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DIVERSITY VISA PROGRAM AND ITS SUSCEPTIBILITY TO FRAUD AND ABUSE

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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DIVERSITY VISA PROGRAM AND ITS SUSCEPTIBILITY TO FRAUD AND ABUSE

THURSDAY, APRIL 29, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. John N. Hostettler (Chair of the Subcommittee) presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

Last week it was reported that Pat Tillman, a former safety for the Arizona Cardinals and an Army Ranger, was killed in Afghanistan. Before we begin today's hearing, I would like to pass along my condolences to Specialist Tillman's family and my gratitude to all of the men and women who are serving our country and to their families.

I would also like to mention another American hero whose death has received less notice. On the evening of December 16th, 2003, Border Patrol Agent James P. Epling disappeared while in foot pursuit of several illegal aliens along the Colorado River. Agent Epling, assigned to the Yuma Border Patrol Sector in Yuma, Arizona, was working near Andrade, California, when he was last seen attempting to apprehend a group of illegal aliens along the banks of the Colorado River.

Moments prior to his disappearance, Agent Epling, with complete disregard for his personal safety, entered the swift cold waters of the Colorado River to rescue a female alien in distress. Agent Epling reached for the woman and pulled her to the safety of the riverbank, where another agent waited to assist.

After transferring the woman to the other agent, Agent Epling pursued four other individuals he observed running south toward Mexico, along the riverbank, in an attempt to escape arrest. That was the last time that Agent Epling was seen alive. Agent Epling left beind a wife, who was 8 months pregnant at the time, and three children, as well as his parents. He was 24 years old. On January 28, 2004, James Paul Epling, II, was born.

It is important as we work as a Committee, and a Subcommittee, to remember the brave men and women who labor day and night, 365 days a year, to enforce our immigration laws. They keep vigil at our ports of entry, in our cities, and along our border, ready to defend our country and its people. Some of them, like Agent Epling, make the ultimate sacrifice for the United States.

I join Customs and Border Protection Chairman Robert Bonner in calling Agent Epling, "One of our Nation's most heroic guardians."

And now I turn to our hearing.

Today, the Subcommittee on Immigration, Border Security, and Claims will examine the Diversity Visa or DV Program. At this hearing, we will review the history of the program and its implementation. The DV Program was part of the Immigration Act of 1990. It was designed to increase diversity in the U.S. immigrant population by providing nationals of countries that have had low immigration rates to the United States the opportunity to apply for immigrant visas. Applicants for the DV Program participate in a lottery in which the winners are selected through a computer-generated random drawing. Qualifying winners are issued visas on a first-come, first-served basis. Annually, approximately 50,000 aliens enter under the program.

The program is not without its critics, however. Some experts have argued that the program is susceptible to fraud and manipulation. For example, although a DV applicant will be disqualified if the State Department discovers that more than one application per year is filed on his or her behalf, critics have asserted that it is commonplace for aliens to file multiple applications for the lottery, a fact borne out by news reports.

In addition, reviewers have asserted that identity fraud, in the process, is "endemic," and that the case of fraudulent documents in connection with the visa lottery is "commonplace." This makes sense if aliens are filing multiple applications under various aliases to improve their chances in a lottery. If an alien were to be selected under an alias, the alien must then obtain and use fraudulent documents to support the visa application. Others have complained that the lottery has spawned a cottage industry of sponsors who falsely promise success to applicants in exchange for large sums of money.

In addition to, and in part because of, concerns about fraud in the DV Program, critics have argued that the program poses a danger to national security. Specifically, the lack of restrictions on admissions under the DV Program has been identified as a vulnerability that could be exploited by criminals and terrorists. Unlike nonimmigrant visas, there are no bars to participation in a visa lottery on aliens from state-sponsors of terrorism. Consequently, 3,380 alien nationals from state sponsors of terrorism, not counting Iraq, were selected in the DV 2004 lottery.

Further, unlike other visa categories, aliens who enter the United States under the DV Program need not have any familial or business ties to our country. These types of relationships help ensure that immigrants who enter our country have a stake in our country's success and have the advanced skills to contribute to our economy, which some successful DV applicants lack.

For whatever the reason, aliens who have immigrated under the DV Program have been tied to terrorism in the recent past. Hesham Hedayet, who killed two and injured several others in an attack at Los Angeles Airport on July 4th, 2002, received his green card under the DV Program. In an asylum application that he had

filed earlier, he had claimed that he had been accused of being a terrorist, a claim that the former INS never investigated.

Similarly, a Pakistani national who pleaded guilty in August 2002 to a single count of conspiracy to use arson or explosives to destroy electrical power stations in Florida and two Moroccans, who were indicted as members of an alleged sleeper cell that same month, also entered the United States under the DV Program.

In addition, critics have complained that the DV Program unfairly moves lottery winners ahead of certain family and employer-sponsored immigrants. This is particularly an issue for aliens in lower priority categories who have to wait years for visas.

Further, experts have asserted that the cost of the DV Program exceed the revenue that the program raises, despite the fact that Congress, in the 1996 act, authorized the State Department to collect a fee for the processing of DV visas. In the nonimmigrant process, applicants pay a processing fee in advance. Currently, however, only those DV applicants who are selected in the lottery actually pay a fee.

Finally, critics have questioned whether the DV Program even accomplishes its goal of enhancing and promoting diversity among immigrants to the United States. Some have gone so far as to term these "antidiversity" visas, asserting that they are intended to offset the diversity resulting from nondiscriminatory immigration. We will explore these issues with our witnesses today.

Before I begin, I would like to recognize a Member of the minority for an opening statement, if you have one.

Mr. BERMAN. No. I recall the whole process and the thinking that went into the creation of this program back in the 1990 bill, but I take a little bit of issue with some of the points in the Chairman's opening statement, but I would be curious to hear more from our experts about the program.

Mr. HOSTETTLER. I thank the gentleman.

The chair recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I appreciate you holding this hearing today. This is an aspect of immigration that I have not been involved in a serious investigation of in the past.

I would just frame this discussion with that any Nation has to have a solid immigration policy and that all Nations do, and all Nations have to preserve and protect their borders. And the goal of an immigration policy is certainly for national security, but also the policy should reflect the economic, the social, and the cultural interests of the Nation that established that policy, and in this case, it is the United States of America.

And I will be curious, as this testimony unfolds, to hear how the diversity lottery has enhanced the economic, social or cultural well-being of the United States and whether it fits in and is compatible with a number of our other immigration policies and to continue the discussion of what are our overall goals, and what do we want this Nation to look like in 10 years or 25 years or 50 years. Immigration policy directs that, and every aspect and every component of immigration policy affects us in a long-term way.

We can deal with any of these in the short term, and we can adapt, but I would also point out that it has been the policy of the

United States over past years to promote assimilation, with the idea that we have a greater overall American culture and civilization that we ask people to buy into and to commit themselves to this Nation and demonstrate a level of patriotism, and that we have lost it.

We have lost our goals, and to the extent that we have been promoting other values, aside from this overall American culture, and the idea of not supporting assimilation and, in fact, dividing and working against assimilation and promoting ideas that are counter to the interests of the United States is something that I am interested in healing back up again, and so I will be looking at how we can use the diversity lottery, if at all, to promote the idea of assimilation.

Thank you, Mr. Chairman. I look forward to the testimony.

Mr. HOSTETTLER. I thank the gentleman.

The chair will now introduce the panel of witnesses that is before us today.

Anne Patterson—excuse me. In just a moment, I will introduce the panel of witnesses.

[Pause.]

Mr. HOSTETTLER. We are honored to have our colleague from the Judiciary Committee, the gentleman from Virginia, Mr. Goodlatte with us today. I would ask unanimous consent for the chair to be given an additional 5 minutes during opening statements, which it will yield to the gentleman from Virginia for an opening statement that he may wish to present.

Seeing no objections, the gentleman may proceed for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding this hearing, and I apologize for my tardiness. I very much appreciate the opportunity to participate and to offer my comments on what I think is an important piece of legislation.

Last February, I introduced the Security and Fairness Enhancement or SAFE for America Act. This important legislation would eliminate the controversial visa lottery program which threatens national security, results in the unfair administration of our Nation's immigration laws and encourages a cottage industry for fraudulent opportunists. This program presents a serious national security threat.

Under the program, each successful applicant is chosen at random and given the status of permanent residence based on pure luck. A perfect example of the system gone awry is the case of Hesham Mohamed Ali Hedayet, the Egyptian national who killed two and wounded three during a shooting spree on Los Angeles International Airport in July of 2002. He was allowed to apply for lawful permanent resident status in 1997 because of his wife's status as a visa lottery winner.

The State Department's Inspector General has even weighed in on the national security threat posed by the visa lottery program. In a report issued in September of 2003, the Office of the Inspector General stated that the visa lottery program contained significant threats to national security from entry of hostile intelligence officers, criminals and terrorists in the United States as permanent residents.

Usually, immigrant visas are issued to foreign nationals that have existing connections with family members lawfully residing in the United States or with U.S. employers. These types of relationships help ensure that immigrants entering our country have a stake in continuing America's success and have needed skills to contribute to our Nation's economy. However, under the visa lottery program, visas are awarded to immigrants at random without meeting such criteria.

In addition, the visa lottery program is unfair to immigrants who comply with the United States' immigration laws. The visa lottery program does not expressly prohibit illegal aliens from applying to receive visas through the program. Thus, the program treats foreign nationals that comply with our laws the same as those that blatantly violate our laws.

In addition, most family-sponsored immigrants currently face a wait of years to obtain visas. If the lottery program pushes 50,000 random immigrants with no particular family ties, job skills or education ahead of these family- and employer-sponsored immigrants each year, with relatively no wait, this sends the wrong message to those who wish to enter our great country and to the international community as a whole.

Furthermore, the visa lottery program is wrought with fraud. A recent report released by the Center for Immigration Studies states that it is commonplace for foreign nationals to apply for the lottery program multiple times using many different aliases. In addition, the visa lottery program has spawned a cottage industry featuring sponsors in the U.S. who false promise success to applicants in exchange for large sums of money. Ill-informed foreign nationals are willing to pay top dollar for the guarantee of lawful permanent resident status in the U.S.

The State Department's Office of the Inspector General confirms these allegations of widespread fraud in its September report. Specifically, the report states that the visa lottery program is subject to widespread abuse and that identity fraud is endemic, and fraudulent documents are commonplace. Furthermore, the report also reveals that the State Department found that 364,000 duplicate applications were detected in DV 2003 alone. The only current penalty for such abuse is disqualification in that year's lottery.

The visa lottery program represents what is wrong with our country's immigration system. My legislation would eliminate the visa lottery program. The removal of this controversial program will help ensure our Nation's security, make the administration of our immigration laws more consistent and fair and help reduce immigration fraud and opportunism. The serious national security threats, fraud and waste that the visa lottery program present beg the question why is this program still in existence?

I applaud you, Mr. Chairman, for holding this hearing to carefully examine this controversial program, and I look forward to hearing from today's witnesses.

Mr. HOSTETTLER. I thank the gentleman.

The chair will now introduce the panel.

Anne Patterson is the Deputy Inspector General of the U.S. Department of State. Just before beginning this assignment, she served as the U.S. Ambassador to Colombia and, before that, as our

Ambassador to El Salvador. Ambassador Patterson joined the Foreign Service in 1973 as an economic officer. She has served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary of Inter-American Affairs and as office director for the Andean Countries.

During the course of her career, Ambassador Patterson has had a variety of political and economic assignments, including in the Bureau of Inter-American Affairs, the Bureau of Intelligence and Research, and the Bureau of Economic and Business Affairs. I also understand that Ambassador Patterson has been tapped to be the career Deputy U.N. Ambassador and congratulate her on this appointment. A graduate from Wellesley College, Ambassador Patterson attended graduate school at the University of North Carolina.

Jan Ting is a professor of law at Temple University Law School where he has worked on and off since 1977. Professor Ting took time off from his academic duties to serve as the Assistant Commissioner for the Immigration and Naturalization Service from 1990 until 1993. Before joining the Temple Law School faculty, Professor Ting was an attorney at the Philadelphia law firm of Pepper, Hamilton & Sheetz. He currently teaches courses in immigration and tax law and has published several articles in both of those areas. He is a graduate of Oberland College and received an MA degree in Asian Studies from the University of Hawaii in 1972. He received his law degree from Harvard Law School in 1975.

Steven Camarota is Director of Research at the Center for Immigration Studies here in Washington. He has testified several times before Congress and has published numerous articles on the impact of immigration in such journals and papers as *Social Science Quarterly*, *The Washington Post*, the Chicago Tribune and National Review. Dr. Camarota is currently under contract with the Census Bureau as the lead researcher on a project examining the quality of foreign-born data in the American Community Survey. He holds a Ph.D. from the University of Virginia in public policy analysis and a master's degree in political science from the University of Pennsylvania.

Charles Nyaga is a native of Kenya. He came to the United States with his family as a student 8 years ago, and he is currently a master of divinity student at the Interdenominational Theological Center in Atlanta, Georgia.

In 1997, he applied for the 1998 Diversity Visa Program, and his application was selected. In accordance with the Diversity Visa requirements, Mr. Nyaga and his wife submitted an application to adjust their status to lawful permanent resident. Because at the end of the fiscal year the INS had failed to adjust Mr. Nyaga's status, his application expired. Mr. Nyaga and his wife took their case to the Eleventh Circuit Court of Appeals. In a decision issued last year, the Court found that the INS lacked the authority to act on Mr. Nyaga's application after the end of the fiscal year. Mr. Nyaga will be discussing his case with the Subcommittee today.

At this time, members of the panel, without objection, you will have 5 minutes to offer your opening statements, and your written statements can be offered into the record.

Ambassador Patterson?

STATEMENT OF THE HONORABLE ANNE W. PATTERSON, DEPUTY INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF STATE

Ms. PATTERSON. Thank you, Mr. Chairman, and thank you Members of the Subcommittee.

I am grateful for the opportunity to testify on the Office of the Inspector General's work on the Diversity Visa Program. I will summarize my written statement regarding OIG's report last fall, our findings and recommendations, and the Department's progress in responding to them.

As you mentioned, the program authorizes up to 50,000 immigrant visas annually to persons from countries who are underrepresented among the approximately one million immigrants to the U.S. each year.

Last fall, the program moved away from its traditional paper-based application system and was held over the Internet. This new application system is based at the Kentucky Consular Center, which I visited last week. The technological advances appear to be significant.

Newly registered electronic winners are just beginning to be notified to start the visa application process. As they move along in the process, facial and name recognition technology will check each winner against the database of other applicants to identify duplicate entries. The Department believes, once the program operates using the full technology available, fraud will be less likely to occur. Since our previous review took place prior to electronic registration, we plan to reexamine the program to determine if some of the vulnerabilities we identified have been addressed.

In our report, we recommended applicants from states that sponsor terrorism be barred from the Diversity Visa Program. We believe this is a serious vulnerability. The Department agrees with OIG in principle, but expressed concerns over the effect of permanently barring aliens who are fleeing oppressive regimes, such as Cuba, Libya, Syria and Iran. Moreover, the Department believes consular procedures and heightened awareness provide safeguards against terrorists since the Diversity Visa applicant must fulfill all of the standard requirements of an immigrant visa. In addition, by October, all immigrant and nonimmigrant visa applicants will have their index fingers digitally scanned and checked against a database.

Although these measures and several others tighten the program, we remain concerned that hostile intelligence officers, criminals and terrorists could use the program to enter our country as permanent residents. It may be advisable to consider legislation similar to the Enhanced Border Security and Visa Reform Act of 2002. This bars the issuance of visas to aliens from states sponsoring terrorism unless the Secretary decides that recipients do not pose a risk to our national security.

Our report also pointed out widespread abuse in the Diversity Visa Program. Much of this is tied to applicant pools which predate electronic registration. I provided some examples of fraud in my written statement. The Kentucky Consular Center continues to detect thousands of duplicates each year. Currently, the penalty for submitting detected duplicate entries is disqualification for the

year that the duplicate submission was detected. Applicants who also file under a false identity and fraudulent documents are commonplace since many countries have little control over their vital records. As a result, OIG recommended that the Department propose changing the Immigration and Nationality Act to bar permanently from future lottery programs all adult applicants who are identified as multiple filers.

While Department officials agree, the law only makes someone ineligible for a visa on the basis of fraud or willful material misrepresentations. In the case of Diversity Visa applicants, it is unclear whether submitting multiple lottery entries is illegal. While we welcome the Department's agreement on this issue, it is inherently unfair that applicants who play by the rules are disadvantaged. Clarifying legislation might provide a basis to eliminate multiple filers.

Unlike other visa applications, the current Diversity Visa processing fee is collected only from applicants selected as winners. Millions of applicants pay nothing to participate. For fiscal 2002, the Department estimated that program costs not covered by the fee were about $840,000. OIG recommended that the Department seek authority to collect processing fees from everybody who applies. In addition, many embassies that issue large numbers of Diversity Visas have small Fraud Units or none at all. As a result, we recommended that the Department determine whether antifraud field investigations would be useful in Diversity Visa cases and how the Diversity Visa fee could be devoted to antifraud work at overseas missions.

The Department considered self-financing of this program to be impractical, at least under the old paper-based system. But with electronic filing, applicants could pay a small fee for registration, enabling the U.S. Government to recoup costs and fund more fraud prevention officers overseas. Such an approach might also reduce multiple applications, since entry would no longer be free.

We also determined the Department could do a better job of identifying all costs associated with the Diversity Visa Program from overseas posts. Section 636 of Public Law 104–208 provides for charging a fee associated with the Diversity Visa Program, which currently is charged only to program winners. Perhaps legislation would allow the Department to expand fee collection to include all applicants and fund antifraud investigators.

To conclude, Mr. Chairman, the Department and the Bureau of Consular Affairs have made progress in reducing fraud and vulnerabilities. We believe applicants from state sponsors of terrorism should be excluded, that multiple applicants should be penalized and that the program should charge application fees that would enable the Department to recoup its costs for hiring more people and would reduce the number of multiple applicants.

OIG will undertake a follow-up review, and we will continue to work with the Department and with the Congress to recommend improvements.

Thank you very much, and I would be happy to answer any questions.

[The prepared statement of Ms. Patterson follows:]

PREPARED STATEMENT OF ANNE W. PATTERSON

Chairman Hostettler, Representative Jackson Lee, and Members of the Subcommittee:

Thank you for the opportunity to testify on the Office of Inspector General's (OIG) work concerning the Department's Diversity Visa Program. I would like to discuss with you the findings and recommendations of our report last fall and the Department's progress in responding to our recommendations. I would also note that OIG has a good working relationship with the Department and is conducting ongoing work concerning consular operations to strengthen consular programs and identify methods to reduce fraud in visa and passport programs. The Department has taken some steps toward addressing OIG's recommendations. However, legislative changes may be needed to effectively address current Diversity Visa Program vulnerabilities, including barring applicants from states sponsoring terrorism, barring applicants with multiple filings, and ensuring that the program is self-financing.

BACKGROUND

In FY 1995, Congress established a Diversity Visa Program that authorized up to 50,000 immigrant visas annually to persons from countries that were underrepresented among the 400,000 to 500,000 immigrants coming to the United States each year. Most immigration to the United States is based upon family relationships or employment. Diversity visa applicants, however, can qualify on the basis of education and/or work experience. Applicants need only to demonstrate that they have the equivalent of a U.S. high school education or two years of work experience in an occupation that requires at least two years of training or experience. If ultimately selected as lottery winners, like other immigrant applicants, they are subject to all of the grounds upon which a visa can be denied, including medical condition and criminal behavior.

Originally, the Diversity Visa Program was one of many immigrant visa functions assigned to the National Visa Center at Portsmouth, New Hampshire. In September 2000, diversity visa processing was moved to a newly remodeled site at Williamsburg, Kentucky, the Kentucky Consular Center (KCC). Unlike earlier lottery programs, KCC processes lottery applications in the United States, thereby relieving overseas missions of many clerical and file storage responsibilities. Kentucky Consular Center employees receive and process lottery entries, select winners, process winners' visa applications, and schedule applicant interviews at missions abroad. Consular officers at those missions issue or deny the applications.

RECENT DEVELOPMENTS IN THE DIVERSITY VISA PROGRAM

Last week, I toured the Kentucky Consular Center. I was impressed with the center's ability to eliminate duplicate entries based on addresses and names electronically, including the use of facial recognition technology. I am sure that the Bureau of Consular Affairs would welcome members of your staff to visit the center to see this technology first hand. The technology can do the many procedures that simply were not possible when seven million or fifteen million envelopes came in by hand. Until this year, the diversity visa lottery was paper-based, which the Department characterized as labor intensive, inefficient, and costly. However, this year the Department implemented an entirely electronic registration system called E-DV for the DV–2005 lottery, which received nearly six million entries via the Internet during the two-month registration period. I should note also that our review took place prior to E-DV's initiation, which occurred between November 1 and December 30, 2003. Therefore, OIG plans to reexamine its previous findings in the context of this new technology. OIG will do this along with other ongoing consular program reviews and will continue to recommend ways to strengthen these programs.

