**Tulane Law: Breakfast Club Transcript 2019**

Well, good afternoon! How are you all doing this afternoon! Everyone awake? Ok.

Well thanks for inviting me, and thanks for coming out to hear me today. Now we all know that for better or worse, immigration is much in the news these days. Unfortunately, much of it is for worse. This afternoon, I’m going to give you a brief overview of the US immigration system, one in which I’ve worked for the past 47 years as your professor mentioned. The U.S. immigration system of course directly relates both to our national values and our position in the international community in many ways, so, it’s about life. Because I’ve been told that you might be particularly interested in the situation at our southern border, I’m also going to offer my ideas for a better cheaper and more appropriate way of processing asylum seekers at our southern border.

Now, as you all know, I’m retired, so I don’t have to give my full government disclaimer, but I do want to hold Tulane Law, the organizers of this opportunity to meet with, and everyone else concerned harmless for my remarks today which are solely my views and for which I take full responsibility. No sugar coating, bureaucratic doublespeak, party line, or BS, just the unvarnished truth as I see it, which of course, not everyone sees it as I do. Now, speaking of organizers, I want to thank Sophia Barba, Amanda Glenz, Professor Mary Yanik, and the newly formed Tulane Immigration Law Society for inviting me. I’m deeply honored to be your first guest lecturer. I also want to recognize my good friend and former colleague at Georgetown Law, Professor Laila Hlass, for her outstanding contributions to clinical teaching, scholarship, writing, and advocacy here at Tulane Law. I had the pleasure of speaking to one of Prof. Hlass’ classes by televideo last fall. Unfortunately she is out of town today on a mission for the new due process army in California. Now, as a former judge I am used to drawing inferences. I don’t want you to draw any inferences from the absence of the individual I know the best at this particular presentation. And, because today is Thursday, and because you are such a great audience, I am going to give you my absolute, money back guarantee that this talk will be completely free from computer generated slides, powerpoints, or any other type of distracting technology that might interfere with your total comprehension and listening enjoyment. In other words, *I* am the powerpoint of this presentation.

Now I call this particular presentation “Welcome to the Breakfast Club” but given the timing, “Welcome to the Pre-Dinner Club” would have been a more appropriate title today... and I want to congratulate all of you not only on the formation of the TILS but also on your automatic membership in the Breakfast Club which was included today with the speech at no extra charge. Similarly, most of us who have the good fortune to be U.S. citizens obtained our membership in the American community through U.S. citizenship automatically and involuntarily conferred at birth: we did nothing to really merit it.

Now that we are all members of the club, what common purposes or values bring us together today? Should support of those values be an absolute membership requirement? Do we want to recruit new members or just keep the members we have? How do we recruit? What about folks who don’t share all of our values? Can they be members? Can they attend and be our friends, even if not members? How do we interact with them? How do we spread our values without treading on the rights and values of others who might disagree with us? Do we expel those whose actions no longer support our common values and purposes? What processes do we do that?

Now has anybody here ever been in a club or organization where disputes over membership and requirements led to threats to resign, dissolution, a split, or all of those? Anybody ever been in a group like that? Yeah. It’s really common. I’ve actually been in several of them, and membership criteria are often a big issue. Now, if we were able to play out completely the exercise I just gave you, when we were done we would probably have a set of rules and regulations that look somewhat like a mini immigration system. In effect, all immigration and naturalization and nationalities systems are simply ways in which we define and regulate membership in our national community or club. No overstuffed leather chairs fill our clubroom, nor does the odor of stale cigar smoke linger in the air. Our club is the United States of America, a vibrant 21st century democracy built on the very sadly not completely fulfilled promise of liberty and justice for all.

Membership issues have always been and remain among life’s most fundamental difficult and therefore contentious matters. They involve sometimes conflicting human needs, such as belonging, control, self-determination, allegiance, loyalty, and even at some level, survival. The U.S. Supreme court has said that expulsion from our national club can result in “the loss of everything that makes life worth living”. Now this afternoon I’m going to talk about the U.S. immigration process, but this issue does not affect only those living in Texas, California, New York, Florida, and the states along our southern border. Indeed, Louisiana has a very rich history that has been and continues to be shaped by immigrants both documented and so-called “undocumented”.

Now as you all know in 2016 we had a very contentious national election in which immigration policy played a major role. The winners presented a far more hostile and negative role of immigration of all kinds than we have seen in the recent history of our country. Hence, both our tradition as a haven of immigrants and our role in the international community as a beacon of freedom, liberty and justice has been challenged in ways that I have not previously witnessed during my lifetime. Already, we’ve seen evidence of accelerated, harsh, and more aggressive removals in many areas of the country. Some politicians, most administration officials and their supporters praise these efforts as absolutely necessary and long overdue. A debate about “building the wall” paralyzed our national government for more than a month, and actually, the U.S. immigration courts where I used to work were among the hardest hit by in my view the completely unnecessary shutdown.

