**“INTO THE MAELSTROM” -- UNDERSTANDING AMERICAN IMMIGRATION IN THE AGE OF TRUMP**

**BOYNTON SOCIETY LECTURE**

**LAWRNCE UNIVERSITY, BJORKLUNDEN, CAMPUS**

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**Greetings, and thank you so much for coming out to listen this beautiful afternoon on a topic that has consumed my post-Lawrence professional life: American Immigration.**

**Whether you realize it or not, immigration shapes the lives of each of us in this room. It will also determine the future of our children, grandchildren, and following generations. Will they continue to be part of a vibrant democratic republic, valuing human dignity and the rule of law? Or, will they be swept into the maelstrom as our beloved nation disintegrates into a cruel, selfish, White Nationalist kleptocracy, mocking and trampling most of the principles that we as “liberal artists” grew up holding dear.**

**Many of you have thought about this before in some form or another. Indeed, that might be why you are here this afternoon, rather than outside frolicking in the sunlight. But, for any who don’t recognize the cosmic importance of migration in today’s society, in the words of noted scholar and country music superstar Toby Keith, “It’s me, baby, with your wake-up call.”**

**For, make no mistake about it, civilization is undergoing an existential crisis. Western liberal democracy, the rule of law, scientific truth, humanism, and our Constitutional guarantees of Due Process of law for all are under vicious attack. Evil leaders who revel in their anti-intellectualism and pseudo-science have shrewdly harnessed and channeled the powerful cross currents of hate, bias, xenophobia, fear, resentment, greed, selfishness, anti-intellectualism, racism, and knowingly false narratives to advance their vitriolic program of White Nationalist authoritarianism, targeting directly our cherished democratic institutions. And, their jaundiced and untruthful view of American immigration is leading the way toward their dark and perverted view of America’s future.**

**As fellow members of the Boynton society, I assume that all of you are familiar with our beautiful chapel, painstakingly hand-constructed by Winifred Boynton and her husband Donald – a true labor of love, optimism, humanitarianism, and respect for future generations. Here are the words of Winifred Boynton:**

**During those years the chapel was in the building, the world was being torn apart by the hatred and fighting of a war and we realized the tremendous need for centers of peace and Christian love for our fellow man. . . . We found ourselves selecting moments of great joy for the large murals. And, the decision to dedicate the chapel to peace was the natural culmination. [Ruth Morton Miller, Faith Built a Chapel, Wisconsin Trails, Summer 1962, at 19, 21-22]**

**If Winifred were among us today, in body as well as spirit, she would approve of the learning, humane values, and concern for our fellow man fostered through our seminars this week and this program.**

**For those of you who weren’t able to join us this week, here are some of the “ripped from the headlines” items that we discussed in the American Immigration and Culture Seminar led by my good friend, the amazing Jennifer Esperanza, Professor of Cultural Anthropology at Beloit College, herself a first generation American whose family came from the Philippines, and me.**

**From Sunday’s Wisconsin State Journal: “Trump’s stamp on immigration courts; recent trend in judges is former military and ICE attorneys” and “Swamped courts fast-tracking family cases: Speeding up hearings aims to prevent migrant families from setting down roots while they wait to find out whether they qualify for asylum.”**

**From Monday’s Los Angeles Times: “’As American as any child:” Defunct citizenship query may still lead to Latino undercount.”**

**From Wednesday’s El Paso Times: “Mr. President, the hatred of the El Paso shooting didn’t come from our city: When you visit today, you will see El Paso in the agony of our mourning. You will also see El Paso at its finest.”**

**From Thursday’s New York Times: “Climate Change Threatens the World’s Food Supply, United Nations Warns.”**

**From Thursday’s Huffington Post: “Children Left without Parents, Communities ‘Scared to Death’ After Massive ICE Raids.”**

**From Friday’s Washington Post: “The poultry industry recruited them. Now ICE raids are devastating their communities: How immigrants established vibrant communities in the rural South over a quarter century.”**

**And, finally, check these out from today’s Washington Post: “When they filed their asylum claim, they were told to wait in Mexico – where they say they were kidnapped;” and “ICE raids target workers, but few firms are charged;” and “Pope Francis again warns against nationalism, says recent speeches sound like ‘Hitler in 1934.’”**