OIG's ongoing consular work has identified fraud that includes the Diversity Visa Program, although, these incidents seem to be tied to applicant pools that pre-date the E-DV program registration. At one post, we discovered that some applicants submitted duplicate applications using similar photos that were undetected by the facial recognition technology. At another post, we discovered a common scheme used by some Foreign Service national employees, who offer to buy winning lottery applications, taking advantage of the fact that many people cannot afford the full costs associated with the visa process. In these cases, FSNs offered to purchase winning applications for up to $4,000. Once in possession of the winning applications, FSNs would switch the photographs with imposters, who paid several times over the original purchase price. In some cases, FSNs switch entire application packages.

At this point in the E-DV program, lottery winners are just beginning to be notified to start the visa application process. Using facial and name recognition tech-

nology and data mining techniques, each winner will be checked against the database of all other applicants to identify duplicate entries, which will result in disqualification. The Department believes once E-DV is further implemented, these types of fraud will be less likely to occur. Our future work will assess whether these vulnerabilities have been fully addressed.

FINDINGS AND RECOMMENDATIONS

In terms of our original diversity visa review, we note that section 306 of the Enhanced Border Security and Visa Reform Act of 2002 (Pub. L 107–173) generally prohibits issuance of nonimmigrant visas to aliens from state sponsors of terrorism unless the Secretary of State judges that they do not pose a risk to the national security of the United States. There are no parallel restrictions for immigrant visas, including the Diversity Visa Program. Because of this, and because of the program's vulnerability to fraud and its ease of application, OIG believes that this program contains significant vulnerabilities to national security as hostile intelligence officers, criminals, and terrorists attempt to use it to enter the United States as permanent residents. As a result of this finding, OIG recommended that the Department propose changes to the Immigration and Nationality Act to bar from the Diversity Visa application process applicants from nations that sponsor terrorism.

The Department agrees with OIG in principal regarding this recommendation, but has expressed concerns over the subsequent effect of permanently barring aliens who are fleeing the oppressive regimes of states that sponsor terrorism. For example, aliens fleeing oppression in countries such as Cuba, Libya, Syria, and Iran would be ineligible to apply for a visa via the Diversity Visa Program if our recommendation were implemented.

It is also true that consular procedures and heightened awareness will provide greater safeguards against terrorists entering through the diversity visa process. Consular officers interview all diversity visa winners and check police and medical records once applicants begin the actual visa application process. By October of this year, all immigrant and non-immigrant visa applicants will have their index fingers digitally scanned. This system is already in place at 17 of the Department's immigrant visa sections and over 100 non-immigrant sections. In fact, all posts will have this capability by the end of October. This means that fingerprints can be run through U.S. databases of criminals and terrorists in about 15 minutes. It also means that if an applicant applies for a non-immigrant visa as Mr. Smith and later applies for a diversity visa under a different name, the fingerprint system will identify him as a fraudulent applicant. The electronic registration system should reduce fraud and reduce the burden on our consular officers. It is also worth observing that in Bangladesh, consular officers rejected 85 percent of the 2002 diversity visa winners using the visa application process, indicating that the consular office at that post has been very alert to the propensity for fraud.

OIG's report pointed out widespread abuse in the Diversity Visa Program. Despite the strictures against duplicate submissions, the Kentucky Consular Center detects thousands of duplicates each year. Currently, the penalty for submitting detected duplicate entries is disqualification for the year that the duplicate submission was detected. Identity fraud, meanwhile, is endemic, and fraudulent documents are commonplace. Many countries exercise poor control over their vital records and identity documents, exacerbating the potential for program abuse. In some countries, control is so poor that consular officers must assume that all travel, identity, and civil documents are unreliable. As a result, OIG recommended that the Department propose changing the Immigration and Nationality Act (INA) to bar permanently from future diversity lottery programs all adult applicants who are identified as multiple filers.

The Department told OIG that it agrees with this recommendation and is currently reviewing the legal ramifications of our recommendation. Current provisions of INA 212(a)(6)(C) only renders persons as ineligible for a visa on the basis of fraud or willful material misrepresentations. In the case of diversity visa applicants, it is unclear whether submitting multiple lottery entries constitutes material misrepresentation. The Department has additional concerns over permanently eliminating applicants unfairly and permanently if, for example, applicants have no knowledge or involvement with the submission of multiple lottery entries. While OIG welcomes the Department's agreement on this issue, perhaps clarifying legislation would provide a means to permanently eliminate multiple filers from the program.

Several offices and officers in CA's Directorate of Visa Services (CA/VO) manage and oversee parts of the Diversity Visa Program and OIG believes that management needs to be tightened. Missions do not have current written guidance on what is, country by country, the equivalent of a U.S. high school education. Many missions

do not have the personnel or language resources to determine which applicants qualify through training or work experience. CA/VO prepares an annual statistical report for the Congress on diversity visa issuances, but does not include much trend analysis for the Kentucky Consular Center, overseas missions, or senior CA management. OIG recommended that the Department issue standards for determining whether foreign high school educations are comparable to U.S. high school educations. OIG believes the Department should also prepare an annual report on regional and worldwide diversity visa trends and program issues.

Responding to this recommendation, the Department recently purchased a newly published reference book that translates and standardizes foreign educational credentials for use in validating educational requirements of applicants and is planning to distribute a copy to all diversity visa posts. The Department is preparing a report on trends and issues for the recently completed DV–2003 program. OIG considers this as a first step toward establishing guidance for this program. In terms of our recommendation that the Department prepare an annual report, we understand that the Department is summarizing the demographic data trends and identifying program issues revealed through its diversity visa database. We look forward to receiving this data and observing what it shows in terms of fraud indicators and other program trends.

Unlike other visa applications, the current diversity visa processing fee is collected only from applicants selected as winners. Millions of applicants, therefore, pay nothing to participate, and the U.S. government pays all costs not covered by the diversity visa fee. For fiscal 2002, the Department estimated that program costs not covered by the fee exceeded $840,000. Since program shortfalls persist, OIG recommended that the Department seek authority to collect processing fees from all persons who apply for the diversity visa program. In addition, OIG determined that no current diversity visa fees are allotted to fraud prevention. Antifraud activities at post are generally dominated by nonimmigrant visa fraud cases. Many embassies and consulates with significant diversity visa issues, therefore, do not routinely refer problem cases to their antifraud units, and some missions have no antifraud units. As a result, OIG recommended that the Department determine whether antifraud field investigations are useful in diversity visa cases and how the diversity visa fee could be appropriately devoted to antifraud work at overseas missions.

The Department charges nothing for entry into the program and has determined that charging a small fee for the paper-based registration system is impractical. Although OIG agrees that an application fee for paper-based applications may not be feasible, the new electronic system may open the door for charging a fee that will cover program costs and the associated administrative costs. According to a sample taken from one region of applicants, about 50 percent of applicants apply from the United States and 70 percent of applicants already use a facilitator to assist with registration. Many of these facilitators can be found on the Internet and charge fees for services. Using an electronic payment system, applicants could pay a small fee for diversity visa registration, enabling the U.S. government to recoup costs and fund more fraud prevention officers overseas, especially in countries with critical fraud problems. Such an approach might also reduce multiple entries since applications would no longer be free. Further, OIG determined that the Department could do a better job of identifying all costs associated with the Diversity Visa Program from overseas posts. Currently, that information is not fully reported. Further, section 636 of Public Law 104–208 provides for charging a fee associated with the Diversity Visa Program, which currently is charged only to program winners. Perhaps clarifying legislation would allow the Department to expand fee collection to include all program applicants and fund anti-fraud investigators.

When OIG began its review of the Diversity Visa Program, there was no antifraud officer position at the Kentucky Consular Center. OIG has been advised that a position now is approved for that facility and an officer soon will be in place to coordinate antifraud issues and policies. When I visited the center last week, the Department affirmed that they were in the process of bringing an antifraud officer on board. At the time of our review, only the center's director was an experienced consular officer. OIG also recommended workload studies to determine whether a full-time visa officer position and a language-designated telephone inquiry position should be established at the Kentucky Consular Center.

With regard to OIG's recommendation to establish a language-designated telephone inquiry position, the Department determined that, since no predominating language exists among diversity visa applicants other than English, the Department is considering the idea of switching foreign language inquiries to the National Visa Center, where employees speak 40 different languages. OIG endorses this idea since it appears to be feasible.

CONCLUSIONS

To sum up, Mr. Chairman, the Department and the Bureau of Consular Affairs have made progress in reducing fraud and vulnerabilities by implementing the facial recognition system for diversity visa applicants. Certainly, our contacts with the Bureau of Consular Affairs and consular officers overseas indicated a widespread understanding of the shortcomings of the program. In OIG, we believe that applicants from state sponsors of terrorism should be excluded, that multiple applicants should be penalized, and that the program should charge application fees that would enable the Department to recoup its costs for hiring more people and would reduce the number of multiple applicants. My experienced consular inspectors have also suggested a possible improvement, excluding from the program countries with extremely high levels of fraud. Most of these recommended changes will require legislation. We plan to review this program in the next few months in light of the changes in technology and the widespread public and congressional interest. We will continue to work with the Department and with the Congress to recommend solutions to these issues.

Thank you Mr. Chairman. I am happy to answer your questions and those of other subcommittee members at the appropriate time.

Mr. HOSTETTLER. Thank you, Ambassador.

Professor Ting?

STATEMENT OF JAN TING, PROFESSOR OF LAW, TEMPLE UNIVERSITY JAMES E. BEASLEY SCHOOL OF LAW

Mr. TING. Thank you, Mr. Chairman.

In summarizing my written testimony, I would like to note that I have three main objections to the Diversity Visa Lottery.

First, the lottery is unfair and expressly discriminatory on the basis of ethnicity and implicitly race;

Second, the lottery does not serve, and is inconsistent with, the priorities and best interests of the United States, as otherwise expressed in our immigration laws;

And, third, the lottery is incomprehensibly complicated, a cruel deception of the overwhelming majority of the millions of would-be immigrants who apply for it every year, and as Ambassador Patterson's written testimony today suggests to me, unadministrable.

First, it is not an overstatement to say, as I have, that the history of U.S. immigration law is the history of Asian exclusion from the United States. Legal restrictions on immigration to the U.S. were not enacted until the late 19th century, when immigrants began arriving from Asia. The first court test of U.S. immigration law, one of the first cases read today by any student of U.S. immigration law, is the Chinese Exclusion case of 1889, in which the U.S. Supreme Court unanimously upheld the constitutionality of the Chinese Exclusion Act. This law initiated 61 years of explicit Chinese exclusion from the United States.

The Supreme Court, sustaining the statute against constitutional challenge, provides the legal and constitutional authority for the modern system of restrictive immigration law and border control we have today. This and other Asian exclusion cases are the legal foundation for the U.S. immigration system.

Even after the repeal of the discriminatory National Origins Quota System in 1965, vestiges of Asian exclusion remain in our immigration laws. One of those vestiges is the per-country cap of Section 202(a)(2) of the Immigration and Nationality Act, which currently obliges qualified immigrants from India, the Philippines and Mexico to wait longer, sometimes significantly longer, for im-

migrant visas than equally qualified immigrants from all other countries.

The other vestige of Asian exclusion in our immigration law is the Diversity Visa Lottery, from which most Asians, all Mexicans and some other Latin Americans have been excluded from the very first year of Diversity Visas, which in my written testimony I note actually began in 1987. The 14 countries whose nationals were disqualified from the DV Lottery for fiscal year 2004 include China, India, Pakistan, the Philippines, South Korea and Vietnam. The other disqualified countries for fiscal year 2004 are Canada, Colombia, the Dominican Republic, El Salvador, Haiti, Jamaica, Mexico and the United Kingdom, except for Northern Ireland.

Would-be immigrants from these 14 countries and other countries in other years have been excluded from the Diversity Visa Lottery solely on the basis of their ethnicity. I find it difficult to justify this current discrimination as a remedy for the adverse impact of the 1965 immigration reform abolishing discriminatory ethnic quotas. When discrimination against women, minorities and the handicapped is ended by law, should able-bodied white males receive a legal remedy because they have been adversely affected by having to compete against others who are finally treated equally? In any area of American law, except immigration law, the explicit discrimination of the Diversity Visa Lottery would fail the constitutional test of strict scrutiny for lack of a compelling governmental purpose. As the Chairman noted, these visas have been called anti-diversity visas since they were created to offset the diversity which would otherwise result from nondiscriminatory immigration.

The second objection I have is that the two primary priorities Congress has identified for our immigration system, which I must say is the most generous in the world, those two priorities are family reunification and work skills. While we can debate the extent to which Congress has correctly balanced these two priorities or the extent to which Congress should extend each of these priorities, there can be no doubt that each is designed and intended to benefit the people of the United States.

In comparison, the benefit, if any, of Diversity Visas to the people of the United States is highly questionable and far from clear. Current law makes the spouses and minor children of legal permanent resident aliens wait in a queue from which 5-year-old applications are just now being processed. Spouses and children of Mexican LPRs—legal permanent residents—wait in an even longer line from which applications more than 7 years old are just now being processed. The resulting separations have caused so much suffering and misery that Congress has had to create a temporary visa category for such spouses and children whose petitions have been pending for at least 3 years. How can it make sense to give out 50,000 immigrant visas each year in a discriminatory lottery, when admissible spouses and minor children of legal permanent residents are kept out of the United States, making family reunification impossible?

Winners of Diversity Visa Lotteries are admitted even in the absence of job skills or family ties to the United States. How does this help the United States?

My last point is simply that the Diversity Visa Lottery is too complicated, burdensome and arbitrary. I rely upon the testimony of Ambassador Patterson, and I second the testimony of Dr. Camarota on that record, but my time is up and so I will stop here.

Thank you.

[The prepared statement of Mr. Ting follows:]

PREPARED STATEMENT OF JAN TING [1]

Mr. Chairman and Members of the Subcommittee. I am grateful for your invitation to speak today to discuss the Diversity Visa Lottery with you and with the other presenters.

After Congress in 1965 finally repealed the racially and ethnically discriminatory national origins immigration quota system, the proportion of non-European immigrants—especially those from Asia—to the United States increased significantly.[2] By 1986, members of Congress were seeking to ameliorate the corresponding reduction in European immigration which was an unexpected byproduct of the 1965 legislation.[3] The so-called NP–5 program provided 5,000 non-preference visas for 1987 and the same number for 1988. Because eligibility for those visas was limited to natives of countries "adversely affected by" the 1965 immigration reform, the countries receiving the most visas turned out to be Ireland, Canada, and the United Kingdom.[4]

Encouraged by this desired result, Congress extended the program and increased the visas available to 15,000 each year for 1989 and 1990.[5] The same statute established the successor OP–1 program which offered an additional 10,000 visas each year for 1990 and 1991 in a lottery open only to those countries which used up less than 25% of the maximum per country cap allowable.[6] Thus would-be immigrants from China, India, Mexico, the Philippines, and other high immigration countries continued to be ineligible for diversity visas.[7]

Continuing Congressional unhappiness with the predominantly Asian and Latin American character of immigration, and corresponding satisfaction with the success of the diversity visa programs in leavening the immigration mix with more Europeans, were reflected the Immigration Act of 1990. For the fiscal years of 1992, 1993, and 1994, a complex statutory scheme was enacted for the so-called AA–1 program which provided 40,000 visas each year in a lottery from which most Asian and Latin American intending immigrants were excluded.[8]

To insure that Congressional intent was implemented, the 1990 Act in a curiously indirect and camouflaged way, effectively directed that at least 40% of each year's AA–1 visas, or 16,000, be issued to citizens of one European country, Ireland.[9] The same 1990 Act increased the number of diversity visas to the current level of 55,000 annually.[10] The deliberately complex formula for assigning these visas arbitrarily disqualifies all natives from countries sending more than 50,000 immigrants in a five-year period under the regular family and employment preferences.[11]

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[1] Professor of Law, Temple University Beasley School of Law; formerly Assistant Commissioner, U.S. Immigration and Naturalization Service (INS) from 1990 to 1993.

[2] 1993 Statistical Yearbook of the Immigration and Naturalization Service (1994), chart A at 12.

[3] See Aleinikoff, Martin and Motomura, Immigration and Citizenship (Thomson West, 5th ed., 2003), pages 282–284; Legomsky, Immigration and Refugee Law and Policy (Foundation Press, 3rd ed., 2002), pages 235–241; Wolfsdorf and Rahman, The Diversity Visa Lottery, 77 No. 37 Interpreter Releases 1365 (2000); Ting, "Other Than A Chinaman:: How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 Temple Pol. And Civil Rights L.R. 301 (1995).

[4] Legomsky, supra note 3, at 236 (citing 64 Interpreter Releases 291 (1987)).

[5] *Ibid.* (relying on the Immigration Amendments of 1988, Pub. L. No. 100–658, § 2, 102 Stat. 3908).

[6] *Ibid.* (referring to the Immigration Amendments of 1988, Pub. L. No. 100–658, § 3(b), 102 Stat. 3908).

[7] See Diversity Visa Lottery Registration Set for Earlly 1995, 71 Interpreter Releases 1587 (1994).

[8] Legomsky, supra note 3, at 236 (referring to the Immigration Act of 1990, Pub. L. No. 101–649, § 132, 104 Stat. 4978, 5000).

[9] *Ibid.* (referring to the Immigration Act of 1990, Pub. L. No. 101–649, § 132(c), 104 Stat. at 5000).

[10] This number was effectively reduced to 50,000 beginning in FY 1999 by an annual offset of 5,000 to cover beneficiaries of the Nicaraguan and Central American Relief Act (NACARA), Pub. L. 105–100, § 203(c), 111 Stat. 2160 (1997). See Aleinikoff, supra note 3, at 281–282; Legomsky, supra note 3, at 236.

[11] INA § 203(c), 8 U.S.C. § 1153(c).

WHAT'S WRONG WITH THE DIVERSITY VISA LOTTERY?

I have three main objections to the diversity visa lottery: 1. The lottery is unfair and expressly discriminatory on the basis of ethnicity and, implicitly, race. Whether or not this is legal, it is not good policy. 2. The lottery does not serve and is inconsistent with the priorities and best interests of the United States as otherwise expressed in our immigration laws. 3. The lottery is incomprehensibly complicated, an administrative burden, and a cruel deception of the overwhelming majority of the millions of would-be immigrants who apply for it each year.

I. IT'S UNFAIR AND DISCRIMINATORY.

It is not an overstatement to say, as I have, that the history of U.S immigration law is the history of Asian exclusion from the United States.[12] Legal restrictions on immigration to the U.S. were not enacted until the late 19th century when immigrants began arriving from Asia. The first court test of U.S immigration law, and one of the first cases read today by any student of U.S. immigration law is the so-called Chinese Exclusion Case[13] of 1889 in which the U.S. Supreme Court unanimously upheld the constitutionality of the Chinese Exclusion Act[14] of 1882. This law initiated 61 years of explicit Chinese exclusion from the United States. The Supreme Court's sustaining this statute against constitutional challenge provides the legal and constitutional authority for the modern system of restrictive immigration law and border control.[15]

In 1893, in a second landmark immigration opinion, a divided Supreme Court upheld the deportation of a Chinese laborer who could not produce as required by a revised Chinese Exclusion Act "at least one credible white witness" to testify he was a lawful resident.[16] In upholding the power of Congress to order deportation of immigration law violators, the Supreme Court determined that deportation is not criminal punishment, and therefore that constitutional requirements of due process, trial by jury, and the prohibitions against unreasonable searches and seizures, as well as against cruel and unusual punishments, have no application in deportation proceedings.[17] Like its predecessor, the Chinese Exclusion Case, *Fong Yue Ting* v. *United States* remains good law and is routinely studied and taught in U.S. law school courses on immigration law.

The Nationality Act of 1940 codified the existing laws on naturalization by specifying that the right to become a naturalized citizen "shall extend only to white persons, persons of African nativity or descent, and descendents of races indigenous to the Western hemisphere,"[18] i.e. not Asians. When explicitly exclusionary anti-Asian statutes were repealed in the 1940's and 1950's, Asians received the smallest possible immigration quotas under the national origins quota system.[19]

After repeal of the national origins quota system in 1965,[20] only vestiges of Asian exclusion remain in our immigration laws. One of those vestiges is the per-country cap of INA § 202(a)(2), 8 U.S.C. § 1152(a)(2), which currently obliges qualified immigrants from India, the Philippines and Mexico to wait longer, sometimes significantly longer, for immigrant visas than equally qualified immigrants from all other

[12] See Ting, supra note 3.

[13] *Chae Chan Ping* v. *United States,* 130 U.S. 581 (1889).

[14] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

[15] The Chinese Exclusion Case was cited with approval in 2001 by Justice Breyer in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), though for its dictim that even sovereign powers are "restricted in their exercise only by the Constitution itself and considerations of public policy and justice." See also *Sanmuganathan Nakeswaran* v. *INS*, 23 F.3d 394 (1st Cir. 1994) (quoting Kleindienst v. *Mandel, 408 U.S. 753, 769–770 (1972)) where the First Circuit cites Chinese Exclusion for the proposition that "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."*

[16] *Fong Yue Ting* v. *United States,* 149 U.S. 698 (1893). See Ting, supra note 2, at 304–305.

[17] *Ibid.* at 730.

[18] Nationality Act, ch. 876, 54 Stat. 1137, 1140 (1940).

[19] See Immigration and Nationality Act, ch. 477, §§ 201(a), 202(e), 66 Stat. 163 (1952). See Ting, supra note 2, footnotes 32 and 33, pages 305–306.

