to issue travel documents.

prevent individuals from having their detentions reviewed in the statutory allotted 90 days.

We also oppose Section 603 because it increases penalties and sets mandatory minimum sentence with respect to aliens who fail to depart when ordered removed or obstruct their removal, or who fail to comply with the terms of release while under supervision. The premise underlying this section is that tough mandatory minimum sentences will solve the problems associated with removal. We believe, however, that current law already contains sufficient penalties for individuals who fail to depart or comply with the terms of their release. Moreover, empirical evidence does not support this premise. The Judicial Conference of the United States and the U.S. Sentencing Commission have found that mandatory minimums distort the sentencing process and have the "opposite of their intended effect."[16] Mandatory minimums "destroy honesty in sentencing by encouraging charge and fact plea bargains."

Further, mandatory minimums result in unwarranted sentencing disparity. That is, "mandatory minimums . . . treat dissimilar offenders in a similar manner, although those offenders can be quite different with respect to the seriousness of their conduct or their danger to society . . ." and . . . "require the sentencing court to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment."[17] The Majority has failed to demonstrate any rationale purpose for mandatory sentences in this legislation—only an unwanted increase in detention time, space and money. Finally, we do not believe the punishment fits the crime when the Government is forced to detain someone for offenses without looking at the individual circumstances of the person's case.

Section 604 creates a new ground of inadmissibility for individuals who are in violation of fraud related offenses connected with Social Security cards and other identification documents. We are particularly disturbed by the fact that Section 604 strips the right to waivers to inadmissibility for certain individuals. This section will harshly penalize newcomers who are not criminals and come to the United States to contribute to the US work force. Because there are not legal channels for most of these necessary workers to enter the country or obtain work permits, many rely on false documents to contribute to our economy and feed their families.

This section inappropriately removes the discretion of officers and judges to weigh favorable equities and individual circumstances when determining whether a bar to admission should be "waived" for humanitarian or related reasons. Under this section, individuals can be forever barred from this country for this conduct that occurred 20 years ago, regardless of their potential to be an outstanding member of society. Countless individuals would be denied admission without regard to family and employment ties, and other discretionary factors. Barring such waivers is an insult to judges whose exercise of discretion is fundamental to their role.

We must also take issue Sections 605 and 606 due to the wide and retroactive net cast by these aggravated felony provisions. As

[16] See U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).
[17] *Id.*

we noted above, the aggravated felony provisions of this bill border on the ridiculous by including a wide net of minor offenses, including ones that are misdemeanors and not violent or aggravated. It is unreasonably harsh to attach a bar to adjustment for some individuals who fall under these provisions, when discretion in the review process can produce a more just and reasonable outcome.

Similarly, we take issue with Section 608 because it creates new grounds of inadmissibility and deportability for people who may have not have engaged in any wrongdoing at all.[18] We believe it may be unconstitutional to create a "guilt by association" regime whereby individuals who have never actually engaged in gang related activities but who are merely associated with them can be found deportable or inadmissible.[19] Further, we believe the designation scheme is likely unconstitutional because it provides no notice to the group or association being designated. Lastly, we believe the bars to asylum and TPS undermine our obligations to protect people who are victims of persecution or torture.

As a general matter, we are disturbed by attempts in this bill to slow down and limit the naturalization process.[20] In combination, Sections 609 and 612 represent an unprecedented attack on lawful permanent residents who are applying for naturalization. Section 609 unreasonably extends the time DHS has to adjudicate naturalizations applications from 120 days to 180 days and limits the ability of an individual seek relief from District Courts if the DHS fails to make a timely decision a naturalization application. The bill removes the ability of the District Court to adjudicate delayed applications and instead only allows the court the ability to review the cause for the delay and remand the case back to DHS where there is no guarantee of prompt processing. Given President Bush's repeated pledge to speed up DHS application process, it is unjustifiable to award DHS additional time to complete naturalization applications and then further penalize the individual whose applica-

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[18] Section 608 applies to individuals who are 1) members of a criminal street gang and has committed, conspired or threatened to commit or seeks to enter the United States to engage solely, principally, or incidentally in, a gang crime or any other unlawful activity or 2) is a member of a criminal street gang as designated by the Attorney General. The bill sets up a designation process whereby the Attorney General can without notice designate a group or association as a "gang." This proposal is based on the "Alien Gang Removal Act of 2005," H.R. 2933.