At the same time, some politicians have reached out to ensure vulnerable populations in our communities that President Trump -- whom some of them actually supported -- will not or cannot keep some of his campaign promises to wall off, deport, and bar the admission of certain groups of individuals on a grandiose scale. In most urban areas (certainly where I live and I imagine the same is around here), local television news regularly features stories of scared families who believe they could soon be forced out of the communities and homes in the united states where they’ve lived and sent to foreign countries where they have not been in years or perhaps decades. Many U.S. Citizen children who are part of these families face the prospect of effective exile to foreign countries they’ve never even visited. Families seeking to apply for refuge under our law are intentionally separated as part of a misguided and probably illegal “zero tolerance program” instituted by former Attorney General Jeff Sessions to punish and deter asylum seekers. Our President mocks the Constitution with bogus threats to strip some U.S. Citizens of their birthright under the law under the 14th Amendment through unilateral and almost certainly illegal use of an executive order. Consequently, the issue of who should be part of our national club and how we should treat those who are not welcome in our club will continue to occupy our nation and its leaders.

Now, if we think of our national community as a club, then full voting members are U.S. Citizens. There is also a very small group of people who are called “Nationals” of the United States who owe permanent allegiance but who are not Citizens of the United States. To keep matters simple this afternoon I’m going to leave nationals out of this presentation.

Under the 14th Amendment to the Constitution persons born in the United States automatically become US Citizens. The exceptions are for children born to certain high-ranking foreign diplomats with immunity and rare individuals born on public foreign vessels who are not subject to the jurisdiction of the United States. As I’ve already told you, and I’m sure all of you recognize, US citizenship vests automatically regardless of the legal status of the mother and father in the United States. Although so-called “birthright citizenship” has been a very controversial topic recently, it has actually been a firmly established constitutional rule for over a century: because it’s a constitutional rule, congress cannot change it by statute, nor can the President change it by executive order. Virtually all reputable scholars and lawyers agree that it would take a constitutional amendment or a radical reinterpretation of our Constitution by the Supreme Court… and that’s certainly my view.

Additionally, certain individuals born abroad whose parent or parents are US Citizens and who lived in the United States prior to birth can automatically acquire US Citizenship at birth. So-called “Citizenship by Acquisition” is governed by statute, rather than the Constitution, and the rules have changed over the years.

This actually came up in connection with the last Presidential race because, as we know, one of the leading primary candidates, Senator Ted Cruz, was born in Canada. Senator Cruz was born in Canada to a Cuban citizen father and a U.S. citizen mother who had lived in the United States for at least ten years prior to his birth. Consequently, by the then-applicable statute, he became a U.S. citizen at birth. Now, that doesn’t necessarily answer the question of whether he is a “natural born citizen” eligible to become President under the Constitution.

Additionally, children born outside the United States may, under certain conditions, automatically derive U.S. citizenship upon the naturalization of at least one parent or upon being lawfully admitted to the United States to reside with a citizen parent.

Finally, certain individuals lawfully residing in the United States may, if eligible, choose to apply to the Department of Homeland Security (I’ll be referring to them as the “DHS”) for naturalization. This is, in effect, a way in which a “prospective member” of our “club” may apply for and receive “full membership.” While Article I, Section 8 of the Constitution gives Congress authority to establish “a uniform rule of naturalization,” and the 14th Amendment provides that all naturalized individuals shall be citizens, the Constitution does not specify rules for naturalization. Theoretically, Congress could decide to have no provision for naturalization whatsoever.

The rules for naturalization are therefore set by statute and also have changed over the years. They largely depend on lawful permanent residence, knowledge of the English language and basic civics, and good moral character. In other words, only naturalized citizens actually earn their status through some sort of merit-based process. The rest of us are simply beneficiaries of extreme good fortune that we did absolutely nothing personally to deserve... and I think always good to remember when we talk about “us” versus “them”: that most of us became “us” without passing any particular merit based test or jumping over any high bars to become one of us.

There is a process for de-naturalization of individuals who illegally obtained naturalization. Some of the most famous denaturalization cases that I had some role in involved Nazi war criminals who concealed their atrocities during the immigration and naturalization processes. This Administration has instituted a vigorous program of reviewing applications of naturalized U.S. citizens for evidence of past fraud that could lead to de-naturalization. Otherwise, however, one may lose U.S. citizenship only through what’s called “voluntary relinquishment”. In other words, Congress may not involuntarily strip an individual of legally acquired U.S. citizenship.

Now, an “alien” is defined by law not as an “extraterrestrial being,” but rather as anyone who is not a citizen or national of the United States. I note, however, that the character “ET” would meet the legal definition of “alien” under our law.