[20] See Act of Oct. 3, 1965, Pub. L. No. 89–236 § 201(e), 79 Stat. 911 (terminating the quota system as of June 30, 1968).

countries.[21] Until well into the 1990's, immigrants from China also suffered from the discrimination of the per-country cap.[22]

The other vestige of Asian exclusion in our immigration law is the diversity visa lottery from which most Asians, all Mexicans, and some other Latin Americans have been excluded from the very first year of diversity visas in 1987. The 14 countries whose nationals were disqualified from the Diversity Visa Lottery for FY 2004 include China, India, Pakistan, the Philippines, South Korea, and Vietnam. The other disqualified countries for FY 2004 are Canada, Colombia, the Dominican Republic, El Salvador, Haiti, Jamaica, Mexico, and the United Kingdom (except Northern Ireland!).[23]

Would-be immigrants from these 14 countries (and other countries in other years) have been excluded from the Diversity Visa Lottery solely on the basis of their ethnicity. I find it difficult to justify this current discrimination as a remedy for the adverse impact of the 1965 immigration reform abolishing discriminatory ethnic quotas. When discrimination against women, minorities and the handicapped is ended by law, should able-bodied white males receive a legal remedy because they have been adversely affected by having to compete against others who are finally treated equally?

Students of immigration law have correctly observed that the so-called diversity visas might properly be called anti-diversity visas, since they were created to offset the diversity resulting from non-discriminatory immigration.[24]

Yes, discrimination in the Diversity Visa Lottery is constitutional, just as Chinese Exclusion was constitutional, and the deportation law requiring one credible white witness was constitutional, and the national origins quota system was constitutional. But that doesn't make it either right or good public policy. The fact that beneficiaries of the Lottery now include significant numbers of Africans and Bangladeshis does not make the discrimination against other nationalities, solely because of ethnicity, any less objectionable. The most recent available statistics for FY 2001 and 2002 continue to show Europe as the number one regional source of diversity immigrants.[25]

II. IT'S INCONSISTENT WITH NATIONAL INTEREST, PRIORITIES.

Academics can debate the question of whether we should put any limits on the number of immigrants admitted each year, or whether we should accept every single person in the whole wide world who wants to come here. Congress has decided to limit the number of immigrants admitted each year, and I have no doubt that the decision to put a limit on the number of immigrants admitted each year enjoys popular support.[26]

But having made the decision to set the number of admissions below the number of people who would like to immigrate, Congress must answer, and has answered the question, which would-be immigrants should we admit? We must necessarily have what I call a "pick and choose" system of immigration, where we pick and choose those who will be admitted as immigrants from all those who would like to be chosen.

The two primary priorities Congress has chosen are family re-unification and work skills.[27] While we can debate the extent to which Congress has correctly balanced these two priorities, or the extent to which Congress has extended each of these priorities, there can be no doubt that each of these priorities is designed and intended to benefit the people of the United States. In comparison, the benefit, if any, of diversity visas, to the people of the United States is debatable and far from clear.

While we place no numerical limits on the admission of immediate relatives of U.S. citizens, current law makes the spouses and minor children of legal permanent

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[21] See the State Department's Visa Bulletin for any month. The Visa Bulletin for April, 2004, is reprinted at 84 Interpreter Releases 351, 367 (March 15, 2004). See also the discussion of per-country caps at Ting, supra note 2, at 308.

[22] See for example the State Department's Visa Bulletin for November 1994, reprinted in Aleinikoff, Martin and Motomura, Immigration Process and Policy (West, 3rd ed., 1995) at p. 135.

[23] Aleinikoff, supra note 3, at p. 282.

[24] Legomsky, supra note 3, at 241.

[25] For FY 2002, see 2002 INS Statistical Yearbook, Table 8, available on-line at *http://uscis.gov/graphics/shared/aboutus/statistics/IMM02yrbk/IMM20002.pdf*. For FY 2001 see 2001 INS Statistical Yearbook, Table 8, quoted in Aleinikoff, supra note 3, at 283.

[26] It should be noted that our immigration laws and policy are the most generous in the world. We admit each year more legal permanent residents with opportunity to become citizens than all the rest of the nations of the world combined.

[27] INA § 203(a),(b), 8 U.S.C. § 1153(a),(b).

resident aliens (LPR's) wait in a queue from which five year old applications are just now being processed.[28] Spouses and children of Mexican LPR's wait in an even longer line from which applications more than seven years old are just now being processed.[29] The resulting separations have caused so much suffering and misery that Congress has had to created a temporary visa category for such spouses and children whose petitions have been pending for at least 3 years.[30]

How can it make sense to give out 50,000 immigrant visas each year in a discriminatory lottery, when admissible spouses and minor children of LPR's are kept out of the United States, making family re-unification impossible?

And those are not the only admissible immigrants kept waiting in long queues while winners of the discriminatory lottery are admitted in their place. Unmarried adult children of U.S. citizens wait in a line nearly four years long (unless they are from Mexico or the Philippines in which case they must wait 10 years or 14 years respectively). Married children of U.S. citizens must wait seven years (9 years or 14 years if from Mexico or the Philippines respectively). Admissible siblings of U.S. citizens must wait 12 years (13 years or 22 years if from India or the Philippines respectively).[31] And no temporary visas have been made available for them while they wait.

Winners of the diversity visa lottery are admitted even in the absence of any job skills or family ties to the United States. How does this help the United States? It is true that until about 1978 it was possible to gain admission as a "nonpreference" immigrant without such qualifications.[32] And it has been argued that perhaps the visa lottery can be justified as a means to give hope to a large group of people wishing to immigrate to the U.S. but with no other way to acquire immigrant status.[33]

If it does provide hope, that hope is largely an illusion, since millions of applications are received each year for the 50,000 diversity visas made available.[34] For the FY 2003 lottery held in October, 2001, about 8.7 million applications were received.[35]

Even if that slight hope were deemed sufficient to maintain a visa lottery, the ethnic discrimination should be ended in order to spread the hope worldwide, and the number could be cut back to 2,500 or 5,000, to provide additional visas for family reunification of relatives of LPR's and U.S. citizens, which should be a higher priority.

III. IT'S TOO COMPLICATED, BURDENSOME AND ARBITRARY.

The complexity of the current statute providing for the diversity visa lottery[36] is comparable to that of the most complicated provisions of the Internal Revenue Code. Defenders of the lottery should be forced to read through the statute and apply it to calculate the number of visas allocable to each country. The sheer number of applications which must be processed each year compared to the number of diversity visas actually granted testifies to the waste of human and administrative resources.[37]

This complexity and burden on the U.S. government creates potential for abuse of the diversity visa system. What is for most foreigners the false illusion that they can gain legal admission to the U.S. through the lottery can make them susceptible to swindlers who claim inside knowledge and special connections in seeking to sell their services to assist applicants. This kind of abuse seems almost inevitable, and has drawn the attention of the Federal Trade Commission.[38]

Normal rules of chargeability may allow persons of one nationality to utilize a different nation of chargeability either to make themselves eligible or to improve their chances. For example, an alien from a high admission country, ineligible for a diver-

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[28] Supra, note 21.

[29] *Ibid.*

[30] INA § 101(a)(15)(V), 8 U.S.C. § 1101(a)(15)(V).

[31] Supra, note 21.

[32] Preference immigrants now use up all available visa numbers. See Aleinikoff, supra, note 3, at 282.

[33] Wolfsdorf, supra, note 3.

[34] The effective number of diversity visas was reduced from 55,000 to 50,000 by an annual set-aside of 5,000 visas each year for beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105–100, 111 Stat. 2160 (1997).

[35] Aleinikoff, supra., note 3, at 283.

[36] INA § 203(c), 8 U.S.C. § 1153(c).

[37] About 8.7 million applications received for the FY 2003 program. Aleinikoff, supra., note 3 at 283.

[38] See "Federal Trade Commission Alleges Fraud by Visa Services Company" announcements by U.S. Dept. of State and Federal Trade Commission, updated 13 Nov. 2003, accessed at *http://usinfo.state.gov/gi/Archive/2003/Nov/13–850792.html* on April 24, 2004.

sity visa, may qualify for a derivative diversity visa as the spouse or child of an applicant from another country.[39] And since marital status is determined not at the time of application or selection, but at the time of the principal applicant's admission to the United States, anyone the applicant marries before admission to the U.S., even though not named on the application, is entitled to derivative status as a diversity immigrant.[40]

An alien from a high admissions country may apply for derivative chargeability through a spouse or parent of a different nationality even if the spouse or parent is not himself or herself applying for the diversity visa lottery. In such cases, both persons are considered to be applicants for purposes of cross-chargeability, and both must be issued visas and apply for admission simultaneously.[41]

Because chargeability is determined primarily by place of birth,[42] a national of an ineligible country may qualify for the lottery if born in an eligible country, e.g. the child of Chinese diplomats born in Malawi while parents were on temporary assignment there. Conversely, children born in ineligible countries while parents were on temporary assignment, may claim the chargeability of the foreign state of either parent.[43]

The statutory requirements of a high school education "or its equivalent" or "at least 2 years work experience in an occupation which requires at least 2 years of training or experience" are also challenging and problematic.[44]

These are not problems that need to be or can be corrected. In my opinion they are inherent in the notion of a diversity visa lottery. Instead of trying to get the diversity visa lottery to work better, we should get to the root of the problems by abolishing the discriminatory visa lottery itself.

IN CONCLUSION

I urge this subcommittee to endorse repeal of the diversity visa lottery in order to end this aspect of ethnic discrimination in our immigration law, re-allocate visa numbers to conform with our acknowledged immigration priorities, and to simplify U.S. immigration law and end the waste of human and administrative resources.

I thank the chairman and the members of the subcommittee for the privilege of presenting my views on this subject.

ATTACHMENT

TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL
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IMMIGRATION LAW REFORM AFTER 9/11: WHAT HAS BEEN AND WHAT STILL NEEDS TO BE DONE

JAN TING

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I. INTRODUCTION

So here we are, eighteen months after the terrorist attacks of September 11, 2001 (9/11), and the most significant event of the past eighteen months is what did not happen. The United States has not experienced another terrorist attack on the scale of 9/11. Would any of us have dared to so predict eighteen months ago?

Why have we experienced no repetition of 9/11? Have the terrorists lost interest, or perhaps had a change of heart? Have they concluded after all that America is basically good? No one can doubt after 9/11 the willingness of terrorists to use weapons of mass destruction against us if, and as soon as, they can get their hands on them.

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[39] INA § 202(b)(2), 8 U.S.C. § 1152(b)(2).
[40] 9 FAM 42.33 Note 6.8, accessed at *http://foia.state.gov/masterdocs/09FAM/0942033N.PDF* on April 24, 2004. See also INA § 203(d), 8 U.S.C. § 1153(d).
[41] 9 FAM 42.33 Note 4.2, supra., Note 40.
[42] 9 FAM 42.33 Note 4.1, supra., Note 40.
[43] INA § 202(b)(4), 8 U.S.C. § 1152(b)(4).
[44] See 9 FAM 42.33 Notes 7 and 8, supra., note 40.

Is it mere coincidence that since 9/11 the U.S. government and its allies have waged war on, pursued, and disrupted the efforts of terrorists around the world, including those in Afghanistan, Europe, the Middle East, Southeast Asia, and on the home front? While Osama bin Laden has so far eluded us, everyone can understand that terrorists on the run and trying to hide are less dangerous and less able to launch new terrorist attacks than those who are not.

Changes in U.S. immigration policy have been part of the U.S. war on terrorism since 9/11. These initiatives by the U.S. government have drawn objections and protests. My greatest concern about the national security initiatives enacted since 9/11 is whether the United States is doing enough.

This paper will explain why the objections and protests against the war on terrorism are unfounded and will propose additional immigration policy reforms in its support.

II. PROFILING AND THE SHADOW OF THE INTERNMENT

Several immigration-related initiatives of the U.S. government since 9/11 have raised concerns about racial profiling and motivated comparisons to the internment of Japanese aliens and Japanese-Americans by the U.S. government during World War II. The first of these initiatives was the effort, announced by the Department of Justice (DOJ) on November 9, 2001, to conduct voluntary interviews of up to 5,000 young men from countries suspected of harboring terrorists who had entered the United States as temporary visitors since January 1, 2000.[1]

The second controversial initiative, announced by the DOJ on January 8, 2002, prioritized the apprehension and removal from the United States of 4,000 to 6,000 men from particular countries of origin, out of more than 300,000 "absconders" whose deportability has been finalized and who have exhausted their administrative and judicial appeal rights.[2]

A third initiative, announced on November 6, 2002, requires special registration of male visitors to the United States from specified countries.[3] Initially limited to male visitors from Iraq, Iran, Libya, Sudan, and Syria, special registration has been expanded in phases to cover male visitors from another twenty countries.[4]

The allegation of racial and ethnic profiling in criticism of these initiatives was perhaps predictable. However, such concerns are misdirected. In fact, none of the three initiatives discriminate on the basis of appearance, skin color, race, ethnicity, or religion. The individuals subject to these initiatives are certainly being profiled, but the profiling is done on non-invidious factors, such as age, gender, and the objective immigration documents presented on entry to the United States, i.e., passports from designated countries. Legal precedent supports the legality and constitutionality of these initiatives. U.S. courts have recognized plenary power over immigration in the political branches of the U.S. government, and no constitutional challenge has ever been sustained against such discrimination by country of origin in screening immigrants or visitors to the United States.[5]

One prior case that is particularly relevant to the legality and constitutionality of these initiatives is the 1979 decision of the U.S. Court of Appeals for the District of Columbia, *Narenji* v. *Civiletti,*[6] where the court upheld, against constitutional challenge, a Federal regulation imposing special registration requirements solely on Iranian students in the United States following the seizure of U.S. diplomats as hostages in Iran. The U.S. Supreme Court declined to consider an appeal from that opinion.[7]

Even if these government initiatives could somehow be construed as racial or ethnic profiling, that fact would not necessarily make the practices illegal, unconstitu-

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[1] Jodi Wilgoren, Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain, N.Y. Times, Nov. 15, 2001, at B7.

[2] Neil A. Lewis, I.N.S. to Focus on Muslims Who Evade Deportation, N.Y. Times, Jan. 9, 2002, at A12.

[3] Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002).

[4] The twenty additional countries are as follows: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

[5] See The Chinese Exclusion Case, 130 U.S. 581, 604 (1889) (upholding unanimously the Chinese Exclusion Act, which was cited with approval by Justice Breyer writing for the majority in *Zadvydas* v. *Davis,* 533 U.S. 678, 695 (2001)); see also *Hitai* v. *INS,* 343 F.2d 466 (2nd Cir. 1965) (sustaining the pre-1965 national-origins quota system even to the extent that it required a Brazilian citizen of Japanese ancestry to apply for the small Japanese quota instead of being treated like other citizens of Brazil).

[6] See *Narenji* v. *Civiletti,* 617 F.2d 745 (D.C. Cir., 1979), cert. denied, 476 U.S. 957 (1980).

[7] Narenji, 476 U.S. at 957.

tional, or wrong. U.S. citizens expect law enforcement to utilize racial or ethnic characteristics in seeking to apprehend criminal suspects and prevent further crimes. If, for example, the Ku Klux Klan was engaged in a bombing campaign against black churches, law enforcement in trying to prevent further bombings should be permitted to single out for attention all white males driving in the vicinity of black churches at night.

Racial profiling by the government should be subjected to strict scrutiny.[8] It should be permitted where the government has a compelling governmental purpose, and where there is no less invasive method of pursuing that compelling purpose. It is hard to imagine a more compelling purpose for the U.S. government than trying to prevent further terrorist attacks on its citizens like those of 9/11.

Do these initiatives, as some suggest, put the United States on a slippery slope to something like the internment of Japanese aliens and Japanese-Americans during World War II? One of the few, if not the only, good things to come out of the current war on terror has been the remembrance and reconsideration of the Japanese Internment, which had been fading from our collective memories.

Most persons now agree that the Japanese Internment was wrong, but what exactly was objectionable about it? Two answers are offered. First, approximately two-thirds of those interned without due process or any showing of reasonable cause were in fact U.S. citizens. If only enemy aliens had been detained during wartime, it is unlikely that such internment would even be remembered, much less remembered as objectionable.[9] Second, the Japanese aliens and Japanese-Americans were treated very differently from their German and Italian counterparts and from German-Americans and Italian-Americans. The latter were treated as individuals on a case-by-case basis, whereas the Japanese and Japanese-Americans within the restricted western United States were treated as a single group and subjected to internment solely on the basis of race and ethnicity.

In comparison to the almost universal condemnation of the Japanese Internment, there have been almost no complaints about mistreatment of the other groups. Internment during World War II on a case-by-case basis of Germans, Italians, and their American citizen descendents is so unobjectionable that it has been largely forgotten by history. This is so despite the efforts of many to remember the internment,[10] and despite the fact that from the German and Italian communities in the United States more than 10,000 individuals were interned from each community.[11]

Can it be concluded that history accepts wartime internment of suspected individuals as long as they are selected for internment on the basis of their individual statements and actions, and not on the basis of arbitrary racial or ethnic characteristics? Even in comparison to such internment, the initiatives of the U.S. government so far are pretty "small potatoes," because they have been limited to individuals charged with specific criminal or immigration law violations or pursuant to Federal Court warrants.

III. DETENTION AND IMMIGRATION LAW ENFORCEMENT AS ANTI-TERROR TOOLS

Much criticism has been directed at the U.S. government because of its arrest and detention of thousands of individuals since 9/11. Some of these individuals have been charged with criminal law violations. Some have been arrested and detained on material witness warrants issued by Federal Courts. But the overwhelming majority of those arrested and detained have been charged with immigration law violations, and the majority of those so charged have been brought before immigration judges who have ordered them deported from the United States. Is anything wrong here?

It is common for prosecutors to believe individuals guilty of crimes, but not to have sufficient evidence to prove those charges in court. So then what do they do? Often they bring lesser charges for which they do have sufficient evidence. That is why the gangster Al Capone was never charged with murder, extortion, or bribery. As dramatized in the movie The Untouchables,[12] starring Kevin Costner and Sean

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[8] See, e.g., *Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. 267, 274 (1986).

[9] It is acknowledged here that Japanese immigrants were ineligible at the time to naturalize and become U.S. citizens, but that does not change the belief that internment of enemy aliens during wartime would be acceptable to most U.S. citizens, even in hindsight.

[10] See, e.g., S. Res. 1356, 107th Cong. (2002) (introducing this resolution was Senator Russell Feingold, resolving to study the facts and circumstances surrounding treatment of European Americans and European refugees during World War II).

[11] James Kurth, Domestic Security and Muslim Immigrants, J. Hist Soc'y 409, 414–15 (2002) (writing about the significance of European Internment during World War II).

[12] The Untouchables (Paramount Studio 1987).

Connery, Al Capone was charged, convicted, and imprisoned only for underpaying his income tax. Is anything wrong with that?

Are immigrants somehow bearing the brunt of the war on terrorism? The most common ground for deportation is overstaying a temporary, non-immigrant visa. Even if the federal government does not believe an illegal alien is involved in terrorism, is there anything wrong with deporting aliens who overstay or violate the terms of their visas? Answer: Only if one believes that U.S. immigration laws should not be enforced.

I always ask my immigration law classes to describe U.S. immigration policy during the first century of our history as a nation. After eliciting the correct answer as open borders, I then ask if anyone believes that such a policy is appropriate for the United States today. Usually, not a single person can be found to advocate open borders as U.S. policy today.[13] The closed borders position, ending immigration entirely, typically also has no supporters. I then ask the class what they believe our policy should be.

In the ensuing discussion, what emerges is the description of an immigration system pretty much like the one the United States actually has. Most Americans, like most students in my classes, want some immigration for the economic and cultural benefits it brings, but they don't want unlimited immigration. Americans typically want the United States to decide how many and what kind of immigrants to admit each year, which may be referred to as a "pick and choose" system of limited immigration. The U.S. government should then admit only those aliens selected by U.S. citizens to be immigrants, and should refuse entry to all others.

But what should be done with those aliens not selected by the United States to be immigrants, but who come to the United States anyway, in violation of U.S. rules? If the answer is to tolerate them or grant them amnesty, then the United States would not really have a "pick and choose" system of limited immigration. What the United States would have then is open borders, which are just fine if that is in fact what the citizenry wants.[14] But it is not what U.S. citizens want. What U.S. citizens want is to "pick and choose."

So there is nothing per se wrong with simply enforcing U.S. immigration laws regardless of whether those removed are terrorist suspects or not. Such removals indirectly serve the war on terrorism by reducing the number of illegal aliens and the resulting culture of fraudulent documents among whom and in which foreign terrorists can conceal themselves.

That the U.S. government lacks the resources to remove all of the estimated ten million illegal aliens from the United States at once ought not preclude the United States from removing some of them. To the allegation of selective enforcement, Justice Antonin Scalia has said:

An alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation. . . . When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.[15]

IV. CLOSED HEARINGS

After the 9/11 terrorist attacks, the U.S. DOJ initiated procedures to conduct closed immigration removal hearings for certain "special interest" aliens charged with immigration law violations, without the disclosure of information to the public.[16] Attorney General John Ashcroft defended withholding the names of those aliens charged with immigration law violations, while noting their continuing access to lawyers of their choosing and to their families.[17] He has noted two reasons for not providing a list of detainees. The first reason was the need to withhold valuable intelligence from the enemy, i.e., which of their agents may have been detained and

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[13] This is regrettable because classroom dynamics improve when one or two advocates of open borders are available to articulate that position in classroom discussion.