**Just before I came to deliver this lecture, I was on the phone with Christina Goldbaum of the New York**

**Times who is writing an article on the Administration’s efforts to “break” the Immigration Judges’ union (of which I am a retired member) which will appear tomorrow.**

**Now, this is when, “in former lives,” I used to give my comprehensive disclaimer providing “plausible deniability” for everyone in the Immigration Court System if I happened to say anything inconvenient or controversial – in other words, if I spoke too much truth. But, now that I’m retired, we can skip that part.**

**Nevertheless, I do want to hold Lawrence, the Boynton Society, Mark, Alex, Kim, Jeff & Joanie, you folks, and anyone else of any importance whatsoever, harmless for my remarks this afternoon, for which I take full responsibility. No party line, no bureaucratic doublespeak, no “namby-pamby” academic platitudes, no BS. Just the truth, the whole truth, and nothing but the truth, of course as I see it, which isn’t necessarily the way everyone sees it. But, “different strokes” is, and always has been, an integral part of the “liberal arts experience” here at Lawrence.**

**But, that’s not all folks! Because today is Saturday, this is Bjorklunden, and *you* are such a great audience, I’m giving you my absolute, unconditional, money-back guarantee that this talk will be completely free from computer-generated slides, power points, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, I am the “power point” of this presentation.**

**Executive Summary**

**I will provide an overview and critique of US immigration and asylum policies from the perspective of my 46 years as a lawyer, in both the public and private sectors, public servant, senior executive, trial and appellate judge, educator, and most recently, unapologetic “rabble rouser” defending Due Process and judicial independence.**

**I will offer a description of the US immigration system by positing different categories of membership: full members of the “club” (US citizens); “associate members” (lawful permanent residents, refugees and asylees); “friends” (non-immigrants and holders of temporary status); and, persons outside the club (the undocumented). I will describe the legal framework that applies to these distinct populations and recent developments in federal law and policy that relate to them. I will also mention some cross-cutting issues that affect these populations, including immigrant detention, immigration court backlogs, state and local immigration policies, and Constitutional rights that extend to non-citizens.**

**Introduction**

**I see four distinct levels of membership in the United States, a vibrant21st century democracy built on the not completely fulfilled promise of “liberty and justice for all.” Membership in this “club” remains, among the nation’s most difficult, fundamental, and contentious issues. Membership determinations involve often conflicting human needs, such as belonging, self-determination, allegiance, loyalty, and even survival. In addition, the stakes are high. The US Supreme Court has said that expulsion from the nation can result in the “loss of everything that makes life worth living.”[[1]](#footnote-1)**

**The US immigration process does not only affect those living in Texas, California, New York, Florida, and states along the US-Mexico border, but other states with rich histories that continue to be shaped by immigrants, both documented and undocumented.**

**In 2016, the United States had a very contentious national election in which immigration played a major role. The election’s winners presented a far more hostile and negative view of immigration than the nation has seen in recent history. In ways not witnessed by recent generations of Americans, the Trump Administration has challenged both the US tradition as a haven for immigrants and its traditional role in the international community as a beacon of freedom, liberty, and justice.**

**We have seen instances of accelerated, harsh, and aggressive removals in many areas of the country. Some politicians, most Administration officials, and their supporters praise these efforts as necessary and long overdue. A debate over funding to build a wall the length of the US-Mexico border led to an unnecessary government shutdown from December 22, 2018 to January 25, 2019, which particularly hurt the US immigration court system (TRAC 2019). By mid-June 2019, the number of pending Immigration Court cases exceeded 900,000.**

**At the same time, other politicians and many states and localities have attempted to protect and reassure vulnerable populations in their communities that President Trump cannot keep all 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, local television news regularly features stories of scared families who believe that they could soon be forced out of their homes in the United States and sent to foreign countries where they have not been for years, perhaps decades. Some US citizen children who are part of these families face the prospect of exile to foreign countries they have never visited.**

 **Families seeking to apply for refuge under our laws were 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. The Administration has employed a range of interception, border enforcement, and legal strategies to deny access to the US asylum system. The President has also mocked the US Constitution with threats to strip some US citizens of their birthright – citizenship under the Fourteenth Amendment -- through unilateral and almost certainly illegal use of an Executive Order. Consequently, the issue of who should belong to our national club and how we treat those who are not welcome will continue to occupy our nation and its leaders.**