[19] We echo the remarks by Georgetown University Law Center Professor David Cole: "It is already a deportable offense for a gang member, or indeed any other foreign national who is convicted of an aggravated felony, a very broad term that as this Committee no doubt knows, includes misdemeanors, misdemeanors, includes shoplifting crimes and the like. What this bill does is make people deportable who have never committed a crime in their life, who are not suspected of committing a crime, who are merely deemed by the Department of Homeland Security to be a member of a group which is deemed by the Attorney General to be a bad group. Bad groups have bad people in them. They also have good people in them. This bill makes no distinction between the two. It deports anyone who is found to be a member of any group which has been blacklisted by the Attorney General. That's guilt by association. If you took the McCarthy era laws that this Congress repealed in 1990, and you just substitute "criminal street gang" for "communist," that's what this bill would be. It essentially takes that approach where we punished people not for their own individual culpable conduct, but for their association with groups that we didn't like, and rendered them deportable. That's what this bill does, and it violates the first amendment right of association, and violates the fifth amendment right of an individual to be treated as an individual and not treated as culpable based on your associations." *http://judiciary.house.gov/media/pdfs/printers/109th/22187.pdf*

[20] In addition to the constitutional issues raised by retroactive application of the provisions of Section 6, we are also concerned that section 610 may be unconstitutional because it expands the ability for DHS (a non-neutral agency) to summarily deport a broad class of immigrants without judicial or administrative review. See also Section 613, modifying the already problematic definition of conviction to include any reversal, expungement, or modification of a conviction record.

tion is not adjudicated in a timely manner by denying him the ability to seek relief in court.[21]

Section 612 similarly limits the naturalization process by making it more difficult to achieve a finding of good moral character.[22] We believe that current standards, allowing the Government to determine good moral character based on conduct outside the five year time period provides sufficient flexibility and has more meaning because of the five year limitation. Under this section, such flexibility is subject to more abuse because it is coupled with language that allows an aggravated felony conviction at any time to be a bar on good moral character, sending the impression that dated offenses and acts can fit this definition.[23]

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[21] See also, remarks from Robert Gibbs, "This approach is particularly troubling given our experience here in Seattle, where we won a state-wide class action settlement with CIS agreeing that they had been making GMC determinations incorrectly for the past several years, causing at least 500 bad denials. Our experience demonstrates the need for judicial review." See, *Lee v. Gonzalez.*

609 limits scope of judicial review of denial to whether the DHS denial was supported by a "facially legitimate and bona fide reasons" as opposed to the current de novo review. **BIEA** 609(c) also precludes adjudication of a natz application if ICE commences removal proceedings, so even if you get to court on a denial, they can shut down your court case by filing an NTA.

609: Besides the improper denials, there is a huge problem with delayed adjudications. There are 900 citizenship cases in this district that are held up beyond normal processing times because the FBI is overwhelmed with background check requests. There are many thousands more nationally. There is nothing negative on the applicants, just an inability of FBI to complete the searches that they want to do. We have numerous of these cases, some waiting over three years after their interview, where they passed all the history and English tests. Many are Iraqi refugees from Gulf War I, who escaped Saddam Hussein's prisons and who cleared CIS background checks when they entered and then when they got permanent resident status. Some have been offered jobs by the US Army to go back to Iraq and interpret for our troops, but they cannot get hired because their citizenship application is stuck, and CIS can give no explanation of the problem.

Under the current law, 8 USC 1447(b), if the citizenship interview has happened, and 120 days have passed without a decision, the applicant can ask a federal court judge to decide your case, who can grant the application, or send it back to CIS for further action. [Prior to 1990, the statute provided that the courts would decide naturalization applications, after you applied to INS for a recommendation. In 1990, Congress decided to make it more administrative, and shifted to INS the power to decide the application as an initial matter, but left an option to go to court for a decision if INS did not do so in 120 days after interview].