[14] Prominent advocates of an open borders policy include the Cato Institute and the Editorial Board of the Wall Street Journal.

[15] *Reno* v. *Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 488, 491–92 (1999).

[16] William Glaberson, Closed Immigration Hearings Criticized as Prejudicial, N.Y. Times, Dec. 7, 2001, at B7.

[17] Neil A. Lewis & Don Van Natta, Jr., Ashcroft Offers Accounting of 641 Charged or Held, N.Y. Times, Nov. 28, 2001, at A1.

which remain free.[18] And the second reason was a respect for the privacy of the individuals detained.[19]

Lawsuits have been filed on behalf of media plaintiffs seeking access to the closed hearings and to the names of those detained pending hearing. These lawsuits have resulted in two conflicting opinions from the U.S. Courts of Appeals for the Sixth Circuit and the Third Circuit.

In the first case, *Detroit Free Press* v. *Ashcroft,*[20] which was published August 26, 2002, Judge Damon Keith, writing for a unanimous three-judge panel of the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, framed the issue as "whether the First Amendment to the U.S. Constitution confers a public right of access to deportation hearings. If it does, then the government must make a showing to overcome that right."[21] First, Judge Keith dismissed the traditional deference of the courts to the political branches in immigration cases as being limited to areas of "substantive" immigration law, and not to issues of procedure.[22] Second, he found it appropriate to apply the two-part test of *Richmond Newspapers, Inc.* v. *Virginia,*[23] in which the Supreme Court concluded that both past experience and public interest supported finding a First Amendment right of media plaintiffs to observe judicial proceedings.[24]

The key problem, however, is that deportation proceedings are not judicial in nature. They are administrative and entirely within the executive branch of government. Nonetheless, Judge Keith found such proceedings to be "quasi-judicial" in nature, citing with approval *New Jersey Media Group* v. *Ashcroft.*[25] He therefore held the test of Richmond Newspapers to be applicable, and rejected the test of *Houchins* v. *KQED,*[26] where the Supreme Court rejected First Amendment claims of media plaintiffs to public access to a county jail.[27]

Applying the two-part test of Richmond Newspapers, Judge Keith found both a tradition of public access to deportation proceedings and a significant public interest in public access to deportation proceedings to insure fairness and prevent mistakes. Having found a First Amendment public right of access to deportation hearings, he turned to the question of whether the government had a sufficient reason for denial "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest."[28] "Moreover, [t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[29] He concluded that the government's reasons for closure, though compelling, were not sufficiently particularized or narrowly tailored.[30]

Judge Keith found the government's closure order in special interest removal hearings both over-inclusive, i.e., too broad and indiscriminate, and also under-inclusive, i.e., insufficient to prevent the disclosures of information by the detained aliens, their lawyers, or their families. Judge Keith affirmed the district court's injunction prohibiting the closure of deportation proceedings on the basis of the government's indiscriminate order, but leaving open the possibility of closing cases on a case-by-case basis upon a proper showing of compelling and particularized interests.[31]

Less than three months after the Sixth Circuit's decision in Detroit Free Press, the U.S. Court of Appeals for the Third Circuit in Philadelphia published the opinion of Chief Judge Becker who wrote for the majority of the three-judge panel that heard a similar challenge on identical facts. Judge Becker's opinion and order in *North Jersey Media Group* v. *Ashcroft,*[32] which was published on October 8, 2002, reversed a district court injunction similar to that affirmed by the Sixth Circuit in Detroit Free Press. A conflict between the circuits was thus created that may be resolved only by the U.S. Supreme Court, or by one of the circuits en banc reversing its own panel upon appeal by a losing party.

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[18] *Id.*
[19] *Id.*
[20] *Detroit Free Press* v. *Ashcroft,* 303 F.3d 681 (6th Cir. 2002).
[21] *Id.* at 682.
[22] *Id.* at 682–83.
[23] *Richmond Newspapers* v. *Virginia,* 448 U.S. 555 (1980).
[24] Detroit Free Press, 303 F.3d at 695–96.
[25] *Id.* at 696 (citing *N. Jersey Media Group* v. *Ashcroft,* 205 F. Supp. 2d 288, 301 (D. N.J. 2002), rev'd, 308 F.3d 198 (3rd Cir 2002)).
[26] *Houchins* v. *KQED,* 438 U.S. 1 (1978).
[27] Detroit Free Press, 303 F.3d at 696.
[28] *Id.* at 704 (quoting *Globe Newspaper* v. *Super. Ct.,* 457 U.S. 596, 606–7 (1982)).
[29] *Id.* at 705 (quoting *Press-Enterprise* v. *Super. Ct. of Cal.,* 478 U.S. 1, 10 (1985)).
[30] *Id.* at 707–8.
[31] *Id.* at 708.
[32] N. Jersey Media Group, 308 F.3d at 198.

Judge Becker invited the U.S. Supreme Court to re-consider the applicability of Richmond Newspapers by stating, "the notion that Richmond Newspapers applies is open to debate as a theoretical matter."[33] The Court concluded, however, that "we must yield to the prior precedent of this court, and hence will apply it to the facts."[34] Applying the same two-part test of Richmond Newspapers, as Judge Keith applied in Detroit Free Press, Judge Becker reached diametrically opposite conclusions.

On the "experience" prong of the Richmond Newspapers test, Judge Becker found that Congress has never guaranteed public access to deportation hearings, that such hearings have often been conducted in locations inaccessible to the public, and were sometimes mandatorily closed to the public by statute. The opinion concluded that there is no "unbroken, uncontradicted history" of openness that Richmond Newspapers and its progeny require to establish a First Amendment right of access. The Court also upheld the government's claim that a "basic tenet of administrative law is that agencies should be free to fashion their own rules of procedure."[35]

On the second prong of the Richmond Newspapers test, "logic" or public interest, Judge Becker also disagreed with the Sixth Circuit by concluding the test requires consideration not only of the positive policy role openness plays in a particular proceeding, but also the extent to which openness impairs the public good. On balance, Judge Becker doubted that openness promotes the public good in this particular context. Because open deportation hearings do not pass the two-part Richmond Newspapers test, Judge Becker concluded that the press and the public possess no First Amendment right of access.

Because of the conflict between the circuit courts of appeal, a decision will be required from the U.S. Supreme Court. U.S. courts have long held that immigration law violations are civil, not criminal, in nature, and that removal from the United States to one's home country is not criminal punishment.[36] Thus, aliens in removal proceedings do not have the rights that a criminal defendant would have. They do not, for example, have the right to jury trial.[37] They do not have the right to invoke the exclusionary rule against improperly seized evidence.[38] They do not have the right to legal representation paid for by the taxpayers.[39]

And because immigration hearings are clearly administrative, occurring entirely within the executive branch, and not judicial, the Supreme Court will have to consider Judge Becker's invitation to rule the two-prong test for judicial proceedings of Richmond Newspapers inapplicable. Until 1983, removal hearings were conducted within the INS itself. In 1983, the Reagan administration decided to designate Immigration and Naturalization Service (INS) Hearing Officers as Immigration Judges and place those persons in a branch of the DOJ separate from the INS. Thus, the agency charging the alien with removability would no longer also have to rule on the charge. For the Supreme Court or any court now to rule that this 1983 Act transformed an administrative proceeding into a judicial proceeding with government discretion substantially restricted would be another instance of "no generous act goes unpunished."[40]

The Court of Appeals for the Sixth Circuit's holding in Detroit Free Press, to the extent that it relied upon the district court's opinion in North Jersey Media, which was itself overturned by the Court of Appeals for the Third Circuit, presents a theory without a firm foundation.

V. ENEMY COMBATANTS

Another controversial initiative of the U.S. government has been the detention of U.S. citizens Yaser Hamdi and Jose Padilla as enemy combatants, without bringing criminal charges or granting them access to lawyers or courts. The attention of lawyers and civil rights advocates to this practice is perhaps understandable, yet it is well established under the laws of war that prisoners of war can be interned for the duration of the war without rights to lawyers or courts.[41] Thousands of German

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[33] *Id.* at 201.
[34] *Id.*
[35] *Id.* at 216.
[36] *See Fong Yue Ting* v. *U.S.,* 149 U.S. 698 (1893).
[37] Immig. and Nationality Act of 1952 (INA) § 240(c)(1), 8 U.S.C. § 1229a(c)(1)(2003).
[38] *INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1046 (1984).
[39] INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4).
[40] Am.-Arab Anti-Discrimination Comm., 525 U.S. at 484.
[41] See Convention (III) Relative to the Treatment of Prisoners of War art. 21 (Geneva Convention), Aug. 12, 1949, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68? OpenDocument.

and Italian prisoner's of war (POW) were brought to the United States during World War II without such rights. But what if one of them happened to be a U.S. citizen?

The U.S. Court of Appeals for the Ninth Circuit held in 1946 that U.S. citizenship made no difference in the status of a POW detained as such by the U.S. government.[42] It is true that the government asserts that Hamdi and Padilla, like other detained enemy combatants, cannot be considered POWs because they did not operate in recognizable uniforms, as part of disciplined military units, or on behalf of legitimate governments. Such a distinction exists in the international law of war and is not the creation of the Bush administration.[43] Thus, these enemy combatants have even fewer rights than POWs, and the Ninth Circuit's determination that U.S. citizenship makes no difference ought to apply equally to them.

The Court of Appeals for the Fourth Circuit recently upheld the continued detention of Yaser Hamdi as an enemy combatant without any special consideration for his U.S. citizenship by birth, and rejected a petition for a writ of habeas corpus and an order for the government to present evidence justifying any detention.[44] In a thoughtful, balanced opinion that deserves to be affirmed by the U.S. Supreme Court, the Fourth Circuit, having dismissed the government's suggestion that there is no role for the judiciary in a challenge to the exercise of war powers, concluded that it would hear such challenges for the purpose of determining whether the government was in fact exercising constitutionally authorized war powers. Having concluded that it was, the court found itself ill-equipped to assess facts on the battlefield and declined to compel the executive branch to defend the particulars of its exercise of war powers delegated exclusively to the executive branch by the U.S. Constitution.[45]

While the court of appeals properly limited its holding and analysis to the facts of the Hamdi case, its opinion should be a guiding light for other courts considering challenges to the exercise of war powers to detain enemy combatants.

VI. REFORM LEGAL IMMIGRATION—CHANGE NUMBERS AND CATEGORIES

The United States admits more legal immigrants each year than the rest of the nations of the world combined. The exact number, which usually works out to around 800,000 to 900,000 annually, is determined by a very complicated formula with multiple ceilings and caps embedded in the Immigration and Nationality Act (INA) as enacted by Congress and signed by the President.[46] The overall number depends to a considerable extent on the number of immediate relatives of U.S. citizens applying to immigrate. This group is admitted without numerical limitation, to the possible detriment of other categories. The complexity of this formula is not in itself particularly problematic. Those who need to understand it manage to do so. The problem is in the numbers the formula produces.

An ongoing debate among policy makers, advocates, scholars, and students of immigration is whether the number of legal immigrants the United States admits each year is too large or too small. There is no answer and no end to that debate that is conducted at various levels: empirical, philosophical, and moral. I wish to add to the discussion only the suggestion that the formula is too rigid, too inflexible, for a nation experiencing the changes that have occurred since 9/11.

The current formula applies regardless of economic conditions in the United States, regardless of the level of unemployment or of economic growth. It also applies regardless of the government's ability to actually process any particular number of immigrants, and regardless of whether the government's capabilities are being temporarily or permanently directed elsewhere. The current formula applies regardless of whether the United States is at peace with the world or whether it is at war and searching for terrorists within its boarders to prevent a recurrence of 9/11.

As an alternative to the current rigid formula set by statute, I propose that Congress authorize the President, before the start of each fiscal year, to decide, in consultation with Congress, the appropriate number of immigrants to admit that fiscal year. The President could take into consideration economic data, the availability of government personnel and resources, and the national security needs of the country. This process would be very similar to that already in place for determining refugee admissions to the United States from abroad each year.[47]

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[42] In re Territo, 156 F.2d 142 (9th Cir. 1946).
[43] Geneva Convention, supra note 41, art. 4.
[44] *Hamdi* v. *Rumsfeld,* 316 F.3d 450, 451 (4th Cir. 2003).
[45] *Id.* at 477.
[46] INA §§ 201–203, 8 U.S.C. §§ 1151–53.
[47] See INA § 207, 8 U.S.C. § 1157.

This flexibility in setting the overall level of immigration may prove useful in facilitating and supporting the war on terrorism and enhancing homeland security. And, as part of a reform of U.S. immigration laws, the United States should also consider whether the current categories of immigrants whom it "picks and chooses" under its current system are in fact the ones that the people of the United States want.

The large majority of legal immigrants to the United States enter as immediate relatives of U.S. citizens or in other family-sponsored categories. The remainder are admitted in employment-based categories, on so-called diversity visas, a.k.a., the green card lottery, and as refugees from persecution abroad. Because immediate relatives of U.S. citizens are the only category admitted without numerical limitation, it is by far the fastest growing group of immigrants. Because the other family-sponsored categories are numerically limited, there is a waiting list for admission in most categories that may be as short as several months or as long as twenty years.

Does it make sense for the United States to admit the largest portion of its immigrants in family-sponsored categories that do not consider job skills or prospects, education, or the ability to contribute to the country? Are those considered immediate relatives deserving of immediate admission regardless of their numbers?

Immediate relatives are defined as "the children, spouses, and parents of a citizen of the United States."[48] In the case of parents, the sponsoring citizen must be at least twenty-one years old.[49] Children are unmarried persons under twenty-one years old.[50]

It makes sense that U.S. citizens want and need to be immediately reunited with their spouses and minor children, but does an adult citizen have a similar need to be reunited with his or her parents in the United States? Most of those citizens who sponsor parents were themselves immigrants who made a conscious decision to immigrate and leave their parents behind. The American family is typically a nuclear family. Adult Americans live with their spouses and minor children. Most do not live with their parents. And because of their age, the parents of citizens are less likely to contribute economically to the country through work, and more likely to require social services at an earlier date. The growing share of the statutory number of legal immigrants taken up by immediate relatives can and should be reduced by redefining immediate relatives to include only spouses and children of U.S. citizens.

One way to reduce the number of immigration visas allocated to other family-sponsored categories is to eliminate the "fourth preference" for brothers and sisters of adult U.S. citizens. Although the statutory formula allocates around 65,000 visas each year to this category, the waiting lists in this category are extraordinarily long, varying from eleven years for most nationalities to more than twenty years for those from the Philippines.[51]

A third reduction in the existing visa categories can be made by eliminating the so-called diversity visas, a.k.a., the green card lottery. Current law allocates 55,000 immigrant visas each year to those selected from applicants with at least a high school education. This category was created in stages between 1986 and 1990 to facilitate more immigration from Europe, thus diversifying the immigration flow that was becoming increasingly dark-skinned. One immigration scholar has characterized these visas as "anti-diversity visas."[52] Persons born in certain "high admission states," such as Mexico, China, India, Jamaica, South Korea, and Vietnam, are expressly ineligible to receive these visas. Other high admission states are allocated reduced numbers of visas.

Besides being explicitly discriminatory, diversity visas do not seem to be a logical way to allocate precious immigration visas, i.e., without regard to skills, advanced education, or employability.

The employment-based categories of immigrant visas generally require a complex labor certification process or other similarly complex requirements. As a result, most of these categories have no waiting list and the allocated visas often go unclaimed. Those who are able to jump through all the statutory hoops to prove the requisite skills and employability, without displacing U.S. citizens or residents, can enter without waiting.

The United States would be better served by taking the visas currently going to parents and siblings of adult U.S. citizens, and the diversity visas, and adding them to the employment-based visas. These visas should be allocated on a flexible but ob-

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[48] INA § 201(b)(2)(A), 8 U.S.C. § 1151(b)(2)(A).

[49] *Id.*

[50] INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).

[51] INA § 203(a)(4), 8 U.S.C. § 1153(a)(4). The U.S. Department of State issues monthly visa bulletins announcing the dates of visa applications being currently processed.

[52] Stephen H. Legomsky, Immigration Law and Policy 225 (Foundation Press 1992).

jective points system without requiring a burdensome labor certification, similar to the immigration systems in Canada and Australia.

Points can be awarded for desirable characteristics, such as youth, health, education, skills, including language skills, work experience, financial resources, or family sponsors. The cut-off point for admission each year can be set based on the number of immigrants the United States chooses to admit. This would simplify the current immigration system, provide the United States with immigrants better able to contribute to its economy, and eliminate the discriminatory diversity visas, all without necessarily changing the number of immigrants who would otherwise be admitted.

VII. LIMIT THE DURATION OF LEGAL PERMANENT RESIDENT STATUS

Once granted, an immigrant visa, commonly called a green card, entitles the holder to legal permanent residence as long as certain disqualifying criminal or terrorist acts are not committed. There is no requirement that the legal permanent resident ever become a U.S. citizen or demonstrate any loyalty or gratitude to the United States. The legal permanent resident can get all the benefits of living and working in the United States while maintaining citizenship in and loyalty to another country. Millions of people choose to do this. How is this in the best interest of the United States?

The United States generally allows legal permanent residents to apply for citizenship only after five years—three years for spouses of U.S. citizens.[53] This allows the alien time to decide if he or she wishes to become a citizen. It also allows the United States an opportunity to evaluate the alien's character and eligibility for citizenship.

The United States should consider requiring legal permanent residents to apply for U.S. citizenship after five years. If they choose not to do so, they would lose their green cards and right to permanent residence in the United States. This would reduce the size of the non-citizen portion of the U.S. population, which though permanently living among U.S. citizens owes no loyalty to the United States. This change would encourage and facilitate the assimilation of immigrants.

VIII. LIMIT DUAL CITIZENSHIP

While dual citizenship may have benefits to the individuals concerned, it is not so clear that toleration of dual citizenship has benefits for the United States. Current U.S. law provides for expatriation by voluntary performance of one of seven specified acts done "with the intention of relinquishing U.S. nationality."[54] This reflects U.S. Supreme Court opinions ruling that U.S. citizenship may be lost only through a voluntary expatriating act done with the intention to expatriate.[55]

The seven expatriating acts specified in Section 349 of the INA are, generally, as follows: 1) obtaining naturalization in a foreign state; 2) taking an oath of allegiance to a foreign state; 3) entering the armed forces of a foreign state engaged in hostilities against the United States or as an officer; 4) employment by a foreign state while a national of such state; 5) formal renunciation before a U.S. Consular officer; 6) written renunciation in the United States during a state of war; or 7) any act of treason.[56]

Current U.S. policy, however, is very tolerant of dual citizenship and expressions of loyalty towards another country. The U.S. State Department has announced that it will presume that U.S. citizens intend to retain their U.S. citizenship when they obtain naturalization in a foreign state, take a "routine" oath of allegiance to a foreign state, or accept non-policy level employment with a foreign government.[57] Citizenship renunciation contained in naturalization oaths of other countries are now considered pro forma declarations, without any intention to give up U.S. citizenship.[58]

The State Department's presumption of intent to retain citizenship despite potentially expatriating acts seems unnecessarily tolerant. National security is enhanced

[53] INA § 316(a), 8 U.S.C. § 1427(a); INA § 319(a), 8 U.S.C. § 1430(a) (providing the three-year rule for spouses).

[54] INA § 349, 8 U.S.C. § 1481.

[55] E.g., *Afroyim* v. *Rusk,* 387 U.S. 253 (1967) (holding that simply voting in a foreign election does not constitute a voluntary relinquishment of U.S. citizenship); *Vance* v. *Terrazas,* 444 U.S. 252 (1980) (holding that when considering whether or not an individual voluntarily relinquishes his or her citizenship, the evidentiary standard to be employed is by a preponderance of the evidence).

[56] INA § 349, 8 U.S.C. § 1481.

[57] See 22 C.F.R. 50.40 (2003); see also 67 Interpreter Releases 1092 (1990).

[58] H. Ansgar Kelly, Dual Nationality, the Myth of Election, and a Kinder, Gentler State Department, 23 U. Miami Inter-Am. L. Rev. 421, 446 (1991/1992).

by a nation enjoying the exclusive loyalty of its own citizens. Sometimes dual citizenship is unavoidable because of the particular laws of another country and without any action on the part of the individual, but it should not be encouraged. The United States should not give the benefit of the doubt to actions that Congress has named by law to be expatriating.

The presumption should be reversed, either by regulation or by statute. It should be presumed that any of the expatriating acts listed in INA Section 351, including naturalization in a foreign state, are committed with the intention to expatriate, with the burden on the individual to prove otherwise.

IX. REQUIRE VISAS OF ALL FOREIGN VISITORS, ENDING VISA WAIVERS

Prior to 1986, the United States required that nearly all aliens, except Canadians and certain Mexicans, wishing to enter the United States to first obtain visas from a U.S. Consulate. Aliens apply for visitor visas to the United States by submitting applications with their passports to a U.S. Consulate. This gives the Consulate an opportunity to inspect the passport to insure that it is not counterfeit and has not been stolen. The Consulate also has an opportunity to investigate the applicant and may require a personal interview. These visitor visa applications may be denied for a variety of reasons, including reasonable grounds to believe the alien seeks to enter the United States to engage in any unlawful activity.[59] Production of U.S. visas was routinely required of aliens to obtain boarding passes for aircraft bound for the United States.