**Categories of Membership in the US “Club”**

 **Full Members**

**The “full voting members” of our nation are US citizens. A very small group of people are US “nationals” who owe permanent allegiance to, but are not citizens of the United States.**

**Under the Fourteenth Amendment to the US Constitution, persons born in the United States automatically become US citizens. The exceptions are children born to certain high-ranking foreign diplomats with immunity and rare individuals born on foreign public vessels who are not subject to the jurisdiction of the United States. US citizenship vests automatically, regardless of the US legal status of the mother or father.**

**Although so-called “birthright citizenship” has become a very controversial topic recently, it has been a firmly established constitutional rule for over a century. Because it is a constitutional rule, Congress cannot change it by statute, nor can the President change it by Executive Order. The great majority of scholars and lawyers agree that to do so would require a constitutional amendment or a radical reinterpretation of the US Constitution by the Supreme Court.**

**Additionally, certain individuals born abroad – i.e., whose parent or parents are US citizens who previously lived in the United States -- can automatically acquire US citizenship at birth. “Citizenship by acquisition” is governed by statute, rather than the Constitution, and the rules have changed over the years.**

**Additionally, children born outside the United States may under certain conditions automatically derive US 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 (“DHS”) for naturalization. This is, in effect, a way in which a prospective member of the 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 Fourteenth amendment provides that naturalized individuals shall be citizens, the Constitution does not specify rules for naturalization. Theoretically, Congress could decide not to provide for naturalization at all.**

**The rules for naturalization are set by statute and also have changed frequently 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 by some type of merit-based process. The rest of us are simply beneficiaries of extreme good fortune that we did nothing to deserve.**

**There is a process for de-naturalization of individuals who illegally obtained naturalization. Some of the most famous denaturalization cases 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 US citizens for evidence of past fraud that could lead to de-naturalization. Otherwise, however, one may lose US citizenship only through “voluntary relinquishment.”[[2]](#footnote-2) In other words, Congress may not involuntarily strip an individual of legally acquired US citizenship. 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.**

 **Associate Members**

**A second group might be characterized as “associate members” or “prospective members” of our club. In immigration terms, they are known as lawful permanent residents (LPRs) or “green card” holders. While LPRs cannot 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 US citizens, although significantly they are not required to do so.**

**LPRs are by far the largest group of “associate members.” The US system of permanent legal immigration favors the admission of three groups: close relatives of US citizens and LPRs; persons with needed job skills; and refugees. The United States admitted approximately 1.1 million permanent residents in fiscal year (“FY”) 2017 (DHS 2018).**

 **Family and employment-based immigrants**

**Immediate relatives of US citizens -- that is, spouses, minor children, and parents of adult US citizens -- can immigrate without numerical limitation. Approximately 516,000 immediate relatives, 300,000 of them spouses, were admitted as immigrants in FY 2017 (ibid, Table 6). However, only parents of adult US citizens who are over age twenty-one qualify for immediate relative status. Consequently, and contrary to popular opinion, the birth of a US citizen child confers no immediate immigration benefits on the parents.**

**Two hundred and twenty-six thousand immigrant visas annually are allocated for other types of family reunification for adult children of US citizens, spouses and children of LPRs, and siblings of US citizens. The latter category, however, has a waiting list of nearly 13 years, and for intending immigrants from certain countries in oversubscribed preference categories projected backlogs can extend for decades (Wheeler 2016; Kerwin and Warren 2019).**

**Another 140,000 immigrant visas annually for employment-based immigrants are allocated 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, at present only 10,000 immigrant visas annually are available to so-called “unskilled” workers whose services are needed by US employers.**

**Yet this latter category appears to be one in which US employers have a great need. Unskilled is a highly misleading term. Many of the so-called unskilled possess abilities and skills that few college educated persons possess or would be willing to learn and perform on a regular basis (Hagan, Demosant and Chavéz 2014).**

**The Trump Administration has chosen to characterize some aspects of legal family migration as “chain migration.” Accordingly, this Administration and some legislators have proposed a reduction in overall immigration and a reallocation of some of the family-based visas to the employment categories. However, there is no basis for such changes in the law. Indeed, most studies show that US society, and particularly the economy, would benefit from more legal immigration across the board (Bier 2018; Orrenius 2018).**