Now, we’ve talked about full members. A second group of individuals might be characterized as “associate members” or “prospective members” of our club. In immigration terms, they generally are known as “lawful permanent residents” -- sometimes referred to as “LPRs”. While these individuals can’t vote or participate in our political processes, they can reside here on a permanent basis, provided that they obey our laws. Generally, they can work here without much restriction and can travel relatively freely abroad. Eventually, most individuals in this category can attempt to meet the criteria to become U.S. citizens, although very significantly, they are not required to do so.

Lawful permanent resident aliens are by far the largest group of “associate members”, and they’re sometimes known as “green card” holders because of the color of the identification card. Our permanent immigration system generally favors the admission of three basic groups: close relatives of United States citizens and lawful permanent resident aliens (family immigration); those with needed job skills (employment-based immigration); and refugees. Approximately 1.1 million permanent residents were admitted into the United States in fiscal year 2017.

Immediate relatives of U.S. citizens, and that is, spouses, minor children, and parents of adult U.S. citizens, can immigrate without numerical limitation. Approximately 516,000 immediate relatives, 300,000 of them spouses, were admitted as immigrants in Fiscal Year 2017. You should know, however, that only parents of adult U.S. citizens who are over age twenty-one qualify for Immediate Relative status. Consequently, and perhaps contrary to some popular notions, the birth of a U.S. citizen child confers no immediate immigration benefits on the parents.

226,000 immigrant visas annually are allocated for other types of family reunification: for adult children of U.S. citizens, spouses and children of lawful permanent resident aliens, and siblings of U.S. citizens. The last category, however, has a waiting list of nearly 13 years.

Another 140,000 immigrant visas annually are allocated for employment-based immigrants, and they’re given primarily to professionals and other skilled workers. “Members of the professions holding advanced degrees,” and, “outstanding professors and researchers,” are within the preferred categories. Significantly however, at present only 10,000 immigrant visas annually are available to so-called “unskilled” workers whose services are needed by U.S. employers.

Yet this latter category appears to be one in which the U.S. employers have a great need. And, “unskilled” in immigration lingo is a highly misleading term. Many of the individuals we call “unskilled” actually possess abilities and skills that few of us college educated folks possess or would be willing to learn and perform on a regular basis. How would you fare shucking oysters, picking crabs, harvesting tomatoes on a hot day, or cleaning windows on the outside of a high-rise building, or putting a roof on in 100-degree temperatures? Not for me!

As you might be aware, the current Administration has chosen to characterize in pejorative terms some aspects of legal family immigration as “chain migration”. Accordingly, this Administration and some legislatures have proposed a reduction in overall immigration and a reallocation of some of the family-based visas to the employment categories. This is sort of disingenuously called a “switch to merit-based immigration”. The Administration also uses “bureaucratic roadblocks” often masquerading as additional “security measure” to slow down the legal immigration process and discourage prospective immigrants.

However, I personally see no basis for such changes in the law. Indeed, most studies consistently show that our society, and particularly our economy, would benefit from more legal immigration across the board.

Family immigration contributes to the success of the American economy and enriches our society, as does employment-based immigration. Indeed, a more rational change would be to increase both family and employment-based legal immigration to better match the “market forces” of supply and demand as well as to reduce the number of individuals seeking to migrate outside the legal system… I call it the “black market” or the “extralegal immigration system”, and as most of you know when you have a currency that doesn’t function, trade regulations that don’t function, you develop black markets: people go around things that don’t function, and that’s sort of where we are now. We have an immigration system that largely is not in accord with market forces in reality, and therefore there is an extralegal black market system that has developed to go around it. Although they have to wait a short period to obtain a green card, refugees and asylees are also slated for permanent integration into U.S. society. Some refugees, very few these days, are selectively admitted directly from abroad, usually from refugee camps.

Approximately 85,000 refugees were admitted in this manner during Fiscal Year 2016. However, the Trump Administration drastically slashed the refugee admission for this Fiscal Year to 30,000, the lowest it’s been since the enactment of the Refugee Act of 1980. In reality, far fewer than that will actually be admitted. This represents a nearly unprecedented retrenchment in our international humanitarian commitment to aid refugees, particularly those from areas like Syria, who are in dire need of resettlement opportunities.

Currently, there are over five million Syrian refugees outside Syria and even more who are internally displaced within Syria. Many of these refugees are children. It’s the largest refugee crisis of our time. Yet, the U.S. accepted fewer than 100 Syrian refugees in Fiscal Year 2018.

Additionally, individuals already in the United States or at our border who satisfy the “refugee” definition may be granted “asylum” by the Department of Homeland Security (the “DHS”) Asylum Office, or by the U.S. Immigration Courts, where I worked. Approximately 20,500 such individuals were granted asylum in Fiscal Year 2016, approximately 8,700 by the Immigration Courts, and the balance by the DHS Asylum Office.