BIEA 609 would effectively eliminate the right under 8 USC 1447(b) to get a decision in delayed citizenship cases. While it appears to just shift the wait time from 120 to 180 days, in reality the clock would never start, as BIEA 609 also allows the DHS to define by regulation an "interview" or "examination" to be continuing. This is a tack they tried successfully in a court in Virginia with a pro se petitioner, but other courts have rejected this as vitiating the 120 day rule completely. As if this were not enough, even if the case gets to court, the only power the court s is to send it back to CIS.

[22] Applicants for certain immigration benefits, including naturalization and cancellation of removal must demonstrate "good moral character". When a person attempts to show good moral character for naturalize, s/he must generally show "good moral character" for the past five years. This section would extend that review period from five years to indefinitely for aggravated felonies, regardless of whether the crime was classified as an aggravated felony at the time of conviction. The bill also adds a clause that Government "shall not be limited to the applicant's conduct during the period for which good moral character is required, but may take into considerations as a basis determination the applicant's conduct and acts at any time."

[23] Notes from Robert Gibbs: BIEA 612 would give CIS even more power to make incorrect good moral character decisions in a couple of ways. First, the bill effectively increases the good moral character eligibility requirement from five years to lifetime. § 609(a)(3). It tries to overturn a recent en banc 9th Cir decision in Hovsepian, 422 F.3d 883 (9th Cir 2005) which held that since citizenship required good moral character for only the past five years, if the applicant showed he met that requirement, the CIS could not deny based on an offense prior to the five year period. This is a recipe for more delays, endless investigations into errors in the distant past. As the Ninth Circuit stated in Hovsepian, "To hold otherwise would sanction a denial of citizenship where the applicant's misconduct . . . was many years in the past, and where a former bad record has been followed by many years of exemplary conduct with every evidence of reformation and subsequent good moral character. Such a conclusion would require a holding that Congress had enacted a legislative doctrine of predestination and eternal damnation, whereas the statutes contemplate rehabilitation." Hovsepian, *supra.*

V. THE PROPOSED EMPLOYMENT VERIFICATION SYSTEM ENACTS AN UNWORKABLE, COSTLY GOVERNMENT PERMISSION-TO-WORK SYSTEM THAT WILL NOT RESOLVE THE FLOW OF UNDOCUMENTED WORKERS INTO AMERICAN SEEKING WORK

Title VII of H.R. 4437 creates a new Government program, the Employment Eligibility Verification System (EEVS) by vastly expanding the existing Basic Pilot Verification System and requiring, for the first time, all employers to seek Government consent to retain each and every worker they employ. We do not believe that the Majority has thought through costs and legal implication of the implementation of such a system, making its implementation unwise without further investigation.

At base, this country simply cannot afford to enact the proposed system. Building the type of electronic, employment verification system envisioned by this bill that will not delay employers and employees unduly will cost at least $11.7 billion per year according to the GAO, and that cost will be born mostly by employers.[24] Further, enacting the system will mandate the construction of a national ID system, whereby the Federal Government will collect and store in Government databases every American's most-sensitive, personally-identifiable information. Recent GAO reports estimate that requiring the issuance of a hardened Social Security Card like the one necessary for this program to all Americans and lawful permanent residents will cost at least $4 billion.

The challenge of implementing the massive new system envisioned by the Majority would be daunting at best: screening the approximately 54 million new hires per year and 146 million person workforce. However, there is no guarantee that the system will ever work due to the technological hurdles. The difficulties posed by the proposed system are well-documented by the current Basic Pilot. For example, the entire system would be based on databases that are known to contain an unacceptable number of errors and that would therefore likely yield millions of false determinations.[25] Workers with erroneous information would face layoffs and would be unable to work for any lawful business for the weeks or months it would take for Government agencies to resolve the problem. Lawful employees should not have to fight the Government just to keep working. Businesses should not lose experienced employees while Government data glitches are resolved.

The difficultlies mount for employment-authorized non-citizens. The records of employment-authorized non-citizens are even more inaccurate than those of citizens, so employers would be required to spend much more time and money to resolve their problems. SSA's databases only automatically verify the status of less than 50% of work-authorized non-citizens.[26] The SSA automated ap-

[24] The GAO cited a study by the Temple University Institute for Survey Research and stated that a "mandatory dial-up version of the pilot program for all employers would cost the Federal Government, employers, and employees about $11.7 billion total per year, *with employers bearing most of the costs*." GAO Report at 29 (emphasis added).