**Family immigration contributes to the success of the American economy and enriches our society, as does employment-based immigration. 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.**

**The Administration also erects bureaucratic roadblocks – often in the guise of additional security measures -- to slow the legal immigration process, and to discourage and block prospective immigrants from seeking permanent status. In particular, it has tried to severely restrict Muslim immigration, apparently to make good on campaign promises. While US law generally does not permit such specific religious exclusions and courts have enjoined the most severe forms of discrimination, the President nonetheless enjoys significant discretion related to immigrant admissions.**

 **Refugees**

**“Refugee” status can be granted to individuals who have been pre-screened abroad. While refugees – as well as asylees -- do not immediately become green-card holders, they have a right to remain in the United States indefinitely, can bring into the country their spouses and minor children, and can work. In most cases, they eventually become eligible to receive green cards, which can lead to US citizenship.**

**In recent years, refugees have become a political football, both internationally and in the United States. The humanitarian disaster in Syria has sent millions of persons, many of them women and children, pouring across the borders of neighboring countries in search of life-preserving safety. Many have found their way to the borders of Europe, prompting European Union leaders to search for solutions, including resettlement in third countries, integration into host communities, and measures to stem the tide of future arrivals.**

**One of President Trump’s first actions in office was to cut US refugee admissions drastically. As a result, refugee admissions have fallen from 84,994 in FY 2016, to 53,716 in FY 2017, 22,491 in FY 2018, 18,051 in FY 2019 through May 31st (DOS-PRM 2019). Between FY 2017 and FY 2019, the refugee admissions ceiling set yearly by the president fell from 110,000 to 30,000 (ibid.), the lowest ceiling since the creation of the US Refugee Admissions Program in 1980.**

**In his first Executive Order on immigration, sometimes referred to as “Travel Ban I,” the president sought to indefinitely bar the admission of Syrian refugees. As a result of litigation before the US Supreme Court, this order was modified to some extent. The latest version, known as “Travel Ban 3.0,” was finally allowed to go into effect by the Supreme 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 the president to institute his highly questionable legal attack on the rights of asylum seekers at the border.**

**Notwithstanding the minute number of Syrian refugees that the United States resettles, the rigorous pre-screening they receive, and the fact that most are women, children, or family units, various US state governors, including notably now 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 unsustainable national security concerns (Kerwin 2016). So far, federal courts have soundly rejected such efforts.[[3]](#footnote-3)**

**Nevertheless, a number of Administration officials and Members of Congress have expressed strong opposition to the current procedures for resettling refugees. 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 those from Syria and the Middle East, while effectively giving preference to Christian refugees over Muslims and those of other religions.[[4]](#footnote-4)**

**The President ultimately has great authority to determine the future of US overseas refugee programs. In theory, he could designate any group of refugees as of “special humanitarian concern” to the United States or designate none at all. And, as shown in FY 2018 and FY 2019, he can reduce the number of legal refugee admissions to historic lows or even to zero.**

**A popular myth about US refugee and asylum law is that the United States protects everyone who can show that they would be killed or placed in severe danger if returned to their home country. In fact, US and international refugee law applies only to those who face harm on account of one of five protected grounds: race, religion, nationality, political opinion, or the amorphous and highly controversial “membership in a particular social group.”**

**This means that if, for example, your neighbor seeks to kill you and rape your daughter because you are a Christian or a member of a targeted political party and the police cannot or will not 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. These are the arcane distinctions that appellate judges and policy makers far removed from the scene argue about endlessly. But to the refugee or asylum seeker, 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.**

**The nearly unprecedented retrenchment in our international humanitarian commitment to resettle refugees at a time of historically high numbers of forcibly displaced persons, has negatively affected large refugee populations such as Syrians, who are in dire need of resettlement opportunities. As of June 2019, the United Nations High Commissioner for Refugees (UNHCR) reported that there were 5.6 million Syrian refugees and 6.6 million internally displaced within Syria. Many of the forcibly displaced are children. The United States accepted only 62 Syrian refugees in FY 2018. According to a report from Oxfam International, the US fair share would be 170,000 a year.[[5]](#footnote-5)**