The U.S. asylum system is also under unprecedented attack initiated by Administration officials, particularly former Attorney General Jeff Sessions and DHS Secretary Kirstjen Nielsen, who claim, without any proof that I have seen, that it has attracted too many fraudulent applicants and serves as a “magnet” for undocumented migration. Indeed, the recent sending of more than 5,000 U.S. troops on a wasteful mission to the southern border to address what most experts consider to be an “imaginary crisis,” is part of the attempt to deter and discourage asylum seekers.

Additionally, President Trump, with assistance from bureaucrats at the DHS and the U.S. Department of Justice, has issued a “proclamation” and “Interim Regulations” that purport to severely restrict the right of individuals arriving at the border to apply for asylum. According to these measures, those who enter anywhere but an official “port of entry” will be automatically ineligible for asylum, even though, in my experience, most families basically turn themselves in to the Border Patrol in the immediate vicinity of the border even if the do enter illegally.

Fortunately, a U.S. District Judge in San Francisco issued a Temporary Restraining Order against the enforcement of this lawless initiative. That order was upheld on appeal by the Ninth Circuit Court of Appeals. Interestingly, in my view, the Ninth Circuit opinion was written by Judge Jay Bybee, a leading conservative jurist appointed by President George W. Bush. By a 5 to 4 vote, the Supreme Court rejected the Administration's request for a stay of this injunction, so this injunction is likely to remain in effect for the indefinite future.

Moreover, the Administration has purposely provided inadequate facilities and DHS Asylum Officers at the Ports of Entry, thereby artificially creating lengthy waiting periods of asylum applicants to be screened. Others allegedly are illegally turned away by U.S. authorities when they try to apply, legally, for asylum at the ports of entry. Not surprisingly, the Administration’s actions have generated a spirited legal challenge from the ACLU and others which is currently pending in U.S. District Court.

Additionally, the Administration has instituted a program disingenuously named the “Migrant Protection Protocols” which requires certain individuals who have been found to have a “credible fear” of persecution to await their Immigration Court hearings in Mexico. I also expect that policy to be challenged in U.S. District Court.

“Refugee” status generally refers to individuals who are pre-screened abroad. “Asylees” generally are those who enter or arrive in the United States with no status or with a temporary status and seek to establish their refugee qualifications while in this country. Cases of such individuals formed the bulk of my work at the Arlington Immigration Court.

Now, while those recognized as refugees and asylees do not immediately become green-card holders (they have to wait at least a year), they have a right to remain in the United States indefinitely, can bring in spouses and minor children (which is very important), and can work freely. In most cases, they eventually become eligible to receive green cards, which can lead to U.S. citizenship.

Let’s take a moment to think about refugees in “real life terms.” Each morning when I wake up I’m thankful for two things. First, that I woke up, which, at my age is never a given. Second, that I’m not a refugee, particularly in today’s world with this Administration.

As I mentioned earlier, refugees and asylees recently have become a human political football both internationally and in the United States. As I mentioned earlier, the humanitarian disaster in Syria has sent over five million individuals, many of them women and children, pouring across the borders of neighboring countries in search of life-saving safety. Many found their way to the borders of Europe creating major issues as European Union leaders searched for solutions to resettle those who have arrived and to stem the tide of future arrivals.

One of President Trump’s first actions in office was to cut U.S. refugee admissions drastically, to 50,000 for Fiscal Year 2017. At the same time, as you probably know, in his first Executive Order on Immigration, sometimes referred to as “Travel Ban 1,” he purported to specifically bar indefinitely the admission of Syrian refugees.

As a result of litigation that got to the U.S. Supreme Court, this Executive Order was modified to some extent. It’s latest version, known as “Travel Ban 3.0,” was finally allowed to go into effect by the Court, over several vigorous dissents. Many observers believe that this partial success at the Supreme Court, along with his appointment of more “conservative” justices has emboldened President Trump to institute his highly questionable legal attack on the rights of asylum seekers at the border.

Only a relatively small number of Syrian refugees have found their way to the United States, about 10,000 in Fiscal Year 2016, almost none since then. According to a recent report from Oxfam International, our “fair share” of Syrian refugees would be about 17 times that amount, or 170,000! And, under the Trump Administration, that number is likely to drop to zero and remain there.
Notwithstanding the minute number of Syrian refugees we resettle, the rigorous pre-screening they receive, and that most of them are women, children, or family units, various U.S. state governors, including notably our Vice-President Mike Pence, when he was Governor of Indiana, have made well-publicized attempts to “slam the door” on Syrian refugee resettlement in their respective states based on bogus national security concerns. So far, Federal Courts have soundly rejected such efforts.

Nevertheless, a number of Administration officials and Members of Congress have expressed strong opposition to the current procedures for resettling refugees in the United States. Some legislators have introduced bills that would give states authority to block refugee resettlement, narrow the already limited refugee definition, and make it generally more difficult for refugees to be admitted, particularly from Syria and the Middle East, while effectively giving preference to Christian refugees over Muslims and those of other religions.
Meanwhile, President Donald Trump has tried to severely restrict Muslim immigration, apparently largely to “make good” on campaign promises. While U.S. law generally does not permit such specific religious exclusions within the U.S., and the most severe forms of the Executive Order on refugees were enjoined, as President, Mr. Trump ultimately has great authority to determine the future of U.S. overseas refugee programs.