[25] As an example of DHS's current incapacity to manage its databases, just last month DHS Citizenship and Immigration Services (CIS) sent out letters recalling more than 60,000 green cards because a computer glitch miscalculated immigrants' residency start dates. Many of those letters were incorrect and CIS has announced it will send out new letters advising all individuals who received the initial letter in error, informing them that their green card was correct and that there was no need to return it.

[26] USCIS, *Report to Congress on the Basic Pilot Program* (Washington, DC 2004)

proval failure rate is more than 50 times higher for work-authorized non-citizens than for citizens.[27] The work-authorized non-citizens whose status cannot be confirmed by SSA must be referred to CIS for confirmation. Of these, CIS has to verify about 17% manually—a step which substantially delays eligibility confirmation.[28] The EEVS also requires employers to collect more data from non-citizens than for others.

Because of this added average expense and burden for non-citizens, we are concerned that employers, recruiters, or referrers are likely to shy away from employing or assisting anyone who looks or sounds foreign. Even worse, the burdensome new system would likely be the last straw for many of these businesses, potentially sending hundreds of thousands of them into the cash economy, completely out of the bounds of Government oversight and regulations. Ironically, this would likely increase undocumented immigration by creating a hidden new employment channel. This potential for exploitation and discrimination would be particularly acute for referrers and recruiters, who are required to verify employment eligibility *before* taking action.

The employer sanction system has frequently been abused by bad-apple employers who want to intimidate workers who complain about job conditions or exercise their workplace rights. Title VII exacerbates this problem by allowing employers to voluntarily and selectively reverify current workers starting two years after enactment so long as they cannot be shown to have done so on a discriminatory basis.

H.R. 4437 includes no procedures, funds or safeguards for correcting or updating inaccurate records, other than the simple requirement that it be done. Based on the error rate in the current pilot program, we could conservatively expect at least 3 million initial false negatives (a determination that the worker was not employment eligible) among the current workforce, many of which would require weeks or months to correct during which time it would be illegal to hire the worker. As a practical matter, we believe that records should be updated *before* the system goes into effect, for example, by setting accuracy standards as triggers before it becomes mandatory. This bill does not do that. In fact, it would severely limit legal recourse by workers who suffer injuries due to systematic agency errors. Under the bill, each wronged worker would be limited to individual claims for compensation under the Federal Tort Claims Act.

Of additional concern are the privacy implications raised by such a system. To be capable of confirming work-eligibility these databases will contain *substantial* amounts of personally identifiable information regarding *every* citizen and *every* visa holder. The information needed will include name, age, Social Security Number and/or another unique identifier, citizenship status, period of work-eligibility for non-citizens, address (to stamp out ID fraud), and a list of the queries from employers, their locations and the dates of those inquiries. Further, to resolve data errors, reduce identity fraud and distinguish between people with common names, addi-

[27] *Ibid.*
[28] *Ibid.*

tional information distinguishing individuals with the same names may be required, which likely necessitates the inclusion in the database of a date of birth and, perhaps, other biometric or personally identifiable information for every person residing in the United States.

Thus, the database to support such a system will, for the first time, list every citizen and every visa holder residing in the United States, and, by necessity those who are non-eligible, but lawfully residing in this country. And, it will track their employment history. This is the very essence of a National ID system. The establishment of such a system is an anathema to rights to privacy under the Fourth Amendment to the United States Constitution.[29] One searches in vain in Title VII for provisions that could potentially mitigate these serious concerns—such as adequate privacy and civil rights safeguards, or protections or recourse for persons who suffer termination due to agency error.

Finally, we are again concerned that this proposal is not accompanied by comprehensive immigration reform, which would provide channels for immigrants to live and work in the U.S. legally. Implementation of an employment verification system without such reform would invite severe unintended consequences such as expansion of the underground economy and increased identity theft, fraud, bribery and corruption.