But in 1986, Congress enacted the visa waiver program, which authorized the entry of visitors from certain countries, which were mainly European, with a low nonimmigrant visa refusal rate.[60] Persons with passports from any of these now twenty-eight countries may board airplanes bound for the United States merely by purchasing tickets and showing their passports.[61] This reform was intended to facilitate the entry of foreign tourists and businesspersons into the United States, and to relieve U.S. Consulates of the considerable paperwork and cost surrounding the issuance of visitor visas to citizens of these countries.

It is now known that a visa waiver allowed the entry, without a visa, of Zacarias Moussaoui, a French citizen of Moroccan descent who is believed to have been the "twentieth hijacker" and who has been charged with conspiracy to commit the murders of 9/11. It is also known that Richard Reid, the so-called "shoe bomber," as a British citizen and passport holder was able, because of the visa waiver program, to board an airplane headed for the United States without having to apply for or acquire a U.S. visa. It has also been reported that Ramzi Yousef and at least one other conspirator used false visa waiver passports to travel to the United States in furtherance of the 1993 World Trade Center bombing.[62] Does the United States need more proof than that of the continuing threat to U.S. national security resulting from the visa waiver program?

It is also now known that all of the 9/11 hijackers spent time in Western Europe and that Western Europe, as much as the Middle East, is a source of Al-Qaida terrorism directed at the United States. In addition, thousands of blank Belgian and Italian passports have disappeared or been stolen from government offices, which might be doctored to facilitate entry to the United States via the visa waiver program.[63]

Regardless, on February 28, 2002, the President and CEO of the Travel Industry Association of America testified before the Immigration Subcommittee of the House Judiciary Committee, stating:

In a post-9/11 world, the Visa Waiver Program is just as important as ever, and the rationale that underlies its creation and existence is as sound as ever. . . . The Visa Waiver Program should be embraced by Congress and the Administration as

[59] INA § 212(a)(3)(A), 8 U.S.C. §1182 (a)(3)(A)(amended 2002).

[60] INA § 217. This program was initially described as a "pilot project" but was made permanent by Congress in October of 2000.

[61] The number of countries was twenty-nine until Argentina was removed from the list in 2002. See Implications of Transnational Terrorism for the Visa Waver Program: Hearing Before the Subcommittee on Immigration and Claims of the Comm. on the Judiciary, 102nd Cong. 8–14 (2002) (statement of Peter M. Becraft, INS Deputy Commissioner).

[62] *Id.*

[63] For a frightening analysis of this problem see Jeff Goodell, How to Fake a Passport, N.Y. Times magazine, Feb. 10, 2002, § 6, at 44.

part of our overall homeland security program, and should be viewed as a means of strengthening both our national security and economic security.[64]

The Deputy Commissioner of the INS agreed, stating, "eliminating the program will not eliminate the ability of terrorists to enter the United States."[65]

Isn't that the wrong question? Of course eliminating visa waivers cannot eliminate the ability of terrorists to enter the United States, but will ending visa waivers to any significant extent reduce the ability of terrorists to enter the United States? Isn't that the right question to ask? And if the answer is yes, shouldn't Congress and the Administration end the visa waiver program immediately and restore the visa requirement for foreign visitors notwithstanding the lobbying of the travel industry?

The repeal of visa waivers will impose a significant burden on U.S. Consulates to screen visa applicants. In the 2001 fiscal year, the number of foreign arrivals under the visa waiver program was seventeen million, but the burden of screening visa applicants assumed by U.S. Consulates will directly enhance U.S. national security.[66] And the additional cost can be offset by the common international practice of assessing a fee for visa processing. There is also the possibility of retaliation by former visa waiver countries, which may choose to begin requiring visas of U.S. visitors. But each country's visa policy is determined by that country's perceived national interest, and it should be recalled that before 1986 most Western European countries did not require visas of U.S. visitors even though the United States required visas of European visitors.

As a Belgian police official stated to an American journalist regarding the problem of missing or stolen Belgian passports, "Strictly speaking, . . . Belgium does not have a problem with terrorism. You have a problem with terrorism."[67]

X. END ADJUSTMENT OF STATUS

U.S. visas for immigration and permanent residence are only available from U.S. consular officials serving outside of the United States. So what should an alien do who is eligible for an immigration visa but who is already in the United States on a temporary non-resident visa as a tourist, perhaps, or a student? For many years the answer was that he or she must return to his or her home country and obtain an immigrant visa from the U.S. Consulate there.

Because of the expense and burden of such a return to one's home country, in 1935 the INS began the practice of allowing aliens to complete paperwork in the United States and then proceed to a U.S. Consulate in Canada to obtain a pre-arranged immigrant visa.[68] And because the trip to Canada seemed entirely pro forma, in 1952 Congress authorized the "adjustment of status" by eligible immigrants to be completed entirely within the United States.[69]

Statutory adjustment of status is no doubt beneficial to those immigrants who make use of it. But is it also beneficial to the United States? Allowing the adjustment of status in the United States precludes a reconsideration of the alien's admissibility by a U.S. consular officer in the alien's country of origin. This officer may be better able to assess admissibility than an immigration officer in the United States because consular officers presumably have a better knowledge of country conditions and access to better intelligence from local sources in-country.

Additionally, returning to one's home country to apply for an immigration visa is no longer the practical or financial burden it was in 1935 or 1952. In the context of a war on terrorism, the United States should obtain the best possible security assessment before granting an immigration visa authorizing permanent residence and eventual citizenship. That assessment can only be made by a consular officer in-country. A balancing of the benefits to U.S. national security and the burdens to the alien of returning home to obtain the immigrant visa strongly favors the repeal of the adjustment of status statute.

XI. Move EOIR and Consular Affairs to the Department of Homeland Security

I was not originally a supporter of reorganizing the INS. I felt that the problems at the INS were not organizational but due primarily to over-tasking, under-fund-

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[64] Implications of Transnational Terrorism for the Visa Waver Program: Hearing Before the Subcommittee on Immigration and Claims of the Comm. on the Judiciary, 102nd Cong. 23 (2002) (statement of William S. Norman, President and CEO, Travel Industry Association of America).

[65] *Id.* at 14.

[66] *Id.* at 12.

[67] See Goodell, supra note 63 (emphasis added).

[68] 8 C.F.R. § 245 (2003).

[69] INA § 245, 8 U.S.C. § 1255 (2000).

ing, and under-staffing.[70] But I concluded that if a reorganization was politically unavoidable, consolidation of the INS with other border security agencies, such as Customs and the Coast Guard, in a cabinet-level department dedicated to border security, as has happened, was the least bad alternative and had some benefits. One of those benefits ought to be better coordination among all the Federal agencies and personnel whose mission includes border and homeland security.

The emergence of the new Department of Homeland Security (DHS) on March 1, 2003, consolidated 177,000 government employees from twenty-two different agencies, and it seems clear that the transition to a new department will not be easy.[71] Still, at least two pieces of the border and homeland security infrastructure are missing, the Bureau of Consular Affairs (BCA), which remains at the Department of State, and the Executive Office for Immigration Review (EOIR), which remains at the DOJ.

The State Department's BCA is the agency that actually issues non-immigrant and immigrant visas to aliens wishing to visit or immigrate to the United States. It is the agency that issued visas to the nineteen hijackers who attacked the United States on 9/11. In a consolidation of all the agencies concerned with border security, including the Coast Guard, Customs, the INS and its Border Patrol, and even the Agriculture Department's border inspectors, it is puzzling to see the BCA escape consolidation into the new DHS.

The issuance of visas has never been the prestige work of the Department of State. Consular work has never been seen as the pathway to an Ambassadorship, and has been regarded in the Department of State as a rite of passage for junior Foreign Service Officers and a safe place for senior officers to work, who, for whatever reason, are not assigned more meaningful diplomatic assignments. The BCA has responded to both external and internal pressures to issue visas quickly to facilitate entry of alien visitors into the United States. The BCA has declared the foreign visa applicant as the customer, rather than the American people.[72]

Both the original Bush Administration proposal and the final legislative enactment for the new department lack clarity on exactly which department will control visa policy, though the BCA itself remains part of the State Department. The State Department has long maintained that visa policy needs to be subordinated to the larger diplomatic policies of the department. If transferred to the DHS, it may reasonably be assumed that visa policy will be subordinated to the national security interests of the United States. That seems preferable.

The other missing piece from the new DHS is the EOIR, which remains at the DOJ. Prior to 1983, when the INS charged an alien with deportability, a hearing would be conducted before an INS Special Inquiry Officer who was authorized by law to order the alien's removal from the United States, with administrative appeal only to the Attorney General and judicial appeal only to the U.S. circuit courts of appeal. Because of the impracticality of the Attorney General's personally considering immigration appeals, a Board of Immigration Appeals (BIA) was created by regulation to rule on appeals on behalf of the Attorney General.[73]

Because of real and perceived problems in the subordination of the Special Inquiry Officers to the INS, in 1983 the DOJ promulgated regulations creating the EOIR to which the Special Inquiry Officers, now designated Immigration Judges, were transferred along with the BIA. The EOIR remained a part of the DOJ under the Attorney General. The Attorney General's authority over both the INS and the EOIR insured that there would never be two conflicting voices from the Federal government on U.S. immigration policy. Any serious policy dispute between the INS and the EOIR could be quickly settled by the Attorney General or his designate.

But with the INS functions transferred to the DHS and the EOIR remaining at the DOJ, the potential for conflicting voices on immigration policy is increased. Presumably, a policy dispute between the immigration bureaus of the DHS and the EOIR could now be resolved only at the cabinet level. This is not a satisfactory method of insuring uniform U.S. immigration policy, however well the current Secretary of the DHS and the current Attorney General get along. The potential difficulty can and should be avoided by moving EOIR to the same department where the immigration powers of the INS now reside.

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[70] See Jan Ting, Too Much Work for Too Few, Phila. Inquirer, Apr. 29, 2002, at A11.

[71] See Tim Weiner, Along Borders, Tension and Uncertainty Prevail, N.Y. Times, Mar. 1, 2003, at A10.

[72] See Nikolai Wenzel, America's Other Border Patrol: The State Department's Consular Corps and Its Role in U.S. Immigration, Center for Immigration Studies, Aug. 2000, available at http://www.cis.org/articles/2000/back800.html.

[73] INA §§ 274B-C, 8 U.S.C. § 1324 (2000).

XII. CONCLUSION

History reassures us that the emergency measures enacted by our government during previous wars, even Lincoln's suspension of habeas corpus during the Civil War, have had no lasting effects on American society once the war was won and peace restored. Indeed, our sensitivity over civil liberties is greater now than it has ever been in our history. The liberty U.S. citizens should be most concerned about right now is the right of all Americans, and non-Americans, too, to live in peace, free of the threat of terrorism. Defense of that civil liberty is what this war is all about. But if this war against terrorism is lost, no person's civil liberties will survive.

Accordingly, U.S. national indecisiveness over immigration policy must end. Immigration law must finally be recognized for what it has always been, an instrument of national security policy.

Mr. HOSTETTLER. Thank you, Professor.

Dr. Camarota?

STATEMENT OF STEVEN A. CAMAROTA, PH.D., DIRECTOR OF RESEARCH, CENTER FOR IMMIGRATION STUDIES

Mr. CAMAROTA. Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify on the visa lottery. As you pointed out, my name is Steven Camarota, and I am director of research at the Center for Immigration Studies.

I would like to discuss what I see as five major problems. Jan had three, but I actually have five major problems with the lottery.

The first problem is that it has to be administered in the first place. Each entry has to be processed, and this creates a very significant administrative burden. Moreover, then the winners of the lottery have to be vetted by the State Department and the Department of Homeland Security. Processing millions of entries and then tens of thousands of thousands of additional green cards this year that would not otherwise have to be processed creates a significant burden for the Department of State and DHS, two organizations that are already overwhelmed by the number of applicants in other categories.

Trying to weed out fraudulent lottery applications and even processing legitimate ones is a diversion for agencies that must identify terrorists among the millions seeking to come to the United States in other categories. It is no surprise that an internal audit conducted by the State Department in the 1990's characterized the lottery as an unfunded mandate that saps personnel resources.

A second problem is that, in addition to creating administrative burdens, the lottery itself encourages illegal immigration. Now, consider the case of Hesham Hedayet, who, as we know, murdered two people at LAX in 2002. Hedayet had overstayed his tourist visa in 1992 and lived in the United States as an illegal alien and even after his asylum application was denied in 1996. During his years as an illegal alien, it turns out, his wife continued to play the lottery with the hope of eventually being able to stay permanently, which she eventually did win. This allowed her and her husband to get a green card.

The fact is that the very existence of the lottery gave the Hedayets a realistic hope of staying if they just played long enough because they really had no other choice. They had no family here. They had no specialized skills, and of course they did not qualify for asylum. If it had not been for the lottery, Hedayet and his family may well have given up, gone home. The lottery's very existence

tells illegal aliens that they should not go home because some day they just might win too.

A third problem with the lottery is that corruption and fraud are very widespread in the countries that send the most lottery applicants. Two of the most corrupt Nations on earth, according to Transparency International Index, are Bangladesh and Nigeria, two countries perennially among the top 10 lottery winners. State Department records from 1996—unfortunately, I was not able to get more recent numbers—show that lottery winners are much more likely than other applicants to be refused due to fraud. Among the top 10 Nations in the lottery of that year, the following refusal rates for fraud: 24 percent for Poland, 44 percent for Bangladesh, 46 percent for Egypt, 62 percent for Ghana and a whopping 80 percent for Nigeria.

The general prevalence of fraud in these countries is bad enough, but the lottery itself encourages fraud. It invites applications from people with no relatives or ties to an American institution, such as an employer who could at least vouch for the veracity of the applicant.

The problem of fraud also of course relates to terrorism. Ordinary fraud is bad enough, but after 9/11 immigration fraud of any kind is a national security nightmare. We must remember that the lottery does not draw people randomly from around the globe. About one-third of winners come from countries that were part of the special registration system for temporary visitors set up by the DHS after the September 11th attacks. All observers agree that these countries are of special concern in the war against terrorism. And as we have already stated, several lottery winners have been involved in terrorism.

The lottery is so ideal for terrorists because it encourages immigration and applications from people with no existing tie to the United States, who come from parts of the world where fraud is common, where documents are difficult to verify and, most importantly, al-Qaeda is very active.

Now, of course, there's other ways to get in, but we must remember that the green card is really the Holy Grail for the terrorists because it allows them to work at any job they want, to enter and leave the United States, to get a hazardous materials license and so on. Thus, a green card, if somebody were going to design the ideal visa category for terrorists, the lottery would be it.

But if all of this wasn't bad enough, the fact is the lottery doesn't even serve any purpose. Maybe these risks would be worth it if we could find some reason for it. There's no humanitarian reason for it. Unlike employment-based immigration, it does not select people based on their skills nor does it unite families. And even despite its official name, the Diversity Lottery, it doesn't even have a significant effect on the actual diversity of legal immigration. Since its inception, there hasn't been a fundamental change in the top countries sending immigrants to the United States. They are the same countries basically year after year, and they account for roughly the same share.

Put simply, the lottery does not increase diversity, serve any economic need, it doesn't promote humanitarian goals or help unite families. Instead, it creates a huge administrative burden for the

immigration system, encourages illegal immigration, invites fraud and makes it easier for terrorists to enter. Surely, the Nation can do without such a program.

Thank you.

[The prepared statement of Mr. Camarota follows:]

PREPARED STATEMENT OF STEVEN A. CAMAROTA

The visa lottery is probably the strangest part of our immigration system. We actually run a system where people send in a postcard, which is now done electrically, and then names are drawn out of a hat, with 50,000 winners each year given premanent residence in the United States. The winners need not have even one family member in the United States, or any particular job skill that is supposed to be in need, nor is any compelling humanitarian reason required. All they need is the desire to come and some luck. There are many problems with the such a system, but five stand out: 1) it is administratively burdensome; 2) it encourages illegal immigration; 3) it invites fraud; 4) it creates a great opportunity for terrorists; 5) it serves no purpose.

ADMINISTRATIVE BURDEN

One of the biggest problems with the lottery is that it has to be administered. Each entry has to be processed to ensure that the application meets the lottery's minimal standards. These names have to be recorded so that the winners can be randomly selected. Finally, the winners have to be vetted by the State Department and Department of Homeland Security (DHS). Processing millions of entries, and then tens of thousands of additional green cards each year that would otherwise not have to be processed, creates a significant burden for the State Department and DHS—two organizations that are already overwhelmed by the number of applicants in other immigration categories. Trying to weed out fraudulent lottery applications, and even processing legitimate ones, is a diversion for agencies that must identify terrorists among the millions seeking to come to America. It is no surprise that an internal audit conducted by the State Department in the 1990s characterized the visa lottery as a costly, unfunded mandate that saps personnel resources.

ENCOURAGES ILLEGAL IMMIGRATION

In addition to creating administrative burdens, the lottery encourages illegal immigration. Consider the case of Hesham Mohamed Hedayet, who murdered Victoria Hen and Yaakov Aminov at Los Angeles International Airport on July 4 of 2002. Mr. Hedayet overstayed a tourist visa in 1992 and before his tourist visa expired, he applied for asylum and then continued to live in the United States for a number of years as an illegal alien after his visa expired. Even after his asylum application was turned down in 1996, Mr. Hedayet stay and live here as an illegal alien.

His wife continued to play the visa lottery with the hope that they would eventually be able to win a visa, which she eventually won, allowing her, her husband, and children to get a green card. The existence of the lottery gave the Hedayets a realistic hope of eventually getting a green card, if they just played it long enough. They really had no other choice, because they had no family member who could sponsor them or any specialized skills allowing them to qualify for employment-based immigration and, of course, Hedayet did not qualify for asylum. If it had not been for the lottery, Hedayet and his family might have given up and gone home. The lottery gives hope to countless other illegal aliens that one day they too will win the lottery and be able to stay in this country. The lottery's very existence tells hundreds of thousand of other people living here illegally, who have no realistic means of every getting a green card, that they should not go home because one day they too may win the visa lottery, if they play it long enough.

RAMPANT FRAUD

One of the things that makes the lottery so difficult to administer is that corruption and fraud are so widespread in the countries that send in the most applications for the lottery. The two most corrupt nations in the world, according to Transparency International's Corruption Perceptions Index 2003 [1], Bangladesh and Nigeria, are also perennially among the top-10 lottery winners. State Department records from 1996 (we can't get more recent ones) show that lottery winners are

[1] The index can be found at *www.transparency.org/cpi/2003/cpi2003.en.html.*

even more likely than other immigration applicants to be refused a visa due to fraud. Among the top-10 nations in this year's lottery, diversity visa refusal rates from 1996 (the most recent year available) were as follows: Poland 24 percent, Ethiopia 38 percent, Bangladesh 44 percent, Egypt 46 percent, Ghana 62 percent. The country with the largest number of lottery winners, Nigeria, had a astonishing refusal rate of 80 percent. And these rates would be higher but for the State Department's laxity with regard to fraud in the visa process.

The general prevalence of fraud in these countries is bad enough, but the lottery itself encourages fraud. It invites applications from almost anyone, especially those with no relatives or ties to an American institution, such as an employer in the United States who can at least vouch for the applicant. Moreover, there is strong anecdotal evidence that many people send in more than one application using different names in an effort to increase their chances of winning. It is partly for this reason that so many "winning" entries are eventually thrown out. The whole process makes a mockery of attempts to apply even the most minimal of requirements.

CREATES AN OPPORTUNITY FOR TERRORISTS

Ordinary fraud is bad enough, but after 9/11, immigration fraud of any kind poses a dire security threat. We must remember that the lottery does not draw people randomly from around the globe. Winners come disproportionately from countries that were part of the special registration system for temporary visitors set up by DHS after the September 11th attacks. All observers agree that these countries are of special concern in the war against Islamic extremism. And about a third of winners come from those countries.

Several lottery winners have already been involved in terrorism in the United States. Michigan sleeper cell member Karim Koubriti, convicted this summer on terrorism-related charges, was a lottery winner from Morocco, as was Ahmed Hannan, who was acquitted of terrorism charges in the same trial but convicted of document fraud. The most notorious lottery winner is, of course, Hesham Mohamed Hedayet.

The lottery is ideal for terrorists because it encourages immigration from those parts of the world were both fraud is common, document are difficult to verify and al Qaeda is very active. Moreover, it allows people into the country with no family or other significant connections to the United States. Again, this is tailor-made for someone wishing to attack our country. While there are other ways to enter the country, a green card is far more valuable to terrorists than temporary visa such those for tourists or students. A green card lets a person stay in the country indefinitely and this gives terrorists the time they may need to plan a sophisticated plot. Moreover, permanent residency allows the recipient to work at almost any job they like, get a licence to handle hazardous material, and to travel to and from the United States as often as they please. If one were to set out to design a visa that was ideal for terrorists, the visa lottery system would be it.