 **Asylees**

**“Asylees” typically enter or arrive in the United States with no status or with a temporary status and they seek to establish their refugee qualifications while in the country. Asylum cases formed the bulk of my work as an Immigration Judge at the Arlington Immigration Court. Beyond seeking asylum in removal proceedings before an Immigration Judge, persons already in the United States or at our border who satisfy the “refugee” definition may be granted asylum by DHS’s US Citizenship and Immigration Service (USCIS) Asylum Officers. Approximately 20,500 persons were granted asylum in FY 2016,[[6]](#footnote-6) approximately 8,700 by the Immigration Courts,[[7]](#footnote-7) and the balance by the DHS Asylum Office.**

**The US asylum system is under unprecedented attack by the Trump Administration. Former Attorney General Jeff Sessions and former DHS Secretary Kirstjen Nielsen claimed without proof that this system has attracted too many fraudulent applicants and served as a magnet for undocumented migration.**

**On February 15, 2019, President Trump declared a national emergency at the US-Mexico border, which has led to the deployment of several thousand National Guard troops to the border. Additionally, they president, with assistance from DHS and the US Department of Justice (DOJ), has issued a “proclamation” and “Interim Regulations” that would verely restrict the right of individuals arriving at the border to apply for asylum. According to these measures, those who enter anywhere but at an official port of entry will be ineligible for asylum, even though most families turn themselves in to the Border Patrol in the immediate vicinity of the border.**

**A US District Judge in San Francisco issued a Temporary Restraining Order against the enforcement of this initiative. That order was upheld on appeal by a “split panel” of the Ninth Circuit Court of Appeals. Interestingly, the Ninth Circuit opinion was written by Judge Jay Bybee, a leading conservative jurist appointed by President George W. Bush.[[8]](#footnote-8) By a 5-4 vote, with Chief Justice John Roberts siding with his four so-called “liberal” colleagues, the Supreme Court rejected the Administration’s irregular “emergency stay” request, thereby allowing the injunction to remain in effect pending further litigation in the lower courts.[[9]](#footnote-9)**

**Moreover, the Administration has provided inadequate facilities and too few USCIS Asylum Officers at the ports-of-entry (POEs), thereby artificially creating lengthy waiting periods of asylum applicants to be screened. Others are illegally turned away by US authorities when they try to apply at a POE. Not surprisingly, the Administration’s actions have generated a spirited legal challenge from the the American Civil Liberties Union and others which is pending in US District Court.**

**Additionally, the Administration has instituted a program disingenuously called 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.[[10]](#footnote-10) This policy has been challenged in federal court. In June 2019, the US and Mexico reached an agreement to expand this program beyond the ports-of-entry at San Diego, Calexico and and El Paso .**

**A continuing controversy involves the mostly women, children, and families from Central America, who are fleeing violence and corruption. We face difficult questions as to where, if anywhere, such individuals fit within our asylum and immigration systems. Will they be welcomed or will they be returned 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 US Immigration Judges. Also, the Administration has so far been unsuccessful in blocking asylum applications by those who entered illegally. It has also made some asylum seekers wait for court hearings in Mexico, even though they have demonstrated a credible fear of persecution, which allows them to make an asylum claim in US Immigration Courts.**

**Another myth is that those who enter illegally should simply “get in line” for a visa. However, unless an individual fits into one of the three limited groups of permanent immigrants, there is no line to join. Even some of those who appear to be eligible for permanent immigration may face lengthy waits or highly technical requirements that preclude any realistic chance of legal immigration in the foreseeable future. Finally, a high percentage of undocumented persons are already in the line, but subject to multi-year visa backogs (Kerwin and Warren 2017, 307).**

 **Friends**

**A third membership category 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 quite lengthy, but who have no clear path to permanent residency or citizenship. The most numerous group in this category is “nonimmigrants.”**

**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, not permanent residence.**

**Visitors for business or pleasure, approximately 50 million in FY 2017 (DHS 2018, Table 25), comprise the largest nonimmigrant category. An example of a “business visitor” might be a French national speaking at a conference and receiving no US compensation other than payment of expenses. Members of a German family coming to see the cherry blossoms or visit Colonial Williamsburg could be classified as “visitors for pleasure.”**