VI. SECTION 8 OF THE BILL WOULD STRIP FEDERAL COURTS OF JURISDICTION OVER IMMIGRATION CASES AND COMPOUND THE INJUSTICES ALREADY PRESENT IN THE CURRENT SYSTEM

Legal immigrants face the risk of mandatory detention and automatic deportation for run-ins with the law that are considered minor in the case of U.S. citizens, and are subjected to judicial proceedings in which speed is valued far more than accuracy or fairness. Evidence of the abysmal treatment that legal immigrants often face in the judicial system can be found in the scathing criticisms emanating even from conservative federal courts as they consider appeals of the decisions handed down by immigration courts.[30] Phrases like "ignored the evidence," "riven with error," "astounding lapse in logic," and "woefully inadequate" have begun to pepper a growing number of these critiques by Federal courts. The Majority's solution to these injustices is to strip Federal courts of their already limited ability to identify and rectify mistakes made by immigration judges.

Section 802 seeks to restrict judicial review of a decision by DHS to revoke an individual's visa.[31] The Majority argues that consular

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[29] Further, the database itself will be a threat to privacy because it will be a prime target of identity thieves. Such an enormous database will be impossible to secure, thus any undocumented immigrant seeking work will be able to pay hackers to steal work-eligible Americans identities. The most obvious targets will be those who are work-eligible but who do not work. Moreover, as current events have indicated, data breaches and spills are inevitable. Thus, we should anticipate significant losses of millions of Americans most sensitive information.

[30] The 7th Circuit court of appeals recently noted that it had to reverse 40% of these BIA orders in the past year—a vastly higher percentage than in other cases where the U.S. Government was the appellee (in those cases the reversal rate was 18%).

[31] This section would amend INA § 221(i) to eliminate judicial review over claims or challenges arising from the revocation of a visa after the holder of the visa has entered the U.S., thereby removing any judicial oversight over consular decisions. (As background, the House, in last year's Intelligence Reform Bill made visa revocation a ground of removal, but in conference the Senate added a clause allowing aliens facing removal to seek judicial review of their visa revoca-

decisions are non-reviewable, so revocations should likewise be non-reviewable. That argument misses the mark. To revoke someone's visa after they have traveled to the United States and acted in reliance on the validity of that issuance (e.g. moving to the U.S. and beginning employment) is very different from denying someone authority to enter the country from the outset. We believe that basic principles of fairness militate in favor of providing an opportunity to challenge the Government's arbitrary reversal of significant decision upon which an individual justifiably relied.

Section 803 attempts to negate 9th Circuit precedent that prohibits reinstatement of removal without a hearing. It would amend INA § 241(a)(5) to state that reinstatement shall not require proceedings before an immigration judge under INA section 240 or otherwise. Section 803 also would amend INA § 242 to restrict any judicial review on the issue of reinstatement to the United States Court of Appeals for the District of Columbia Circuit and would only allow a challenge to the constitutionality of the law or regulations.

Section 804 is another assault on those who fear persecution. "Withholding of removal" is a form of protection that, while similar to asylum, differs in two important respects: (1) it is nondiscretionary and (2) to receive this benefit, the alien must meet a higher standard of proof than asylum. In the REAL ID Act, Congress amended the asylum motivation standard to require an asylum applicant to show that one of the five protected characteristics would be "at least one central reason" for harm in order to receive asylum. Section 804 would import the REAL ID Act's "one central reason" requirement into the withholding statute by amending INA § 241(b)(3) to preclude a grant of withholding of removal unless the alien can establish that his or her life or freedom would be threatened in the country in question, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least one *central reason* for such threat. The provision would be effective retroactive to the date of the REAL ID Act's passage into law (May 11, 2005).

We remain concerned about this standard because it could mean that a woman who is raped because she is a woman and because she is of a minority religion could apply for withholding of removal only if she could prove that the persecution based on religion was a central reason, but not if it was only one non-central reason while the main reason was due to her sex. Sex is not one of the protected categories. Proving this "central reason" is often difficult in these situations considering the many mixed motives for rape of minority women.