SERVES NO PURPOSE

The visa lottery might be worth all the problems and risks it creates if it met some need. But it does not. There is no humanitarian reason to admit people based on luck. Unlike employment-based immigration, the lottery does not make any attempt to select people based on whether they have some special or much-needed job skill. Nor does it reunite families as is the intent with family-based immigration.

Despite its official name, the Diversity Lottery does not even have a significant effect on the actual diversity of legal immigration. In FY 2002, the top-10 immigrant-sending countries were the source of more than half of that year's total legal immigration. This is almost exactly the same percentage as 10 years earlier, before the lottery was put in place. In fact, the nation's total immigrant population (legal and illegal) has actually become *less* diverse during the course of the lottery. A recent analysis of Census data by the Center for Immigration Studies found that from 1990 to 2000, Mexicans went from 22 percent of all immigrants to 30 percent, while immigrants from all of Spanish-speaking Latin America combined went from 37 to 46 percent of the total foreign-born population. Truly diversifying immigration would entail one of two things: huge reductions in immigration from Mexico, or huge increases in immigration from everywhere else. The lottery simply cannot do even what it purports to.

CONCLUSION

If it can be said that anything good may have come from the atrocities of 9/11, it is that many Americans have come to realize that immigration is not simply a matter of economics or something to think about only in romantic and nostalgic terms. No longer can quaint stories of one's immigrant grandmother be a substitute

for intelligent discourse on one of the most important issues confronting the country. Failures in our immigration system result mostly from a lack of resources and ill-conceived immigration programs. The visa lottery is clearly one of those programs. The lottery does not increase diversity, serve any economic need, promote humanitarian goals, or help families reunite. It creates a huge burden for the immigration system, encourages illegal immigration, invites fraud, and makes it easier for terrorists to enter. Surely the nation can do without such a program.

Mr. HOSTETTLER. Thank you, Dr. Camarota.

The chair now recognizes Mr. Nyaga for 5 minutes.

STATEMENT OF CHARLES NYAGA, MARIETTA, GA

Mr. NYAGA. Mr. Chairman and the distinguished Members of the Subcommittee, my name is Charles Nyaga. I am from Marietta, Georgia. I also would like to introduce and acknowledge my attorney, Charles Kuck, who is here with me today. He represents me on this issue and has helped me to understand what has happened to me and my family and is advising me on the next steps to take.

I am honored to be here today to discuss my very trying experiences with the Diversity Visa Program. I come before you today in hopes that you will help resolve my case and ensure that others will not have to go through the same experiences that I and my family are going through. While I understand that there have been problems in the past with the Diversity Visa Program and that some of these problems continue today, I am here to point out that the program also provides great benefits to potential immigrants such as myself.

My own experience with the Diversity Visa Lottery Program started with great excitement when my single application was selected. However, despite having been notified by the Government that I had been selected as a winner in the Diversity Visa Program and, moreover, having done everything the Government asked me to do, I now find myself and my family facing deportation because of the Government's failures in carrying forward this program.

I am a native of Kenya, and I came to the U.S. with my family as a student in 1996. I am currently pursuing a master's degree in divinity, and am an elder at Southminster Presbyterian Church. I have served as an elder in the Church's stated session, as an elder commissioner to the Church Presbytery meetings, as chair of Church Missions and Service, Buildings and Grounds Maintenance and Worship Committees.

In 1997, I applied one time for the fiscal year 1998 Diversity Visa Program. After my selection as a winner by the Department of State, and in accordance with the Diversity Visa requirements, I submitted my fee to adjust my status to legal permanent resident and completed my application by February 1998. However, the Immigration Service failed to complete the processing as mandated.

The Immigration Service's receipt notice of my permanent resident application provided the following instructions, and I quote: "While your application is pending before the interview, please do not make an inquiry as to the status of your case since it will result in further delay." The Immigration Service told me in this receipt that it would take 3 years to process my permanent resident application and that I should not follow up with them until 3 years had passed. I, accordingly, never made inquiry and unfortunately never heard anything from the Agency. At the end of the fiscal

year, my petition expired, although a sufficient number of diversity visas remained available. I suspect that massive casework overloads at the Immigration Service prevented my paperwork from being processed within deadlines.

I know of a few others who are in the same situation I am in because of Government inaction. We all followed the rules, but nonetheless face deportation: a Swiss national who was in the U.S. as an investor prior to being selected as a winner under the Diversity Visa Lottery Program, who has had to sell his business because the Immigration Service did not process his green card in time; a South African airline pilot whose application for permanent residence was not timely adjudicated ended up losing his employment because of this failure; and a Russian whose wife is a lawful permanent resident will now have to wait back in Russia for the next several years while she awaits her naturalization to be approved. All of these individuals and others have been victimized by the inaction of the Immigration Service and erroneous and incomplete instructions of the Department of State who notifies the winners.

I am fortunate that my family and I have not had to face this situation alone. Members of my church have stood by me in the very trying moments. I want to take this opportunity to publicly thank them from the bottom of my heart. I also would like to submit, for the record, these letters from my church and others which support my case.

I am also very grateful to Senator Saxby Chambliss, the chair of the Senate Subcommittee on Immigration, Border Security and Citizenship, for introducing legislation No. S. 2089 that will address my situation. This targeted legislation will provide welcome relief to people like myself and my family and others who, during fiscal years 1998 through 2003, were unable to obtain permanent residence under the Diversity Visa Program because the fiscal year ended before their cases were approved. The bill authorizes such individuals to reopen their cases and continue processing as long as the Diversity Visas for the fiscal year in which they filed remain available.

I am very excited to see the positive efforts of Senator Chambliss and the other Members of the Senate who support those persons such as myself who have been deprived of legal benefit of permanent residence by the inaction of the former Immigration Service. I hope the Senate will move quickly on this legislation. I also hope that Members of the House of Representatives will quickly introduce and pass this worthy legislation.

Law-abiding people who follow the rules pay the required fees and rely on the Government's procedures should not be punished because of Government inaction.

Thank you again for allowing me to testify.

[The prepared statement of Mr. Nyaga follows:]

PREPARED STATEMENT OF CHARLES NYAGA

Mr. Chairman and distinguished Members of the Subcommittee, my name is Charles Nyaga. I am from Marietta, Georgia. I also would like to introduce and acknowledge my attorney, Charles Kuck, who is here with me today. He represents me on this issue, has helped me to understand what has happened to my family and me, and is advising me on the next steps.

I am honored to be here today to discuss my very trying experiences with the Diversity Visa Program. I come before you in hopes that you will help resolve my case and ensure that others do not have to go through the same experiences that my family and I are going through. While I understand that there have been problems in the past with the Diversity Visa Program, and that some of those problems continue today, I am here to point out that the program also provides great benefits to potential immigrants such as myself.

My own experience with the Diversity Visa Lottery program started with great excitement when my single application was selected. However, despite having been notified by the government that I had been selected as a "winner" in the Diversity Visa Program, and moreover having done everything the government asked of me to do, I now found my family and myself facing deportation because of the government's failures in carrying forward this program.

I am a native of Kenya and legally came to the U.S. with my family as a student in 1996. I currently am pursuing a master's degree in divinity, and am an elder at Southminster Presbyterian Church. I have served as an Elder in the Church's stated session, as an Elder Commissioner to Church Presbytery Meetings, and as Chair of Church Missions and Service, Buildings and Grounds Maintenance and Worship Committees

In 1997, I applied once for the FY 1998 Diversity Visa program. After my selection as a "winner" by the Department of State, and in accordance with the Diversity Visa requirements, I submitted my fee to adjust my status to legal permanent resident, and completed my application by February 1998. However, the Immigration and Naturalization Service (INS) failed to complete the processing as mandated.

The Immigration Service's receipt notice of my permanent resident application provided the following instruction: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since it will result in further delay." The Immigration Service told me in this receipt that it would take three years to process my permanent resident application, and that I should not follow up with them until three years had passed. What I did not understand, nor was it properly explained to me as a "winner" of the diversity visa program, was that 100,000 winners are typically chosen, yet only 50,000 people (and many times far less) are given permanent residence. During the eight months that INS had to review my application in fiscal year 1998, I accordingly never made inquiry, and unfortunately never heard anything from the agency. At the end of the fiscal year, my application expired, although a sufficient number of diversity visas remained available. I suspect that massive casework overloads at the Immigration Service prevented my paperwork from being processed within deadlines.

Let me step back a moment. Individuals like me who win the DV visa lottery program are provided a number, and when our number becomes current, are eligible to apply for permanent residence. However, the law presently requires that applicants not only file their applications in a timely manner, but also be approved during the fiscal year in which they file. If approval is delayed for any reason, including administrative backlogs, the person loses the opportunity to benefit from the program.

I know of a few others who are in the same situation I am in because of government inaction. We all followed the rules, but nonetheless face deportation: a Swiss national who was in the U.S. as an investor prior to being selected as a winner under the Diversity Visa Lottery program, who has had to sell his business because the Immigration Service did not process his green card in time; a South African airline pilot whose application for permanent residence was not timely adjudicated, who ended up losing his employment because of this failure of timely processing; and a Russian national whose wife is a Lawful Permanent Resident. He will now have to wait back in Russia for the next several years while she awaits her naturalization to be approved. All of these individuals, and countless hundreds and perhaps thousands more, have been victimized by the inaction of the Immigration Service, and erroneous and incomplete instructions of the Department of State who notify the "winners."

Thus, people who have done everything our government requires of us to do, through no fault of our own, ultimately are unable to become permanent residents under the DV Program.

Now, because of government inaction, my family and I face deportation from the U.S.

Since I did not believe what happened was fair, my wife and I took our case to the Northern District Court of Georgia, where the District Court Judge granted our request for adjustment of status and ordered the Immigration Service to process my application for permanent residence outside of the parameters of the timeframe dictated by the statute. However, the government appealed in an effort to support their

own failure to timely adjudicate applications. Unfortunately, the Eleventh Circuit Court of Appeals reversed the District Court, finding that the Immigration Service lacked authority to act on my application after the end of the fiscal year, regardless of the merits of my case. The court even went so far as to note that a private relief bill is the remedy that would overcome the statutory barrier that prohibits the INS from reviewing a case filed in a prior fiscal year. The U.S. Supreme Court recently declined certiorari in my case.

I am fortunate that my family and I have not had to face this situation alone. Members of my church have stood by me in every way possible. I want to take this opportunity to publicly thank them from the bottom of my heart.

I also am very grateful to Senator Saxby Chambliss (R-GA), the chair of the Senate Subcommittee on Immigration, Border Security, and Citizenship, for introducing legislation, S. 2089, which would address my situation. This targeted legislation would provide welcome relief to people like my family and me and others who, during fiscal years 1998 through 2003, were unable to obtain permanent residence under the DV program because the fiscal year ended before their cases were approved. The bill authorizes such individuals to reopen their cases and continue processing as long as diversity visas for the fiscal year in which they filed remain available.

I am very excited to see the positive efforts of Senator Chambliss and the other members of the Senate who support helping those persons such as me, who have been deprived of the legal benefit of permanent residence by the inaction of the former Immigration Service. I hope the Senate will move quickly on this legislation. I also hope that Members of the House of Representatives will quickly introduce and pass this worthy legislation.

Law-abiding people who follow the rules, pay the required fees, and rely on the government's procedures should not be punished because of government inaction.

Thank you again for allowing me to testify.

Mr. HOSTETTLER. Thank you, Mr. Nyaga, and without objection, your letters of support will be entered into the record after your statement.

[The material referred to follows:]

Southminster Presbyterian Church
1507 Hurt Road
Marietta, Georgia 30008
770-436-4010

March 20, 2003

We, the Session (Governing Body) of Southminster Presbyterian Church, do with full commitment and concern endorse Charles Kibaara Nyaga to receive a Permanent Residence Visa from the United States Immigration Authorities.

Charles became an active member of Southminster in 1996. He is a faithful participant in worship, an ordained elder, a strong participant in our leadership, chair of our mission and service program, a mentor to our youth, and a vital part of the fellowship of this congregation. His strong faith, knowledge of the Bible, and Christian behavior are an example to us all.

Charles has worked more than one job at a time and has been successful in establishing himself as a homeowner. He provides for and cares for his family. He is an asset to his community and to his workplace by his outstanding character.

We can say, without reservation, that his being here makes this church and this community a better place. We pray that it will be possible for Charles Kibaara Nyaga to become a permanent resident of the United States.

Vincent S. Alig, Pastor

Richard C. Dalton, Associate Pastor

Betty J. Cheek, Clerk of Session

Janet M. Boehm, Elder

Edith W. Chaffee, Elder

Christine A. Curschmann, Elder

Jane C. Lavender, Elder

Edward S. LaVipe, Elder

Daniel M. Wright, Elder

Kenneth Kariuki Nyaga, Elder

Jean P. Shelor, Elder

Robert R. Shelor, Elder

Constance T. Swain, Elder

Jennifer H. Whitehead, Elder

3/31/03

Dear Senator Miller,

We are very concerned that Charles Kibzara Nyaga could lose his right to live in the U.S.A. We understand noone is really to blame — just agencies inundated with paper + somehow records were lost.

We don't know if our letter will help but we as a church session are so concerned about this that we felt at least we should go on the record standing behind Charles.

His attorney, Madeline Witt has also been in touch with you I believe. Just in case, her phone number is 770 532 7211 - She works out of an office in Gainesville, Ga.

For now Charles works 2 jobs, his wife works at Walmart + the 2 children are doing very well in school.

Thank you for whatever time you can give to this case.

Sincerely,
Jan Bocko

P.S. I am sorry this is snail mail — my eyes + the computer don't focus well together!

FRIDAY
MARCH 14, 2003
3 SECTIONS

DAILY REPORT

$1.00 VOL. 114, NO. 51 ESTABLISHED 1890 FULTON COUNTY DAILY REPORT

Know Your Neighbors? Parolee Site May Help

RACHEL TOBIN RAMOS
rramos@amlaw.com

Ever wanted to know if a convicted cocaine dealer lives near you? Now a few clicks of the computer mouse can tell you the address of every Georgia parolee in your neighborhood who is finishing a criminal sentence.

Building the new parolee database as an electronic neighborhood watch, Sen. Eric Johnson, R-Savannah, president pro tem of the Georgia Senate, unveiled the system Thursday at the state Board of Pardons and Parole's office here. Johnson introduced the bill that led to creating the database.

The database is similar to the Georgia Bureau of Investigation's

See **PAROLEES**, *Page 5*

CHARLES LOVETT/DAILY REPORT

Charles Kibaara Nyaga: 'I don't feel good...I'd feel good if I had my visa.'

WINNING IMMIGRATION LOTTERY PAYS NOTHING

Kenyan loses visa bid because of INS' inaction; 11th Circuit offers no help

JONATHAN RINGEL
jringel@amlaw.com

Imagine winning the lottery only to find that bureaucracy has rendered your ticket worthless.

That's what happened to Charles Kibaara Nyaga in his quest to become an American citizen. The 45-year-old Kenyan, who came here with his wife and two children, lives in Powder Springs.

Nyaga learned in 1997 that he was one of 100,000 winners in an annual U.S. State Department drawing held for citizens of countries that are under-represented on America's immigration rolls. Millions participate, each hoping to get applications for "diversity visas" that grant aliens permanent residency on their way to citizenship.

Nyaga filed his diversity visa application in February 1998 with the Immigration and Naturalization Service. But according to court decisions, the INS did nothing to process the application beyond sending Nyaga's fingerprints to be checked by the FBI.

The INS responded in court briefs that it was "simply overburdened" and that Nyaga was not entitled to have his application processed within a specific period of time.

That was bad news for Nyaga and his wife, Doin Kainyu Kibaara, whose immigration status is tied to her husband's diversity visa. Last week, a panel of the 11th U.S.

See **IMMIGRATION**, *Page 2*

TERRORISM SPARKS SECRETS; COURTS REMOVE HABEAS CORPUS CASES FROM PUBLIC RECORDS

DAN CHRISTENSEN
dchristensen@floridabiz.com

With war in Iraq looming, the largely invisible U.S. campaign against terror being waged in the nation's federal courts surfaced in extraordinary ways in Miami last week.

A published court calendar for the 11th U.S. Circuit Court of Appeals was obliterated to omit the names of litigants in a sealed civil case brought by an Algerian man. The *Miami Daily Business Review* has learned the man was among 1,200 young Arab and Muslim men secretly detained in the post-Sept. 11 nationwide dragnet.

Later, the appellate court's computer records were altered to remove from public view information about the case, No. 02-11060.

In between, a three-judge panel of the 11th Circuit closed its courtroom March 5 to the public and the press to hear arguments in the sealed case.

Court records that were briefly public said the case is styled *Bellahouel v. Wetzel*. Wetzel was a warden at the Federal Correctional Institution in Miami-Dade County.

"That's very unusual," said one federal judge, referring to the closure of the appeals court.

Also unusual: The public docket for the Southern District of Florida, where the case apparently originated, is devoid of any mention of either Bellahouel or his case.

See **SECRETS**, *Page 6*

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LAWYER: AGENCY WAS 'OVERBURDENED'

IMMIGRATION, *from page 1*

Circuit Court of Appeals voted 2-1 in favor of the government.

The majority said that Nyaga's eligibility for a visa expired at midnight on Sept. 30, 1998—the end of the fiscal year for which the lottery applied.

Madeline S. Wirt

Nyaga and Kibaara aren't in immediate danger of deportation because their case is still alive, said one of their lawyers, Madeline S. Wirt of Gainesville's Whelchel & Dunlap.

But the couple's prospects for collecting on the winning lottery ticket look murky at best.

Wirt said she probably would ask the full 11th Circuit to reconsider the panel's ruling. The court grants only a handful of such reviews each year, and petitions for certiorari at the U.S. Supreme Court face equally long odds.

What little case law that exists on the subject poses more trouble, as the 7th Circuit, the federal appeals court based in Chicago, held in a similar case that eligibility for a diversity visa ends with the fiscal year in which the application is issued.

The couple has received some sympathy—from Chief Judge Orinda D. Evans of U.S. District Court, who last year ordered the INS to process Nyaga's application, and from 11th Circuit Judge Rosemary Barkett, who dissented from last week's decision reversing Evans.

This week U.S. Sen. Zell Miller (D-Ga.) also pledged his support to the couple.

"The INS' handling of this couple's visa application was deplorable," Miller said in a statement issued by his spokeswoman.

Miller added that the case was the latest example of the INS being "dysfunctional and incompetent," a reason he supported the bill that placed immigration decisions within the new Department of Homeland Security's Bureau of Citizenship and Immigration Services.

PAUL PIECHO

U.S. Sen. Zell Miller: This case is the latest example of INS incompetency.

An Atlanta spokeswoman for the new bureau said she could not discuss the case without "an original, notarized statement" from Nyaga giving permission. A statement meeting those requirements could not be provided by press time.

> *"The INS' handling of this couple's visa application was deplorable.... I stand ready to serve them."*
> *—Sen. Zell Miller*

Miller added that if Nyaga and Kibaara want help from his office, "I stand ready to serve them."

If litigation proves fruitless, the couple may very well need the assistance of Miller and at least half of his colleagues. The 11th Circuit majority suggested Congress could pass a bill authorizing the government to issue visas specifically to Nyaga and Kibaara. That is what happened in 1999, when Congress authorized the INS to issue diversity visas to emigrants whose application process was interrupted by the 1998 ter-

Christopher J. McFadden, Edward C. Brewer III and Charles R. Sheppard

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Decatur, GA
404-601-4121

Edward C. Brewer III
Professor of Law
Northern Kentucky University
Highland Heights, KY
859-572-6943

Charles R. Sheppard
Assistant District Attorney
Augusta Judicial Circuit
Augusta, GA
706-821-1135

rorist bombings of U.S. embassies in Kenya and Tanzania.

If all else fails, Nyaga said that he would consider moving back to Kenya, but that is "the last option."

Lost in the Shuffle

Nyaga's ride on America's immigration roller coaster began in May 1996, when he came to the United States to attend technical college. His wife came two months later, followed by their daughter and son, who are now 16 and 13, respectively.

The son of a Presbyterian minister, Nyaga said, "I wanted to get some education so I could better myself."

He earned an associate's degree from Chattahoochee Technical College in Marietta. Now he works in guest services at a Marietta hotel and for a commercial cleaning service. Kibaara is a cashier at a local Wal-Mart.

Nyaga said he threw his name into the State Department lottery because he hoped to gain permanent residency in America so his kids would have opportunities for a good education.

When he received notice that he had won one of the rare applications for a diversity visa, Nyaga said, "It was a big shock. ... It was incredible."

But what was incredible was yet to come.

After Nyaga submitted his application in February 1998, the INS sent his fingerprints to the FBI—and did nothing else, according to Evans' decision.

Meanwhile, Nyaga said he followed

Fox Photos

Chief Judge Orinda D. Evans of U.S. District Court ruled for the couple.

the instructions on the diversity visa application—not to inquire as to the status of his case.

But when he came to the INS to renew his work permit, he asked informally. Each time, he recalled, "they said the best thing to do was wait."

So he waited. And waited. And waited.

Finally, in January 2001, the INS asked Nyaga's wife, Kibaara, to come in for a permanent status interview. They both went.

According to Evans' decision, an INS representative told the couple that Nyaga's diversity visa lottery information could not be located. Accordingly, Kibaara's request for a visa—based on Nyaga's now nonexistent diversity visa—was denied.