In theory, and I think he’s moving towards this, he could designate any group of refugees as of “special humanitarian concern” to the U.S. or designate none at all. And, as shown this year, he can reduce the number of legal refugee admissions to zero if he chooses. This probably does not bode well for future admission of Muslim refugees who are screened abroad.

Now I would like to put to rest one of the popular myths about U.S. refugee and asylum law: that we protect everyone who can show that they would be killed or in severe danger if returned to their home country. Not true. In fact, U.S. and international refugee law applies only to those who face harm because of one of five “protected” grounds: race, religion, nationality, political opinion, or the amorphous and highly controversial “membership in a particular social group.”
Let’s “unpack” that in “real life” terms. If, for example, your neighbor seeks to kill you and rape your daughter because you are a Christian or a member of the XYZ party, and the police can’t or won’t offer help, you qualify for refugee status. On the other hand, if your neighbor threatens to do the very same things to you and your family because of envy or lust or just plain old criminal behavior, you do not qualify for protection. These are arcane distinctions about which appellate judges and policy makers far removed from the scene argue endlessly. But, not surprisingly, to the refugee or asylum seeker, the person before me in court, the exact reason why he or she is likely to be killed or harmed upon return seems unimportant in relation to the very real danger.

A continuing controversy is so-called “Border Surge” cases, involving mostly women, children, and families from Central America fleeing violence and corruption. We face difficult questions as to where, if anywhere, such individuals fit within our asylum and immigration systems. In other words, will they be welcomed to our “club”, or booted back to the danger zones from whence they fled?

The Trump Administration has pledged not only to restrict the right to apply for asylum, but also hold all undocumented border crossers including asylum seekers and their families in expanded detention facilities in remote locations along the Southern Border pending final determination of their asylum claims and to make it more difficult for those claims to be heard by U.S. Immigration Judges. Also, as I mentioned earlier, they so far unsuccessfully attempted to block asylum applications by those entering illegally and are permitted by statute to nevertheless apply for asylum. Also, I mentioned that the Administration has made some asylum seekers wait for court hearings in Mexico, even though they have preliminarily demonstrated a “Credible fear” of persecution.

Another myth that we sometimes encounter, and this is a favorite of officials in this administration, is the bogus “line.” People often say that those who come here illegally should instead “just get in line.” However, unless an individual fits one of the three limited groups of permanent immigrants I have just described, there is no line to join! Even some of those who appear to fit our permanent immigration system may face lengthy waits or highly technical requirements that essentially disqualify them from any realistic chance of legal immigration in the foreseeable future.

Let’s move on to my third group, who could be characterized as “friends” of the club, that is, individuals who are here with legal permission and may remain for a temporary period of time, sometimes that could be a quite long indefinite period… it could be forever... but they have no clear path to permanent residency or citizenship. The most numerous group of “friends” are known as “non-immigrants.” We may actually have a few in this room.

A “nonimmigrant” is distinct from an “immigrant.” The term “immigrant” generally refers to those, whether legal or illegal, who seek to remain permanently in the United States. Nonimmigrants, by contrast, seek only temporary admission to the United States for a specific purpose, not permanent residence.

Visitors for business or pleasure, approximately 50 million in Fiscal Year 2017, comprise the largest nonimmigrant category. An example of a “business visitor” might be a French national speaking at a conference and receiving no U.S. compensation other than payment of expenses. Members of a German family coming to see the cherry blossoms or visit Williamsburg could be classified as “visitors for pleasure.”

Another familiar category is nonimmigrant academic students in so-called “F-1" status. In Fiscal Year 2017, approximately 1.9 million such individuals with accompanying family members were admitted to the United States. An F-1 student must maintain a residence abroad, and must demonstrate an intention to return to that residence upon completion of studies, must show access to the resources necessary to complete the course of study, and must maintain a full course load. Moreover, F-1 students generally cannot study at public elementary or secondary schools. So if a non-immigrant student drops classes and gets below a certain credit level, then they are out of status and their foreign student advisor is obliged to report them to the DHS. Moreover, F-1 students generally can’t study at public elementary or secondary schools. Because of these requirements, F-1 status generally is not an option for undocumented alien schoolchildren in the United States. That’s why many of the folks who are so-called “Dreamers” under DACA who might be full-time students have no chance of moving into F-1 nonimmigrant status.