Section 805 would severely weaken the right to federal court review of erroneous Board of Immigration Review opinions. Specifically, section 805 would amend INA § 242(b)(3) to implement a process whereby an alien's petition for review would be assigned to a single court of appeals judge upon the filing of the alien's brief. If the judge issues a "certificate of reviewability," the case would proceed through the normal appellate process. Such certificate,

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tions.) This section would gut the Senate's attempt to inject a measure of due process into the revocation process.

however, would issue only if the alien had "made a substantial showing that the petition for review is likely to be granted." If the alien fails to make such a showing, the single judge would deny the petition for review and that decision would be unreviewable. In addition, if the judge fails to issue such a certificate within 60 days (with certain limited extensions available), the petition for review would be deemed denied. If no certificate of reviewability is issued, any stay of removal would dissolve automatically, the Government would not be required to file its brief, and the petitioner could be removed without further recourse.

We strongly object to this proposal. Only months after the Majority revamped the statute as part of REAL ID, insisting that the circuit courts were the appropriate place for judicial review, the bill now seeks to restrict and virtually eliminate it altogether. In essence, section 805 unnecessarily initiates an unprecedented certiorari process for Article III court appeals, at a time when the circuit courts have become increasingly critical of the quality of agency decision making.

The number of cases being reversed and remanded, and the percentages cited by the courts themselves, indicates that petitions for review being filed today are far from "meritless," as the Majority contends. Although circuit courts have experienced an increase in volume of immigration cases (resulting in large part from irresponsible streamlining regulations issued by the Department of Justice), they also have initiated measures to address the caseflow that are far less drastic than those the bill would impose. Given the significant role being played by the judiciary in insuring that removal decisions comport with due process, we believe the degree of interference that the bill requires would undermine the court's role in ensuring fairness and providing needed oversight. There are far better mechanisms than those the bill proposes, which are already in place and working, to address the wave of immigration appeals in a way that balances the interests of all concerned.[32]

Congress has contemplated "court stripping" legislation numerous times including around the issue of desegregation that occurred in the 1960s at the height of the modern civil rights era. Those proposals were seen for what they were—an attack on judges who enforce the Constitution and protect the rights of individuals—and were defeated. Likewise opponents of women's right to reproductive choice and to separation of church and state have tried to strip the courts of their jurisdiction over abortion and school prayer cases. In each instance, civil rights, civil liberties and women's right communities mobilized against the proposed laws, educating the public that taking away the court's power to enforce rights is tantamount to taking away the rights themselves. When the targets are the most vulnerable in our society: immigrants, prisoners and the poor, there is less public awareness or opposition but all the greater need to defend these constitutional protections of fairness.

Section 806 would prohibit the issuance of a non-immigrant visa unless the applicant first waives his or her right to any review or appeal of an immigration officer's decision at the port of entry as

[32] For example, the 2nd Circuit has established a mediation program for blocks of cases where appropriate. Other courts such as the 3rd Circuit have established pro bono referral programs to ensure competent representation of aliens in their petitions for review.

to the alien's admissibility, as well as his or her right to contest, other than on the basis of an application for asylum, any action for removal of the alien. In the Majority's explanation of the bill, they analogize this required waiver of due process rights to the existing requirement under the Visa Waiver Program.

This analogy is disingenuous at best, as the class of individuals affected under this amendment would include H-1B and L-1 visa holders, students, exchange visitors, journalists, diplomats, treaty traders, fiancés, spouses of United States citizens entering on K visas, athletes, entertainers, certain aliens with extraordinary ability, cultural exchange visitors, religious workers, witnesses, and victims of trafficking. We maintain that the entry of these individuals is not analogous to that of tourists who, in exchange for being admitted visa-free for a period of 90 days, agree to waive their right to a removal hearing.

VII. H.R. 4437 VIOLATES U.S. OBLIGATIONS TO ASYLUM SEEKERS AND REFUGEES UNDER INTERNATIONAL LAW

People seeking asylum in the United States from persecution in their home countries would be particularly affected by this legislation. Asylum seekers detained upon arrival in the United States are already subject to being treated like criminals and detained under jail-like conditions for indeterminate periods of time. This bill would increase the prolonged detention of this vulnerable population, would redefine asylum seekers who were simply here out of status as felons under the law, and would subject an overwhelming proportion of asylum seekers inside the United States to removal without a hearing.