In briefs submitted to the 11th Circuit, Linda S. Wernery, a Justice Department lawyer representing the INS, pointed out that the Atlanta INS office gave higher priority to diversity visa applications.

But that "does not create a duty on the part of the INS to adjudicate such applications within a certain time frame," she added.

Later she wrote, "The INS inadvertently failed to expedite Nyaga's adjustment application and was unable to adjudicate the application within fiscal year 1998 because it is simply overburdened."

Wernery concluded that the INS did not violate any statute or regulation: "at most, this is simply a case of unexplained delay or inaction and thus does not rise to the level of affirmative misconduct."

No Isolated Incident

Nyaga's problem wasn't unique. While Nyaga's application was gathering dust in Atlanta, the INS in Chicago was having trouble with the diversity visa applications of Teodor and Leila Paunescu from Romania.

Just 12 days before the Sept. 30, 1998, deadline, the INS requested a third set of fingerprints from Teodor. He complied, and then he and his wife sued the INS in federal court.

On Sept. 25, the judge ordered the INS to complete the processing of the applications, pending approval from the FBI fingerprint check. The fingerprints didn't clear until Oct. 8, 1998, eight days after the deadline.

But in December 1999, the judge, Robert W. Gettleman, ruled that the Paunescus "should not be penalized for the government's misfeasance" and again ordered the INS to process their applications. *Paunescu v. INS*, 76 F. Supp. 2d 896 (E.D. Ill. 1999).

James V. Noonan, one of the Paunescus' lawyers, said his firm "developed a little niche industry" from the botched visa cases—"until the circuits starting ruling against us." Noonan went on to represent Nyaga with Wirt.

Last August, a three-judge panel of the 7th Circuit ruled in a case of eight plaintiffs whose diversity visa applications lapsed. While noting that the INS "did not take a single step toward processing any of the applications," the panel ruled that the law clearly stated the applications could be processed only "through the end of the specific fiscal year for which they were issued."

The 7th Circuit distinguished between the eight plaintiffs before them and the Paunescus' case because the Paunescus brought their case before the Sept. 30 deadline. *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002).

Predicament is 'Offensive'

Judge Evans looked at Nyaga's case before the 7th Circuit issued its *Iddir* decision.

See IMMIGRATION, Page 4

4 • DAILY REPORT FRIDAY, MARCH 14, 2003

FBI, INS SHARE BLAME, KENYANS' LAWYER SAYS

IMMIGRATION, *from page 3*

Evans said that while she was sympathetic to the overworked INS, the service offered no evidence explaining why it did not process Nyaga's application on time. "The court will not reward such gross inaction by concluding the application was automatically denied when the fiscal year expired," Evans added.

But when the 11th U.S. Circuit panel looked at the case, *Iddir* was on the books—and was cited by the majority that voted to reverse Evans.

In an unsigned decision, Chief Judge J.L. Edmondson and Senior Judge Emmett Ripley Cox said that the law establishing the diversity visa was clear that the applications expire at the end of the fiscal year.

Since Nyaga's application had expired, they added, whether the INS should process the application was a moot point.

Barkett, the 11th Circuit dissenter, hinted that Edmondson and Cox struggled with their decision by writing that the majority "reluctantly" accepted the INS' argument. Moreover, Barkett decried Nyaga's predicament as not his fault.

ARK MOSTERO-CLARK/MIAMI DAILY BUSINESS REVIEW

Judge Rosemary Barkett: Majority 'reluctantly' supported the INS.

"Such a result is particularly offensive because it is clear from the statute that Congress expected the INS to perform the ministerial duties required by the program," Barkett added. *Nyaga v. Ashcroft*, No. 02-12265 (11th Cir. March 5, 2003).

Missing Prints

Wirt, Nyaga's lawyer, said she blames the FBI as much as she does the INS.

"If the FBI had sent back the fingerprint cards, something would have happened," she said.

A spokesman at the FBI's fingerprint lab in West Virginia did not respond to a faxed request for comment.

The Atlanta spokeswoman for the Bureau of Citizenship and Immigration Services allowed that it usually takes only one or two days for fingerprints to be processed by the FBI and that immigration officials do follow up with the FBI "if the situation is warranted."

Wernery, the Justice Department lawyer who represented the INS, referred a call to the department's press office, where an official declined to comment on the case.

Daryl R. Buffenstein, an Atlanta immigration lawyer from Paul, Hastings, Janofsky & Walker, said the INS was "absolutely overwhelmed with unfunded mandates," but he called the case "very, very troubling."

Buffenstein, the general counsel of the American Immigration Lawyers Association, said holdups regarding fingerprint checks could be "a portent of things to come," given the security precautions being applied under immigration's new administrators at the Department of Homeland Security.

For his part, Nyaga did not sound cynical about the justice system in the country he wishes to join.

"I don't have a problem with the legal system," he said.

But he added, "I don't feel good. I'd feel good if I had my visa." □

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has become Of Counsel,

and

Lee M. Mendelson

has become associated with the firm.

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1/28/04

Photos by KIMBERLY SMITH / Staff

Charles Nyaga won a "diversity lottery" to obtain a visa in 1998. But time may have run out for the seminary student, an elder of Southminster Presbyterian Church in Marietta, who hopes Georgia's two U.S. senators can undo the bureaucratic error threatening his shot at permanent U.S. residency.

A bungled case

Government snafu threatens Kenyan who played by U.S. immigration rules

By MARK BIXLER
mbixler@ajc.com

Charles Nyaga has a daily routine like most everyone else.

He sees his children off to school before heading to work as a hotel concierge. Some days he attends seminary or works a night cleaning job. On Sunday, it's off to Southminster Presbyterian Church in Marietta, where he is an elder who has taught Sunday school, collected offerings and stripped and waxed church floors.

Yet the Kenyan immigrant goes through each day with the gnawing fear that federal agents could take him into custody and deport him to his native land. Those fears deepened Monday, when a letter from immigration authorities told him to show up for a Feb. 20 court hearing that could lead to his expulsion.

Although Nyaga followed U.S. immigration rules, he finds himself the victim of a bureaucratic oversight that threatens to invalidate the opportunity he had at gaining permanent resident status in 1998.

An overworked government agency never got around to reviewing his application for legal status, even though Nyaga turned it in seven months before the deadline. So authorities who said in 1998 that he could stay now say he should be deported because they did not get to his application in time.

"I am frustrated but not angry. Anger does not solve any problems," Nyaga said.

His fellow church members are outraged that Nyaga may pay the price for the government's inaction.

"I am so ashamed as an American," said Jan Boehm, 66, who sings in Southminster's choir. "If we can't allow people like this to be in the country, then what's all this talk about 'Give me your tired and your poor'?"

She said she and others at church have collected 568 signatures on a petition asking someone — anyone — to help Nyaga stay in America.

Nyaga entered the United States on a student visa in 1996, studying auto mechanics at Chattahoochee Technical Community College in Marietta. The next year, he applied for permanent resident status through a federal program that sets aside visas for people from countries that are under-represented in the general population.

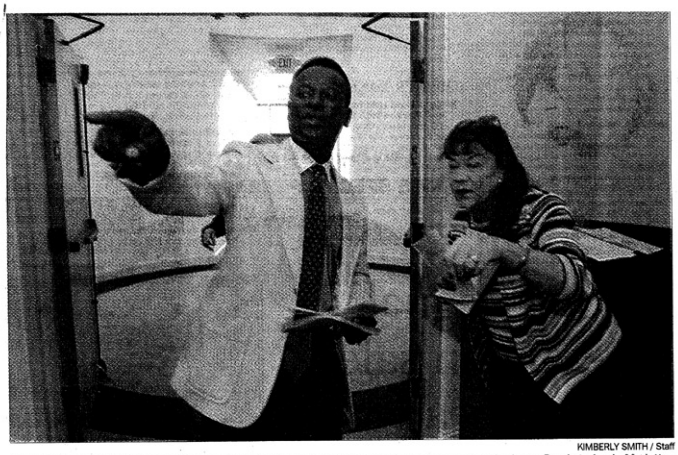
Hundreds of thousands of people around the world apply for up to 55,000 visas a year in the government's "diversity lottery." Winners can parlay the visa into a green card and, ultimately, U.S. citizenship.

The Rev. Vincent Alig (left), pastor of Southminster Presbyterian, talks with Charles Nyaga after Sunday's service. A church elder, Nyaga has taught Sunday school, collected offerings and polished floors.

➤ Please see KENYAN, F6

CHECK FOR BREAKIN

1/28/04



KIMBERLY SMITH / Staff

Charles Nyaga and fellow church member **Kaye Schuler** prepare for services Sunday at Southminster Presbyterian in **Marietta.** Church members have gone to bat for him, collecting names on a petition supporting his efforts to stay in this country.

Kenyan: Deportation feared

➤ Continued from F1

Nyaga was among those chosen in 1998. He turned in all required paperwork and fees by Feb. 2, 1998, seven months before the Sept. 30 deadline.

"While your application is pending . . . please DO NOT MAKE inquiry as to the status of your case, since it will result in further delay," the immigration service told him, according to court records.

Immigration officials, however, failed to process his paperwork before the deadline, and the government later told Nyaga he lacked legal standing to be in the United States.

A favorable ruling

In 2001, Nyaga sued what was then the Immigration and Naturalization Service. U.S. District Judge Orinda B. Evans of Atlanta ruled in his favor the next year.

"The government admits the INS Atlanta district office did not follow its own policy and procedure," the judge wrote. The immigration service "offers no explanation for this failure to act, aside from suggesting that the INS has more work that it can handle, which is not a very satisfying explanation."

She ordered the INS, which has since been broken up into three agencies, to process Nyaga's visa application as if the 1998 deadline had not passed. The 11th Circuit Court of Appeals later said the law did not allow that. It ruled that Nyaga became ineligible for a visa at midnight Sept. 30, 1998, even though 3,500 of the 55,000 visas set aside in that year's diversity lottery were never claimed. The U.S. Supreme Court declined three months ago to hear his case.

"I am so ashamed as an American."
Jan Boehm, who sings in the Southminster Presbyterian choir

Nyaga said he knows the immigration service is overworked, but he does not understand why authorities seemed so intent on denying him a visa that all sides agree he was once entitled to receive.

"In a system like this, one person like me doesn't matter," he said, "but that one person is me."

The most frustrating thing, Nyaga said, is that he played by the government rules.

"This is very hard to talk about," he said, tears welling.

Senators enlisted

Nyaga wants to become a preacher like his father, who started 12 Presbyterian churches in East Africa. He is pursuing a master's degree in divinity at the Interdenominational Theological Center in Atlanta and said he would like to preach and teach theology.

His best hope for legal status may lie with a private bill in Congress. A handful of such bills pass each year, typically benefiting immigrants with a sympathetic case and connections, said Jeanne Butterfield, executive director of the American Immigration Lawyers Association.

Boehm said she has spoken with people in the offices of both U.S. senators from Georgia, Saxby Chambliss and Zell Miller. Nyaga said he took Miller a stack of photocopied documents related to his case when Miller held a book signing at Lenox Square a few months ago.

Legal remedy possible

Now, with the threat of deportation looming at every minute, Nyaga may finally get a break.

A spokeswoman for Chambliss said Monday the senator wants to tweak the law to help a handful of foreign nationals in Nyaga's situation — people who win a rare shot at legal status through a government diversity lottery but face expulsion because authorities don't review their applications in time. Chambliss could introduce a bill in the next few weeks, said Angie Lundberg, the spokeswoman.

Joe Jacquot, who handles immigration issues for Chambliss, said he knows of a dozen people nationwide in similar straits. He said Chambliss' bill would affect people who participated in past diversity lotteries and that the Department of Homeland Security plans to change regulations to prevent a repeat of what happened to Nyaga.

"We are well aware of his situation. We're going to solve it for him," Jacquot said.

Meanwhile, Nyaga goes through his daily routine in limbo.

"I still keep my faith," he said. "It's the only thing you can do."

ZELL MILLER
GEORGIA

United States Senate

WASHINGTON, DC 20510-1006

WASHINGTON OFFICE:
WASHINGTON, DC 20510
(202) 224-3643
TDD: (202) 228-2105

ATLANTA, GA OFFICE:
100 COLONY SQUARE, SUITE 300
1175 PEACHTREE STREET, NE
ATLANTA, GA 30361
(404) 347-2202
TTD: (404) 347-2248

INTERNET ADDRESS:
www.senate.gov/~miller

April 9, 2003

Ms. Madeline S. Wirt
Law Offices of Whelchel & Dunlap, LLP
405 Washington Street, N.E.
P.O. Box One
Gainesville, Georgia 30503

Dear Ms. Wirt:

Thank you for contacting my office recently regarding Mr. Charles Nyaga and his family of Powder Springs, Georgia. Their experience in trying to obtain a diversity visa from the INS is extremely unfortunate. As I have stated, this is just another example of just how dysfunctional the INS really is. That is one of the reasons I so strongly supported the creation of the Department of Homeland Security and putting immigration decisions within the new Department of Homeland Security's Bureau of Citizenship and Immigration Services.

I am submitting a meeting request to Mr. Eduardo Aguirre, Jr., the Director of the Bureau of Citizenship and Immigration Services. Once given the opportunity to meet, I plan to address both the particular case concerning Mr. Nyaga and the many similar cases of others who are caught in the INS bureaucracy. Please know that I will have the concerns of Mr. Nyaga and his family in mind and I will keep you updated following the meeting.

Again, thank you for contacting me and I encourage you to stay in touch with my office.

With kindest regards, I am

Sincerely,

Zell Miller

Zell Miller

Enclosure

ZELL MILLER
GEORGIA

United States Senate

WASHINGTON, DC 20510-1006

WASHINGTON OFFICE:
WASHINGTON, DC 20510
(202) 224-3643
TDD: (202) 228-3105

ATLANTA, GA OFFICE:
100 COLONY SQUARE, SUITE 300
1175 PEACHTREE STREET, NE
ATLANTA, GA 30361
(404) 347-2202
TTD: (404) 347-2248

INTERNET ADDRESS:
www.senate.gov/~miller

April 9, 2003

Director Eduardo Aguirre, Jr
Department of Homeland Security
Bureau of Citizenship and Immigration Services
425 I Street, NW
Washington, DC 20536

Dear Mr. Aguirre:

As you may be aware, my constituent, Mr. Charles Kibaara Nyaga, was one of the 100,000 applicants who won the State Department's drawing for a diversity visa in 1997. Mr. Nyaga filed his application in February of 1998, but later learned that the INS did nothing to process the application beyond sending his fingerprints to be checked by the FBI. Later, the INS informed Mr. Nyaga that his eligibility for the visa expired on September 30, 1998. Mr. Nyaga and his family are among the many immigrants who have been disappointed and frustrated at this type of inaction by the Immigration and Naturalization Services.

I am writing to request an opportunity to meet with you in order to discuss recent actions and future plans of the Immigration Services agency. As you may know, I strongly supported the creation of the Department of Homeland Security and putting immigration decisions within the new Department of Homeland Security's Bureau of Citizenship and Immigration Services. I am invested in ensuring the success of the entire Department and am interested in seeing effective changes and policies put in place within the Bureau.

Thank you for your attention to this matter and request. I look forward to hearing from you soon to discuss a convenient meeting date.

With kindest regards, I am

Sincerely,

Zell Miller

Zell Miller

For Immediate Release
February 12, 2004

CHAMBLISS INTRODUCES DIVERSITY VISA BILL

Legislation would help Charles Nyaga of Marietta

WASHINGTON – U.S. Senator Saxby Chambliss, R-Ga., Chairman of the Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship, released the following statement upon introducing legislation seeking to help Charles Nyaga of Marietta and about a dozen others in similar situations. Nyaga, who legally complied with U.S. immigration laws and deadlines, currently faces deportation because massive casework overloads at immigration services prevented his paperwork from being processed within deadlines.

"Today, I am introducing a targeted fix to a problem that some of my colleagues have experienced in serving their constituents. Immigration case work is one of the top issues that my state offices handle on a regular basis Occasionally, people who are in our country legally and playing by the rules can slip through the cracks as they wait on the immigration process to run its course. With the massive caseload handled by immigration services, there are bound to be mistakes, and this legislation allows the agency to remedy those mistakes in the limited situation of the Diversity Visa program.

"The case of an Atlanta couple, Charles Nyaga and his wife, Doin, recently came to my attention. Charles Nyaga, a native of Kenya, came to the U.S. with his family as a student in 1996, and he is currently pursuing a master's degree in divinity. In 1997, he applied for the Fiscal Year 1998 Diversity Visa program and the Immigration and Naturalization Service (INS) selected him. In accordance with the Diversity Visa requirements, Nyaga and his wife submitted an application and a fee to adjust their status to legal permanent resident.

"A cover letter on the Diversity Visa application instructed: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since it will result in further delay." During the eight months that INS had to review his application, Nyaga accordingly never made inquiry, and he unfortunately never heard back. At the end of the fiscal year, Nyaga's application expired, although a sufficient number of diversity visas remained available.

"Nyaga and his wife took their case to the 11th Circuit Court of Appeals. In a decision last year, the Court found that the INS lacks the authority to act on Nyaga's application after the end of the fiscal year, regardless of how meritorious his case is. The court even went so far as to note that a private relief bill is the remedy for Nyaga in order to overcome the statutory barrier that prohibits the INS from reviewing a case in a prior fiscal year. The U.S. Supreme Court recently declined to take up the case.

"My legislation would overcome this statutory hurdle for Charles Nyaga, his wife, and others who are similarly situated. The legislation would give the Department of Homeland Security (DHS) the opportunity to reopen cases from previous fiscal years in order to complete their processing. The bill would still give DHS the discretion to conduct background checks and weigh any security concerns before adjusting an applicant's status.

"I look forward to working with my colleagues and with Homeland Security officials to pass this legislation this year. We must provide relief in these cases. I believe this targeted legislation strikes the proper balance to provide thorough processing of Diversity Visa applications while not compromising the Department's national security mission."

[For more information, contact Chambliss' press office at 202-224-3423.]

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Angie Lundberg
Communications Director
U.S. Senator Saxby Chambliss
202-224-8368 28lc4004

Mr. HOSTETTLER. The chair now recognizes, for purposes of an opening statement, the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the distinguished Chairman very much for his kindness, and I thank the panelists for their presentation. I was in an earlier meeting, and I appreciate very much their statements.

This hearing today is one that points to an overall systemic problem, and that is that the immigration policies of the United States are in shambles. I think if I had to calculate the hearings that we have had over the last session, it has been a journey of problems. We have not had an opportunity to put forward solutions, reforms. We have heard the Administration speak eloquently about changes to the system, one summer, 1 year after another with no action.

So here we go again with another hearing discussing the inadequacies and inequities of a system that is broken that needs to be fixed. Now, whether or not you wish to topple the Statue of Liberty, which some of the witnesses desire to do or as others are victimized by a system that is crumbling, clearly, we need to begin to put on track this Nation's position and posture as it relates to immigration.

There is no doubt that this Nation will continue to be perceived as the greatest Nation in the world, and that means that individuals coming to seek not only a better life because we always utilize that terminology, but to come to be on the soil of a place that provides justice, and freedom, and equality, and dignity.

Mr. Chairman, I was with a group of individuals just a couple of days ago celebrating the 56th anniversary of the independence of Israel, and one of those who was part of the celebration, who had not been born in this country, but was a citizen, indicated that whenever she comes back to the country—this Nation—she desires to lay flat and kiss the ground. Now, that is the image of America. That is what people perceive America to be, and it is certainly tragic that we have had an Administration that has failed to realize the need for consistency and to realize the need for a pronounced policy, to reunite relatives, to provide order to Diversity Visa Programs, to protect children who have aged out, to address various ethnic groups who have suffered in a system of indifference—Haitians and Africans—and so here we are today.

It may be why I will, in about 40 minutes, introduce H.R. 3918, the Comprehensive Immigration Fairness Act of 2004, which I hope the Chairman will give us the opportunity to have hearings on before this Committee. If we do not begin to have a vigorous discussion, questions of fraud and abuse on different isolated policies will continue to exist, and we will continue not to fix the problem. We will just simply be here over, and over and over again.

Mr. Chairman, I know your frustration. We may disagree on ways to get to the ultimate journey, which is to have a policy that immigrants and others alike, enforcers can understand, so that in Houston, Texas, we do not have individuals fleeing schools and worksites of Hispanic origin because they believe there is going to be a raid at hospitals and schools. This is frivolous. This is a country that invented electricity, the light bulb, trains and buses, and yet we cannot seem to sit down for a reasonable program.

We all know what the Diversity Visa Program is all about. We realize that it is only limited to six geographic regions. Mr. Chairman, it has been put in place so we can fix the broken system. The program does not provide visas for countries that have sent more than 50,000 immigrants to the United States in the past 5 years. The top countries in the latest year for which detailed data is available, fiscal year 2002, were places like Albania, Ethiopia, Nigeria, Poland and Ukraine, countries that, overall, may have a number of other issues, but we have not necessarily seen a waive of terrorists coming in from those Nations. In fact, Poland now is a new member of the NATO alliance.

This is a lottery program, and we know that the problems have come about through fraudulent ID and identity theft, maybe. We realize that the Office of the Inspector General for the State Department issued a report on the Diversity Visa Program. According to the report, the Diversity Visa Program is subject to widespread abuse, why we are here today.