As reported in the Washington Post and other media, nonimmigrant student admissions have been steadily declining since Trump’s election. This has actually hurt many colleges and universities who had come to rely on them to maintain and boost enrollment. Many attribute the decrease to the anti-immigrant rhetoric of the Administration and to bureaucratic roadblocks they have constructed to slow down and discourage applicants applying for visas.
There are numerous other classifications in the “alphabet soup” world of nonimmigrants. However, because of very specific technical requirements, and the general concept that a nonimmigrant is someone who is coming to the United States temporarily, these categories seldom are useful to undocumented immigrant families already living, working, and/or studying in the United States. Nonimmigrant visas have also come into the limelight, because President Trump’s Executive Orders on immigration barred visa issuance of such visas to nationals of certain, predominantly Muslim countries.

Another group of “friends” that we in this area encounter on a regular basis is individuals in what is known as Temporary Protected Status, or “TPS.” The Secretary of Homeland Security may make TPS designations for nationals of countries where there is an “ongoing armed conflict” or where there has been a natural disaster. Individuals in TPS status can temporarily reside and work in the United States. TPS generally does not lead to green card status or U.S. citizenship, although some people in TPS status eventually are able to qualify for green cards through the normal immigration system.

Two of the largest groups of TPS individuals currently in the United States are nationals of El Salvador and Honduras who entered the U.S. prior to a cutoff date in the fairly distant past.

Because TPS designations are within the sole discretion of the Executive Branch, the new Administration can decide to terminate or revoke any of the current TPS designations. This would leave individuals subject to removal from the United States if they failed to depart voluntarily or achieve legal status in some other way.

The Trump Administration has announced that it will end TPS for Salvadorans in 2019 because of a highly debatable -- I would say fictional -- “improvement in country conditions.” This will throw approximately 200,000 Salvadorans and their families in the United States into limbo and the danger of removal. More recently, the Trump Administration announced plans to terminate TPS for Hondurans in 2019, throwing another 85,000 long-term residents into limbo.

Similarly, the Administration announced that the TPS programs in effect since the January 2010 earthquake will end in 2019 thereby stripping approximately 60,000 Haitians of their current protection, and that’s an issue here and in Florida for sure. Some have criticized this action as racially motivated, and perhaps showing that no group is too small to escape the wrath of the Trump Administration, the Administration has also ended TPS for 9,000 TPS holders from Nepal.

All of these terminations are being actively challenged in Federal Court. So far, testimony has indicated that the Administration ignored the recommendations of career officials and other experts in reaching this highly questionable termination decisions, although the court has yet to rule.

Based on statements to date, The Trump Administration is unlikely to grant any large groups TPS status in the future, no matter how dire their situation. The Administration and its supporters claim that TPS is widely abused and that the so-called “temporary” protection invariably morphs into permanence.

On the other hand, in my experience, TPS has turned out to be a handy, practical, low-budget way of handling large numbers of humanitarian cases that might otherwise clog our asylum and court systems. The vast majority of those granted TPS make positive contributions to our society and many, perhaps most, have U.S. citizen and/or green card holding family members.

The relatively few who “screw up” by misbehaving are arrested by ICE, placed in detention, and usually promptly removed by order of an Immigration Judge. Far from an “evasion of law, I view TPS to be one of the overall most successful, practical, and efficient immigration programs on the books. It fills gaps in our legal immigration and asylum systems that otherwise would be problematic. Terminating these long-standing grants of TPS, particularly for those with long residence and ties to the U.S., makes little if any sense, in my view.

Finally, my fourth group are the “Outcasts” and there are an estimated 11.2 million – 5.6 million from Mexico – individuals in the United States who are outside our “club”. This group consists primarily of individuals who crossed the border surreptitiously or by fraudulent means, but also includes a significant group of individuals who entered legally as nonimmigrants, but overstayed or otherwise violated the terms of their admittance. Indeed, most studies now show that the majority of the undocumented population are nonimmigrant overstays rather than illegal entrants. Six states – California, Texas, Florida, New York, New Jersey and Illinois – are home to 60% of the undocumented population.

In some instances, the law permits individuals in the United States to change to “green card” status through a process known as “adjustment of status”. In Fiscal Year 2017 approximately 550,000 individuals used this provision. However, the stringent requirements for that relief make it of little practical benefit to most here in undocumented status.

Also, there is a smaller, yet highly visible, group of individuals who were granted lawful permanent residence, in other words, became “associate members”, holders of green cards, but who by their subsequent criminal misconduct forfeited that right and are therefore subject to expulsion from membership and removal from the nation.

Most people would agree that the latter group, criminals, presents plausible arguments for expulsion. Nevertheless, there may be circumstances where forgiveness based on an overall assessment of the equities, particularly the effect on U.S. citizen and lawful permanent resident family members, is warranted. Indeed, a limited form of discretionary relief called “cancellation of removal” is available to individuals whose criminal record is on the less serious end of the spectrum.