**Another familiar category is nonimmigrant academic students in so-called “F-1" status. In FY 2017, approximately 1.9 million such individuals with accompanying family members were admitted to the United States. (ibid.). As reported in the Washington Post and other media, nonimmigrant student admissions have steadily declined since Trump’s election.[[11]](#footnote-11) This has hurt the many colleges and universities that have come to rely on them to maintain and boost enrollment. Many attribute the decrease to the Administration’s anti-immigrant rhetoric and to bureaucratic roadblocks intended 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 are seldom accessible to the undocumented immigrants who are already living, working, or studying in the United States. Nonimmigrant visas have also come into the limelight, because President Trump’s Executive Orders on immigration bar visa issuance to nationals of certain, predominantly Muslim countries.**

**Beneficiaries of Temporary Protected Status (TPS) represent another group of “friends.” The Secretary of DHS may make TPS designations for nationals of countries where there is an “ongoing armed conflict,” “where there has been a natural disaster,” or “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety.” [[12]](#footnote-12)**

**Individuals in TPS status can temporarily reside and work in the United States. However, this status does not lead to lawful permanent residence or US citizenship, although some TPS recipients eventually qualify for green cards through the normal immigration system. Three of the largest groups of TPS beneficiaries are nationals of El Salvador, Honduras and Haiti. Because TPS designations are within the sole discretion of the Executive Branch, the administration can decide to terminate or revoke them, leaving former beneficiaries subject to removal if they cannot secure status in another way and fail to depart voluntarily. As of this writing, federal courts have enjoined the Administration’s attempt to terminate TPS for nationals of El Salvador, Honduras, Haiti, Nicaragua, Sudan, and Nepal. Testimony in these cases has indicated that the Administration ignored the recommendations of career officials and other experts in reaching these highly questionable termination decisions.**

**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. It claims that TPS is widely abused and that the so-called temporary protection invariably morphs into permanence.**

**On the other hand, TPS has been proven to be a 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 have US citizen or LPR family members (Warren and Kerwin 2017).**

**The relatively few TPS recipients who misbehave are arrested by ICE, placed in detention, and usually promptly removed. Far from an evasion of law, TPS has proven to be one of the most successful, practical, and efficient US immigration programs. 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 United States., makes little if any sense.**

**Outside the Club: the Undocumented**

**The estimated 10.7 million US undocumented residents-- 5.4 million from Mexico -- are outside the club (Warren 2019, 20). This group consists of individuals who crossed the border surreptitiously or by fraudulent means, as well as a significant group who entered legally as nonimmigrants, but overstayed or otherwise violated the terms of their admittance. A recent study by the Center for Migration Studies shows that overstays have significantly exceeded illegal entrants for each of the past seven years (ibid., 20-21).**

**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 FY 2017 approximately 550,000 individuals used this provision (DHS 2018, Table 6). However, the stringent requirements for that relief make it of little practical benefit to most of those who are here illegally (Kerwin and Warren 2019).**

**Also, there is a smaller, yet highly visible, group of individuals who were granted LPR status, 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 presents plausible arguments for expulsion. Nevertheless, there may be circumstances where forgiveness based on an overall assessment of the equities, particularly the effect on US citizen and LPR 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.[[13]](#footnote-13)**

**For many years, there has been an acrimonious debate on how to address the US undocumented population. Some say that these individuals possess characteristics, such as willingness to work hard in jobs most Americans do not want and US citizen or green card holding relatives, particularly children, which make them strong candidates for membership in the club at some level. They also argue that mass removals of such individuals from the United States would be impractical and inhumane.**

**The Trump Administration avers that such individuals are lawbreakers and a drag on US society and should be removed, through active enforcement efforts, a strategy of attrition, or both. The attrition strategy depends heavily on aggressive and effective enforcement of the prohibition on hiring non-citizens that lack employment authorization.**

**These laws also prohibit discrimination based on national origin or citizenship status against employees and job applicants authorized to work in the United States. The I-9 employment verification form is part of the process for enforcing these laws. To date, however, the so-called employer sanctions laws have not effectively eliminated US employment opportunities for unauthorized workers.**

**Groups favoring removal have consistently blocked efforts at overhauling the immigration system. One such effort, referred to as comprehensive immigration reform, was supported by then President George W. Bush and subsequently by a bipartisan group of US senators. It would have combined stronger border enforcement with 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 admission of temporary workers to do “low-skilled” or “semi-skilled” jobs. In reality, however, many of these jobs, which are demeaned by immigration restrictionists and policymakers, involve skills that few possess and fewer still would be willing to obtain and carry out on a long-term basis.**