For those whose cases were decided through the immigration court process, the bill would aim to diminish their access to judicial review, by subjecting their cases to summary dismissal if a single judge of the court of appeals failed to issue them a "certificate of reviewability" within a 60 day time limit. Finally, by attempting to undo the Supreme Court's rulings prohibiting the indefinite detention of non-citizens who cannot be removed from the United States, the bill would allow asylum seekers and refugees who were ordered removed but could not be returned to their countries—a situation which historically has applied to persons who fled countries ranging from Cambodia to Vietnam to Cuba—to be jailed indefinitely, subject to very limited administrative and still more limited judicial review.

Section 203 of the bill would make it a crime to be in the U.S. in violation of immigration laws. The radical nature of this change to our immigration laws, as applied to non-citizens generally, has been noted earlier. As applied to asylum seekers, it would also violate U.S. obligations under Article 31 of the Refugee Convention, which prohibits the penalization of asylum seekers for the irregular manner of their entry into or presence in the territory of their country of refuge. The bill contains no exception for asylum seekers. Nor does it contain an exception for other vulnerable populations: victims of trafficking, children, young people whose lack of status in the U.S. is due to their having been brought here at a young age by their parents, battered women, and others whose ir-

regular presence in the United States is due to forces beyond their control including war or natural disaster in their home countries.[33]

Other sections of the bill that aim to subject an increasing proportion of non-citizens to summary removal without a hearing also pose particular concerns for refugee protection. Section 806 would prohibit the issuance of a non-immigrant visa to anyone unless the person waives his right, not only to review or appeal the decision of a BCBP officer at the port of entry that he is inadmissible, but also "to contest, other than on the basis of an application for asylum, any action for the removal of the alien."

The extreme nature of this proposal as applied to non-citizens in general has been noted earlier, and despite its provision of an exception for asylum claims, it also threatens asylum seekers' access to the adjudication process. Persons apprehended and deported for overstaying their period of authorized admission under the Visa Waiver Program (VWP) are not subject even to the limited protections available to asylum seekers placed in expedited removal under section 235. The extension of these same summary-removal provisions currently applicable to VWP entrants to all non-immigrants greatly increases the risk of asylum seekers who entered the U.S. legally being returned to their countries of persecution without ever having an opportunity to make their claims.

In addition, this provision would appear to prevent those who entered on non-immigrant visas and are coming forward spontaneously to claim asylum from making an affirmative application for asylum before the Asylum Office, in that people not eligible for hearings under section 240 are currently removed from the Asylum Office's jurisdiction. While being inefficient (in forcing the adjudication of all these cases by the immigration courts, a much slower, more cumbersome, and more expensive process), this provision also has the perverse effect of penalizing asylum seekers who entered the United States through legal channels for the legality of their original entry. And asylum is the only exception this provision recognizes, leaving other categories of vulnerable people to be deported with no process whatsoever, including children, trafficking victims, and persons eligible for relief under VAWA, cancellation of removal, or Temporary Protected Status.

The vast expansion by statute of expedited removal under section 401 of this bill, to anyone (other than Mexicans, Canadians, and Cubans) present in the U.S. without admission or parole and apprehended within 100 miles of an international land border of the U.S. and within 14 days of entry, is also of serious concern. Although persons seeking asylum would still be eligible to be referred for a credible fear interview, the expansion of these summary procedures, which place enormous unreviewable power into the hands of Border Patrol officers, would pose a very serious challenge of training and supervision to ensure that refugees are not returned to persecution in violation of the United States' obligations under the Refugee Convention. Moreover, aside from asylum seekers, this

[33] For example, under this provision, a person who entered the U.S. legally and found herself unable to return to, for example, El Salvador, Liberia, Honduras, Burundi, based on circumstances beyond her control like civil war or natural disaster, could find herself prosecuted, jailed for up to 366 days, and then—as a result of this—ineligible for TPS if that protection later became available to people in her situation.

section makes no other exceptions for other vulnerable groups who have a claim to protection under our laws, including victims of trafficking.

Additionally, for arriving asylum seekers, Section 401, would result in increased prolonged detention.[34] Under the permanent regime, however, the person's detention would be mandatory until admitted or removed, unless he/she were permitted to withdraw his/her application for admission and immediately depart the U.S., or were paroled. DHS's use of its discretionary parole authority for arriving asylum seekers thus far has been erratic—leading, for example, to the unaccountable decision last year to detain the Rev. Joseph N. Dantica, an 81-year-old Baptist minister from Haiti who arrived in the United States on a valid passport and visa and whom DHS had the power to release immediately pending his asylum claim, but who instead died in DHS custody a few days later.