I also decided those cases on a regular basis during my time in Arlington. Many involved individuals were held in immigration detention by the DHS. The possibility of long-term civil detention of individuals awaiting hearings or eventual removal is always a controversial aspect of immigration enforcement. Indeed, a dispute over the number of authorized “detention beds” for DHS was a major issue in the recent bipartisan border security package-- and it’s my understanding that the President is actually going to sign that but declare a bogus national emergency so he can finish building his wall.

A case involving the permissible scope of pre-hearing immigration detention was recently before the U.S. Supreme Court. In a split decision that drew a stinging dissent from Justice Breyer, the court “punted” the case back to the lower Federal Courts, which again have slammed the government’s position on indefinite detention without any review. However, the Court’s majority did not appear to be sympathetic to the plight of those facing indefinite so- called “civil” immigration detention… so it’s unclear what will happen the next time this gets to the Supreme Court.

The Administration has announced plans to dramatically increase the use of immigration detention, particularly along our southern border with Mexico – I call this phenomenon the “New American Gulag.” This is in addition to President Trump’s plans to build a wall along that border, which, as we know, has met with a mixed reception in Congress and has not been fully funded to date, hence the bogus national emergency.

Many view President Trump’s decision to send the military to the Southern Border to protect us from an alleged “caravan” consisting largely of desperate women and children seeking refuge from uncontrolled violence in the Northern Triangle of Central America to be largely a spiteful reaction to Congress’s failure to fund his “Wall.” As I mentioned, this Administration also has used family separation, family detention and criminal prosecution of asylum seekers as “deterrents” to those legally seeking refuge under our laws.

With respect to the other two groups, illegal entrants and status violators, there is an acrimonious ongoing debate. Some say that these individuals possess characteristics, such as willingness to work hard in jobs most Americans don’t want and U.S. citizen or green card holding relatives, particularly children, which make them strong candidates for membership in our club at some level. They also argue that mass removals of such individuals from the United States would be impractical, wasteful, and inhumane.

Others, primarily this Administration and its supporters, say such individuals are “lawbreakers” who are a drag on our society and should be removed, through active enforcement actions, a strategy of “attrition,” or both. The “attrition strategy” depends heavily on more aggressive and effective enforcement of federal laws, on the books since 1986, prohibiting the hiring of aliens not authorized to work in the United States.

These laws also prohibit discrimination based on national origin or citizenship status against employees and job applicants authorized to work in the United States. Most of you in this room, I suspect, probably have filled out the so-called I-9 employment verification form, which is part of the process for enforcing these laws. To date, however, these so-called “employer sanctions” laws have not effectively eliminated U.S. employment opportunities for unauthorized workers.

Groups favoring removal have consistently blocked efforts at overhauling the immigration system. One such effort, generally referred to as “comprehensive immigration reform,” was supported by then President George W. Bush and would have combined stronger border enforcement with an “earned legal status” for many individuals now residing and working in the United States without status. It also would have provided more avenues for the legal immigration of temporary workers to do low-skill jobs.

A second unsuccessful proposal that some of you might be familiar with called the “DREAM Act” would have made it possible for certain undocumented youth, many of them U.S. high school graduates, who had lived in the United States since a young age to ultimately regularize their status by attending college, working in the United States, or joining the U.S. military.

In the absence of Congressional action, in 2012 the Obama Administration implemented an administrative program, known as Deferred Action for Childhood Arrivals (“DACA”) to allow some potential Dream Act beneficiaries to remain, work, and study in the United States pending some sort of resolution in Congress. As of 2018, approximately 750,000 young people residing in our communities had registered under DACA. Most estimates are that there may be another 4-500,000 that would be eligible but for various reasons, mostly being afraid to come forward, have not registered.

A similar program for parents of U.S. citizens and green card holders known as Deferred Action for Parents of Americans (“DAPA”) was prevented from going into effect by an injunction issued at the request of Texas and other states which claimed that they would be harmed by this program. An evenly divided Supreme Court rebuffed the Obama Administration and allowed this injunction to stand.
As you probably know, President Trump has declared an end to the DACA program, claiming that it was an illegal action by President Obama. Terminating DACA would strip more than 750,000 young people of authorization to work or study and throw then into our Immigration Courts, which are already in chaos with a pending docket that has grown to an astounding 1.1 million plus cases… and I think by now, it’s likely more than 3.1 million cases following the shutdown and problems earlier this year. Fortunately, that ill-advised decision has been blocked on legal grounds by a number of lower Federal Courts. The Supreme Court recently turned down the Administration’s request to intervene in the lower court actions, thus leaving DACA in effect at least for the indefinite future.