**A second unsuccessful proposal -- the Development, Relief and Education for Alien Minors Act (the DREAM Act”) -- would have made it possible for certain undocumented youth, many of them US high school graduates, who have lived in the United States since a young age to regularize their status by attending college, working in the United States, or joining the US military.**

**Often, students who came with their parents at a young age do not become fully aware of their undocumented status until they fill out college application or financial aid forms and are asked to verify legal status in the United States. By one estimate, there are 1.25 million DACA-eligible individuals in the United States, making the issue of how to treat them a highly significant aspect of the immigration debate (Kerwin and Warren 2016).**

**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 in the United States. As of 2018, approximately 750,000 young people residing in US communities had registered under DACA (Kerwin and Warren 2016, 22).**

**A similar program for parents of US 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 that disingenuously claimed that they would be harmed by this program. An evenly divided Supreme Court rebuffed the Obama Administration and allowed this injunction to stand.**

**At first, President Trump expressed “great sympathy” for the Dreamers, and 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 border wall, cut legal immigration, restrict family migration, and reduce the rights of children seeking asylum in return for granting Dreamers a path to citizenship.**

**In September 2017, the Trump Administration ended the DACA program, claiming that it was an illegal action by President Obama. Terminating DACA would strip beneficiaries of authorization to work or study and would throw them into US Immigration Courts, which are already in chaos with a pending docket that may soon reach an astounding one million cases. 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.**

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

**Constitutional Rights**

**Before closing, I will say a few words about the Constitutional rights of undocumented individuals. One often misstated 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. The Supreme Court, for example, recently reaffirmed that US “representatives serve all residents, not just those eligible or registered to vote.”[[14]](#footnote-14)**

**First and foremost is the right to fair treatment under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to our Constitution.[[15]](#footnote-15) Sometimes, the course of history can be changed by a single vote. One of those instances is a 5-4 decision by the US Supreme Court in 1982 in a case called Plyler v. Doe.[[16]](#footnote-16) 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 US citizens and lawful permanent residents. In doing so, 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.” [[17]](#footnote-17)**

**The right to receive free public education does not, however, extend to higher education. In many states, notwithstanding long residence, undocumented high school graduates have a difficult time continuing their education because they are required to pay nonresident tuition and are denied access to most scholarships or other forms of financial aid.**

**Not surprisingly, unlawful presence does not relieve an individual from compliance with local civil and criminal laws. Thus, for example, an undocumented couple from Uganda who seek to marry in Alexandria, Virginia must comply with Virginia law, rather than with Ugandan tribal customs.**

**Another important obligation under our laws that does not depend on legal status is payment of taxes. Failure to pay taxes and to be able to prove compliance, may prove to be a serious impediment for a foreign individual who otherwise qualifies to regularize status in the United States. Under the Federal REAL ID Act, designed to improve security following the 9-11 attacks, in many states it is difficult or impossible for someone without legal status to obtain a driver’s license.**

**Conclusion**

**In closing, I have described how the rules governing permanent membership in the United States favor three groups: family, skilled workers, and refugees/asylees, while providing only limited opportunities for those who seek membership based on unskilled labor.**

**The undocumented possess certain well-recognized rights, including the right to receive public primary and secondary education and the right to fair treatment with respect to expulsion from the club and/or removal from the premises.**

**The mass deportation of the 10.7 million US undocumented residents is highly unlikely because all of these individuals have due process rights to a fair procedure prior to their removal. Moreover, it would be disastrous to US families, many industries, and communities. Nevertheless, the Executive does have a great deal of discretionary power over immigration and could revoke Executive protections granted by previous Administrations, to terminate or restrict overseas refugee admission programs, and step up arrests, detentions, and removals. While these actions are counterproductive and wasteful, they undoubtedly will be politically popular with certain voting blocks. Therefore, immigration is likely to remain both highly controversial and in the public eye for the foreseeable future.**

**Thanks again for inviting me, for coming out this afternoon, and for listening.**

***Now is the time to take a stand for fundamental fairness and social justice under law! I urge you to join what I call the New Due Process Army and fight for a just future for everyone in America! Due process forever!***

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