This bill's overwhelming focus on detention and on filling available bed space without providing adequate safeguards sets the stage for further tragedies of this sort as automatic detention, rather than a reasoned consideration of individual circumstances, becomes a reflex.[35] The Committee in fact recognized the problem of substandard, inhumane conditions and treatment of immigration detainees through adopting an amendment offered by Mr. Scott of Viginia which will require the Comptroller General of the United States to report to Congress on the deaths in custody of detainees held on immigration violations.[36]

For persons, including asylum seekers and refugees, whose cases were ultimately denied but who could not be returned to their countries of origin, Section 602, as described in more detail in earlier sections of this document, would allow them to be jailed indefinitely subject to very limited review. This section could subject large numbers of asylum seekers, refugees, and nationals of countries like Cuba to prolonged indefinite detention for reasons beyond their control and subject to inadequate review.

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[34] The provision sets up an interim regime, which would go into effect 60 days after enactment of this legislation, and a permanent regime, which would go into effect on October 1, 2006. Under the interim regime, a person attempting to enter the U.S. illegally and apprehended at a U.S. port of entry or along a land or maritime border could not be released pending proceedings unless the DHS secretary determined ("after conducting all appropriate background and security checks on the alien") that the alien "does not pose a national security risk" and the alien posted bond of at least $5,000.

[35] In this regard, we recognize the importance of Congressman Meek's amendment to the House's Border Security and Terrorism Prevention Act of 2005 (H.R. 4312) entitled "The Security Immigration Coordination and Oversight Act" which provided simple protections for immigrant detainees. For example, the amendment called for families to be detained together and not separated, as current policy dictates. The amendment also included language mandating access to medical care for these vulnerable detainees, many of whom have experienced rape, torture and other human rights abuses. It also sought to increase the effectiveness of the Department of Homeland Security's Policy Directorate, codify detention standards and provide for a high level officer in charge of monitoring detention conditions. Had the measure passed, it would have directed DHS to create enforceable regulations on the treatment of immigrants, asylum-seekers, refugees and other vulnerable groups that promote a balance between law enforcement and humanitarian considerations.

[36] Mr. Scott's amendment was timely considering the shocking, gut-wrenching expose entitled "The Death of Richard Rust" which aired on National Public Radio's *All Things* Considered on December 5, 2005, available *http://www.npr.org/templates/story/story.php?storyI.* In this expose, Daniel Zwerdling examines how Richard Rust, a 34-year-old Jamaican detainee in Louisiana's Oakdale Federal Detention Center, collapsed and died after Government employees apparently disregarded national medical standards by neglecting to give him basic emergency care. Prison employees subsequently put dozens of immigrants at Oakdale in near-solitary confinement after they protested what had happened. The Department of Homeland Security refused to be interview for the report.

CONCLUSION

There is an urgent need and desire for real solutions that could truly address our immigration problems. H.R. 4437 does not deliver, and represents yet another failed opportunity. As it stands, this bill is just another in a long line of get-tough immigration bills that have only succeeded in exacerbating our problems. Since 1995, Congress has enacted an average of nearly one such bill every year. Enactment of H.R. 4437 would represent the third time in just the last 12 months that we would have done so. Last December we passed intelligence reform, which included significant immigration enforcement provisions, and then in May we passed the REAL ID Act which was supposed to bring our immigration situation under control. No sooner do we enact such legislation than it is forgotten—except by those charged with implementing failed concepts that sounded good in a press release—and calls begin for yet another get-tough bill.

After numerous such bills in the last decade of GOP control, net illegal immigration is at its highest level ever, and there are an estimated 11 million undocumented immigrants in the U.S. We believe that it is well past time to re-consider our approach. As Members on both sides of the aisle now recognize, our immigration enforcement mechanisms will not work until we reform the system they are intended to enforce. It is time to enact comprehensive legislation that resolves the status of undocumented immigrants who work and pay taxes in our country, accommodates the future flows that will be necessary for our economy, and prevents the needless separation of families.

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