The Immigration Court backlog has largely been caused by political interference and ever-changing priorities over the last three Administrations. I call this phenomenon “Aimless Docket Reshuffling”, or “ADR” in the immigration world. As the “priority of the day” moves to the front of the docket and everything else, including cases that are many years old, is displaced to the end. That’s also known as “churning”, and is how we get big groups of cases by moving them around, creating different prioritie: the one thing the immigration court never does is finish the one priority before the next priority is thrust upon them by political officials. Under former Attorney General Sessions, the court backlog has risen astronomically to the point where it is now totally out of control with no realistic plan to reduce it. He took a sick system with about a 500,000 case backlog and in less than two years, jacked it up to about 1.1 million with moves intended to intentionally overload the courts and create larger backlogs. Even with more judges (at the time I left, there were about 250 judges, now there are 400) the backlog continues to grow: the 400 judges can’t even produce enough cases to take care of DHS’s undisciplined incoming cases, let alone the backlog. According to TRACK, if there were 400 judges and no other cases came into the system, it would take around four and half to five years just to finish the cases that are currently pending, that means they’d finish them around 2024/2025.

Meanwhile, the role of U.S. Immigration Judges under this Administration has been reduced to what essentially are demoralized rubber stamps. I encourage any of you who are interested to read my blog, ImmigrationCourtside.com, because today I posed a story about four or five of our gang of retired judges, who talk about demoralization and their reasons for, even though most of them are very proud of the job and think it’s their best chance to help American justice, why they left disillusioned and broken by what Jeff Sessions had done. So we are basically booting out the best and brightest and leaving just those willing to rubber-stamp what the Administration wants them to do.

At first, President Trump expressed “great sympathy” for the so-called “Dreamers.” He pledged to work with Congress to achieve a legislative solution to their plight. However, he later turned on the Dreamers after Democrats declined to accept his proposals to build the wall, cut legal immigration, restrict family migration, and reduce the rights of children seeking asylum in return for granting Dreamers a “path to citizenship”.

At present, there are no politically viable comprehensive immigration proposals pending before Congress, nor is there any current prospect of legislative relief for Dreamers.

Perhaps as a consequence, a number of states and localities have taken it upon themselves to enact or are considering immigration proposals. Some are “restrictionist” aimed at discouraging the presence of undocumented immigrants. Examples include denying them in-state tuition, requiring local law enforcement to turn suspected undocumented individuals over to the DHS for removal, denying services or housing to undocumented individuals, or revoking the licenses of businesses that hire undocumented workers. These are the brainchild of prominent Republican politician Kris Kobach, who recently managed to lose the governorship race in heavily Republican Kansas with his campaign which was solely based on his anti-immigrant rhetoric. Such laws and regulations have had mixed success in Federal Courts.

In a highly controversial countermove, some states and cities have enacted so-called “Sanctuary-City Laws” which limit cooperation between local police and Federal immigration enforcement agencies. The apparent rationale for such laws is that fear of being turned over to the DHS might inhibit cooperation from ethnic communities in reporting crimes or cooperating with law enforcement in solving crimes. For example, where I live in the city of Alexandria, most families containing undocumented individuals are what we’d call mixed families: one member, an uncle, aunt, grandparent, or cousin might be undocumented, others are U.S. Citizens, but the U.S. Citizens are afraid to contact the police in case someone comes by and finds their cousin is undocumented and gets deported. This, in turn, has led to threats to enact laws on the Federal and State levels to withdraw funding from localities that have enacted such provisions as well as suits brought by the Department of Justice to force cooperation with the DHS. Some of these laws are in Texas and were upheld by the Fifth Circuit, which required localities to cooperate with DHS in a certain manner.

In particular, former Attorney General Jeff Sessions and DHS Secretary Kirstjen Nielsen have taken an aggressive stance on stripping “sanctuary jurisdictions” of various types of Federal funding. However, like the “Travel Ban,” however, these efforts have run into roadblocks in the lower Federal Courts which have uniformly held them to be illegal, although that hasn’t stopped DHS and DoJ from pursuing them.

One often mis-stated aspect of the current debate is the proposition that “aliens in the United States illegally have no rights”. Although it is true that such individuals might ultimately have no right to remain in the United States, while here, they do have a number of important rights under our laws. Indeed, the Supreme Court recently reaffirmed that U.S. “representatives serve all residents, not just those eligible or registered to vote”.

First and foremost is the right to fair treatment under the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to our Constitution.

Guaranteeing due process to individuals charged with being removable from the United States is what my “day job” at the U.S. Immigration Court in Arlington was all about.

Sometimes, the course of history can be changed by a single vote. One of those instances is a 5-4 decision by the U.S. Supreme Court in 1982 in a case called Plyler v. Doe. There, the Court found that it was a violation of the Equal Protection Clause of the 14th Amendment for the State of Texas to deny undocumented school-age children the free public education that it provides to U.S. citizens and lawful permanent residents. In doing so, the late Justice Brennan, writing for the majority of the Court, observed, “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests”. I think about quite often, and I want you to think about that in the context of kids who are being traumatized in detention facilities, and who are being separated from their families and who may never be reunited, and what that is going to do to future generations. I can guarantee you that what DHS says, the educational opportunities supposedly provided in these detention facilities aren’t anything you would want any child of yours to experience.