If we had a reform in the immigration policy, access to legalization for those who are illegally in this country and other reunification efforts, we might not be at this hearing today. We would give lawyers the opportunity to have a real road map that they could follow with their clients. We could eliminate the 6 million backlog in benefits where there are people in line legally or trying to access legalization in a legal way. We would have a situation, Mr. Chairman, where a student who had an I–94, went to Mexico on a summer break, left the I–94 in her school dorm, did something foolish because she is young, coming across the border from Mexico in the United States, they asked her if she was a citizen. The kids with her said, "Say, yes," and of course she was not. Got caught. Had all of her documents, but in a dorm like kids will do, their keys in their car, as opposed to where they're supposed to be. And so we have to face the problem of her being deported who has been in this United States for almost 20 years, has a husband and a child. It is an outrage. This program is likewise filled with outrage.

Mr. Chairman, I believe that this program is worthy of fixing. It is not meritorious of the condemnation that some of the witnesses this morning have begun to do because that is their life's work, to condemn immigration policies and to suggest that we must go back to the Neanderthal days when we did not extend to those who sought an opportunity to come here. It is foolish. It won't work. And the only thing that is going to help us is to use the electronic improvements that we have begun to use in the diversity program or the diversity system and make sure that we are diligent in eliminating the suggestion of fraud, but to eliminate the program would be foolish.

I would just close by simply saying that I believe Mr. Nyaga, a native of Kenya, has very eloquently stated his case. He has proven that he is no threat to this country. In fact, some of us might think that we need more prayer, and so I would hope that by hearing his story we realize that people who follow the rules and follow timely diversity visa applications should not lose their immigration benefits on the account of accounting and processing delays.

I would ask this Committee to seriously think, to get back on track to be reformers and individuals who can put this immigration policy on track and begin to set us straight.

I yield back, and I thank the Chairman.

Mr. HOSTETTLER. I thank the gentlelady.

The chair will now recognize Members of the panel for 5 minutes for questions.

Dr. Camarota, the Committee has been told that one of the main flaws in the visa lottery is that applicants file multiple applications under different names or different variations of their names. To your knowledge, is this a common occurrence?

Mr. CAMAROTA. Yes, it is, for the obvious reason that the more you submit, the better your probability of selection based on statistics. And then this is one of the reasons why so many of the subsequent winners don't qualify is because then they have to come up with the bogus documents to back up the names that they submitted their applications under.

Now, since such a large share from countries—come from countries with a kind of weak document regimen or a system where documents are notoriously unreliable, they can often do that, but this creates an enormous problem because one of the fundamental things that we have to do to keep out criminals, and terrorists and other people who are not qualified is verify identity. But the whole visa lottery itself encourages people to, if you will, disguise their identity because we reward, if you will, multiple applications under different names and then people have to back that up. And this is, I think, one of the many problems with the lottery itself.

Mr. HOSTETTLER. How difficult is it for lottery winners to obtain fraudulent documents to back up their fraudulent application?

Mr. CAMAROTA. Obviously, it would vary quite a lot from country to country. But according to International Transparency's Index, many of the top winners, in fact, most of them, are countries that rank highest in fraud and abuse. So, in that environment, a false driver's license, a false record of work, a false birth certificate. The kinds of things that consular officers would rely on are apparently pretty easy to come by.

Mr. HOSTETTLER. Thank you.

Ambassador Patterson, in your testimony you state that the Diversity Visa Program is fraught with fraudulent applications, and the State Department is authorized to charge fees to maintain the program. Could you tell us why the State Department has not charged the necessary fees for the program that would help in aiding in the exposure of fraud and elimination of fraud in the Diversity Visa Program.

Ms. PATTERSON. Well, the Department, for the winners, is planning to raise the fee this year to recoup the cost. But I think the basic answer is, under the old paper-based system, it simply wasn't practical. When this cash would flow into the Kentucky Consular, it would not have been feasible to have cash flow into the Kentucky Consular Center in an envelope with the application.

Now, that they're on an electronic system, we have systems like PayPal or credit cards or debit cards that would make this much more feasible. We think it would—we had a lot of discussion about this in preparing for the testimony—we think it would probably re-

quire legislation to allow the Department to recoup more than its costs, but one thing we were particularly concerned about in our report was not so much the recovery of costs, but funding the personnel overseas that we need to investigate these cases of identity theft and false records.

Mr. HOSTETTLER. Now, when you suggest covering the costs, with your last statement——

Ms. PATTERSON. Yes.

Mr. HOSTETTLER.—part of the cost is not considered to be the fraudulent application investigations?

Ms. PATTERSON. It's very hard to get those figures very precisely, and some of the consulates that have a very high number of DV winners are basically small posts with no adequate personnel. This probably wouldn't be true of a place like Nigeria, of course, but it is true of a place like Albania. So they need more personnel to work directly on the DV Program.

We also mentioned that some of these costs are hard to ascribe across programs and more work needs to be done on that, but our view is strongly that some fees should be levied for entering the program at all.

Mr. HOSTETTLER. So the legislation that you're speaking of has to do with the authorization or appropriation of more personnel?

Ms. PATTERSON. Yes, that would be, in our view, the greatest weakness and the place where money is most needed at this point. The recovery of costs, our estimate was $840,000, but the bigger problem is overseas and the ability to investigate the fraudulent cases.

Mr. HOSTETTLER. So there is not a policy issue with regard to investigating fraud; it is just a matter of manpower.

Ms. PATTERSON. It is not a policy issue, and in some places we've had quite remarkable success, like in Nigeria, in investigating some of these cases.

Mr. HOSTETTLER. Thank you.

Professor Ting, you have provided the Committee with an extensive discussion of the history of the visa lottery. And what were the original purposes of the visa lottery?

Mr. TING. Well, I think it's clear from the history, if you look back to 1987, that the purpose of visa lottery was mainly to bring Europeans to the United States. And I think if you look at the most recent statistics for fiscal years 2002 and 2003, out of the six regions, the regions sending the most people under the DV Program continues to be—and always has been as far as I can tell—Europe. And that was an explicit purpose, and I think anyone who looks back at the history of the program, back to the original program back in 1987, can see that it was transparently a device to bring more Caucasians to the United States. And I think the fact that it now also brings significant numbers of Africans and Bangladeshis to the United States does not mitigate the discriminatory nature of the program which continues to this day.

Mr. HOSTETTLER. Thank you.

The chair recognizes the gentlelady from Texas for 5 minutes for questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me try to understand, Mr. Camarota, what your angst is with these policies. You stated that the lottery's very existence tells hundreds of thousands of other people living here illegally, who have no realistic means of ever getting a green card, that they should not go home because one day they too may be in the visa lottery if they play it long enough.

The current estimate is that we have between 8 and 14 million undocumented aliens in this country. Do you have any evidence to show that a substantial portion of them would leave the country if the Diversity Visa Program was terminated?

Mr. CAMAROTA. Well, that's why I said several hundred thousand, assuming that there are 8 to 10 million illegal aliens in the United States, and according to the INS, about 70 percent are presumably from Mexico, and then Central America and so forth, countries often outside of the visa lottery. But there are clearly several hundred thousand people in the United States illegally who are nationals of countries that could benefit from the lottery.

We do have some anecdotal evidence. Obviously, there was a survey done of legal immigrants, and it did appear that a third of those who were lottery beneficiaries back in the 1990's were residing here illegally. Additionally, very often lottery applicants will give an address within the United States—again, this provides evidence that a large share are illegal.

Ms. JACKSON LEE. May I just——

Mr. CAMAROTA. So I think there's pretty strong evidence that a significant share of visa lottery winners are——

Ms. JACKSON LEE. Thank you for that answer.

I would imagine we could also say that a grain of sand on an ocean beach might "spurry" up and fly up in the air and gather dust and become a boulder that lands in Jackson, Mississippi, and kills 500 people. There are a lot of things that we could speculate. That's what anecdotal evidence is all about, from my perspective.

Let me suggest to you that I would be very confident in taking a roving microphone and would go to any immigrant community in the United States where people are living illegally and pose a question to someone, not a lawyer or an immigrant advocate, and ask them are they waiting to get into the Diversity Visa Program, and I would venture to say that most would look at me in shock and askance because they probably have never heard of it.

So I think your anecdotal evidence is weak at best. I think, as I said, my premise is that we need to be in the business of reform. My question to you, then, what is your suggestion in terms of if we have this visa waiver program, what is your ultimate suggestion—elimination?

Mr. CAMAROTA. Did you say visa waiver program? I'm sorry.

Ms. JACKSON LEE. Excuse me, the Diversity Visa Program. What is your point; is it elimination?

Mr. CAMAROTA. Yes, and as I indicated, I don't think it's——

Ms. JACKSON LEE. What is your philosophy or what is your proposal for an immigration policy in the United States, short of, well, let me not put words in your mouth, but short of that we want to make sure that we have no policy? So do you have a way for immigrants to come into the country?

Mr. CAMAROTA. Obviously, it would take a long time to answer your question, so let me answer it this way. I think the United States can, and should, accept more people for permanent residence, that is, green cards, than any other country in the world——

Ms. JACKSON LEE. You think they should.

Mr. CAMAROTA. We should accept more people. Presently, we're accepting about three times as many as the next nearest country, which would be Canada, but certainly I think we can accept more and should accept more.

I think that I basically come down where the late Barbara Jordan came down, is that we should have a system where we decide who it is we're going to admit every year, and then admit all of those people, but that system should be built around basically families, immediate families—not more extended.

Ms. JACKSON LEE. You support 245(i)? That's—Mr. Chairman, I think we have an enormous announcement here that should be really reported by the news because we've got Dr. Camarota, if I'm pronouncing his name correctly, and forgive me if I'm not, announcing to open the doors for legal permanent residents. We've got him announcing family reunification, which is 245(i).

I think we can talk, Dr. Camarota, and I am going to go to Dr. Nyaga, if I could.

Mr. CAMAROTA. Let me just say that I did not endorse giving out green cards to illegal aliens, that is, people here illegally. So what I said is that our legal immigration system should reflect I think what the Jordan Commission suggests.

Ms. JACKSON LEE. And let me just say, and great respect for the esteemed Barbara Jordan, who sat in this seat preceding me, is that not being here to explain in this element and climate further her thoughts, I respect what you have said.

I was going to Mr. Nyaga, and I will end on this. What would you like to see as a conclusion to your application, sir, since you believe that the system weeded you out, as opposed to you ignoring the rules and not following the rules? What would be the best conclusion for you?

Mr. NYAGA. Madam, the best way to look at my case would be to adjudicate my case, give me relief. Because, right now, I'm facing deportation, after having done all the Government asked me to do. I followed all of the rules.

Ms. JACKSON LEE. And you did not present yourself in a fraudulent manner or an abusive manner.

Mr. NYAGA. I did not, ma'am.

Ms. JACKSON LEE. And you are here with a family.

Mr. NYAGA. Yes, ma'am.

Ms. JACKSON LEE. We thank you very much for your testimony, and your expression and knowledge about this system. Thank you very much.

I yield back, Mr. Chairman.

Mr. HOSTETTLER. The chair recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman, and I direct my first inquiry to Professor Ting, and I think just a simple point to clarify.

And that would be that you made the statement that the Diversity Lottery discriminates solely on the basis of ethnicity. Would

you concede that the language of it discriminates on the basis of national origin?

Mr. TING. Yes. I mean, I'm not sure how we would parse the distinction that you're making. Clearly, it's based on where you were born, and I use as an example the child of Chinese diplomats born in Malawi, which, by the way, is a real case, and that individual did qualify as a native of Africa and did gain a green card in the United States. So that is the case.

But I do think it's discriminatory, and I think in response to an earlier question from Congresswoman Lee, the reason most illegal aliens don't know anything about the Diversity Visa Lottery is because they're not eligible for it. The discrimination is so great that most of the illegal aliens in the United States, particularly from Latin America and Asia, are not eligible for it. So, of course, it's not high in their minds.

Mr. KING. And then, Professor Ting, would you also, having conceded that technical point and made your point as well, would you concede that a Nation has a right, and sometimes possibly a duty to discriminate on immigration policy or do we have an obligation to put the perfect multicultural formula into our immigration policy so that we get the balance from the rest of the world?

Mr. TING. Well, the Supreme Court has held unanimously that we can discriminate in immigration on any basis that we want. If we decide we don't want any more Chinese in the country, that is okay, and we can do that today or tomorrow. If we want to have a quota system that specifies how many people we take in from each country, we can do that.

I would suggest that that is not good policy, that we should look at what's in the best interests of the United States. We should decide what our national priorities are. I commend the Congress for identifying family reunification and bringing job skills, useful skills, to the United States as the primary purposes behind our immigration policy. I think those ought to be our priorities.

Mr. KING. Then, could I ask you, also, there seems to be a sense that the proportion of the European immigrants has gone down since 1965. Could you give some perspective into the implications of the change of the immigration law in 1965 that might have initiated such a change in that proportion?

Mr. TING. Well, sure. I mean, up until 1965, the quota for Asian countries was typically about 100 per year, about 100 per year from a country like China. And when it was proposed in 1965 that the discriminatory quota system be lifted, there was, I understand, a heated discussion in Congress as to whether this would, in fact, set off a wave of Asian immigration to the United States. And it was only upon the reassurance that this was not, in fact, going to happen that Congress felt comfortable abolishing the discriminatory immigration system, the quota system that was there. Of course, after 1965, the wave of Asian immigration occurred. And most of the Asians——

Mr. KING. In many cases then—excuse me—in many cases then it becomes a political question rather than a legal question, but I do appreciate your remarks on that.

I direct to Dr. Camarota—I see my time unfolding here—the broad and general question that I would like to have the oppor-

tunity to ask each one of the panel members would be how does the Diversity Lottery enhance the economic, the social and the cultural well-being of the United States of America? And wouldn't that be the central question that we should ask before we adopt any immigration policy?

Mr. CAMAROTA. Absolutely. I couldn't—I agree with that 100 percent. As far as I can tell, it doesn't select people based on some skill, and it doesn't satisfy a humanitarian concern, it doesn't satisfy some need of the U.S. economy. It doesn't even bring the diversity that it purports to, quite frankly. I can find no logical reason to burden the immigration system with this program.

Mr. KING. Thank you.

Mr. Nyaga, would you care to answer that question?

Mr. NYAGA. I would say I would tend to differ with Dr. Camarota—I'm sorry—because he may be looking at a very, very small number of the people who are in the woods hiding, but I work two jobs, I pay my taxes, and there are so many of us who do that. So, if you are looking at just a small percentage, then you can say what you are saying here. But I believe the majority of the immigrants who come here are looking for a better life, and they help the economy as much as the Americans do. We work a lot more than the Americans do sometimes. Would you contend that?

Mr. KING. Mr. Nyaga, I would just make the point, as our clock ticks down here, that I see a humanitarian interest in this, and that's the only way that I can justify the Diversity Lottery, and there are 6-point-some billion humanitarian interests across the planet, and I would make the point that no Nation can address all of the humanitarian interests that there are around the globe.

My time is up. Thank you, Mr. Chairman.

Mr. HOSTETTLER. Thank you.

I would ask unanimous consent for the chair to be given an additional 5 minutes for questioning, which it will yield to the gentleman from Virginia, Mr. Goodlatte, for any questions that he may have.

Seeing no objections, the gentleman may proceed for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, thank you very much for that generosity.

I would like to begin by noting that I was here when the well-respected Jordan Commission, chaired by former Congressman Barbara Jordan, made recommendations to the Congress for substantial reforms of our immigration policy and would that the Congress had followed the recommendations of that commission at the time we would no longer be here talking about this issue because Ms. Jordan and her commission recommended the abolition, the elimination of the Visa Lottery Program.

I think that that would have saved this country some additional problems because we, at this point, don't know what national security effects have occurred as a result of people who, given the odds in any given year, we may have lots of people in this country who have been members of al-Qaeda or other organizations that have no criminal record, no background that would indicate that they are a terrorist suspect, but could very well be, very much similar to the hijackers on September 11th, 2001, most of whom did not have any significant background or record that would indicate they

were likely to do the things that they did. That would include Mr. Hedayet, who entered this country as a part of the Visa Lottery Program, and killed some people at the El Al ticket counter in Los Angeles a few years ago.

Ambassador Patterson, you've noted these concerns that the State Department has about the way the program operates and how it could be abused by terrorists and others. I take it that one of those recommendations is that we exclude participation in this program by those who are from countries that are on our state-sponsored terrorism list?

Ms. PATTERSON. Yes, sir, that would be consistent with other legislation. And there is an exclusion in that legislation or a waiver for individuals that the Secretary determines—that the Secretary makes a decision on. But with thousands, literally thousands, of people coming in from these, from these countries, and I should add that these individuals of course go through our normal immigrant visa process, and insofar as that we had information on them, it would be revealed. It still is of great concern to us, and we think it could be fixed by legislation.

Mr. GOODLATTE. Sure. But there are only six or seven countries on that list of state-sponsored terrorism——

Ms. PATTERSON. Yes, sir.

Mr. GOODLATTE. And in the detention facility in Guantanamo Bay, Cuba, right now are citizens of some 40 different countries that are suspected of being engaged in combat or terrorist activities against the United States, and Mr. Hedayet was from Egypt. That's not a terrorist-sponsored state. Many of the 9/11 hijackers were from Saudi Arabia. That's not a state that's on that list.

Why wouldn't it make more sense just to simply eliminate the program, and we wouldn't have to worry about the fraud that comes about that the other witnesses have referred to? We wouldn't have to worry about the abuse of the system.

Ms. PATTERSON. Well, from my narrow standpoint as Inspector General, our job is to recommend improvements in efficiencies in the program. I think your concern, though, is of course, well-founded, that people can come in and get green cards from other countries who are not on the terrorist list. Again, I think there have been improvements certainly in the processing of the immigrant visas, including the fingerprinting that may reduce this possibility, but the bottom line is I think it's a program that can be taken advantage of by hostile intelligence officers or terrorists.

Mr. GOODLATTE. In other words, the Department hasn't taken a position, one way or another, on the underlying legislation. You simply offered observations about problems with the existing program.

Ms. PATTERSON. Yes, sir.

Mr. GOODLATTE. Very good.

Mr. Ting, could you elaborate on the reasons why you believe the Visa Lottery Program does not align with our Nation's current immigration policies.

Mr. TING. Well, to the extent, our immigration policies, we have the most generous immigration system in the world, but to the extent that our priorities are family reunification and bringing people with job skills to America who can help build our economy up, I

just think we're failing. Our family reunifi—I mean the separation of immediate families, where we allow legal permanent residents to be in the United States without their spouses and without their minor children is, to me, unconscionable. And the notion that we're bringing in 50,000 people chosen at random ahead of these individuals to me shows a misplaced set of priorities.

I think, well, I'll stop there. I think that's a response to your question.

Mr. GOODLATTE. It is, and I thank you.

Dr. Camarota, you state that, "If one were to set out to design a visa that was ideal for terrorists, the visa lottery system would be it." I wonder if you could elaborate on that and my observations earlier.

Mr. CAMAROTA. Sure, because it doesn't require any tie to an American institution, like an employer. It doesn't require a family member to be in the United States. It's specifically for people with no ties to the United States, existing ties—again, something that past terrorists have generally had. In addition to that, it's——

Mr. GOODLATTE. Let me interrupt you on that point. In other words, if you're in "X" country—let's just say Saudi Arabia, where Osama bin Laden is originally from—and you want to put terrorists in the United States in furtherance of Osama bin Laden's goal, you don't have to have any contacts with the United States. You can simply start sending in names of people that you've recruited, that don't have a criminal record, aren't going to show up on anybody's watch list or terrorist list and get them in here.

Whereas, if you were consistent with the rest of our immigration policies, which relate to having a family relationship or an employment need, an employer in the United States who needs somebody here, you've got a much harder burden to find somebody who can fit into one of those particular pieces of the puzzle. But if you send in 50 or 100 names from Saudi Arabia of people who say, yes, I'll go there, and I'll be ready to do something when Osama bin Laden sends forth the next terrorist attack, they can do that with this program. They can't very easily do that with any of our immigration programs.

Mr. CAMAROTA. Not as easily. And the other thing I would say is you want to pick countries where fraud, and bribery, and corruption are very common so the securing of multiple identities or false identities would be easy, and you'd also want to pick countries where al-Qaeda is most active, and that's what this does.

And then, finally, what you'd want to do is give them a green card because temporary visas you have to go home, and there's a whole bunch of restrictions on them, but the green card has very little. You can secure American documents, like a driver's license, and you can get a hazardous materials license, you can travel to and from the United States as much as you want with a green card. So the very nature of this category is ideal for terrorists. If I were going to set out to design one, this would be it.

Mr. GOODLATTE. Thank you very much.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. I thank the gentleman.

Without objection, the gentlelady from Texas is recognized for a question.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I just wanted to make note of the fact that Ambassador Patterson did not choose to comment on the question of whether or not the program should be eliminated, which means that, as I understand what you've said——

Ms. PATTERSON. Yes, ma'am.

Ms. JACKSON LEE. Which means that it gives us the opportunity to look at the comprehensiveness of the immigration policies and begin to establish something that makes sense, rather than the suggestion of I've got legislation, with all due respect to my colleague, to eliminate this, and eliminate this, and eliminate that. We need to get to be comprehensive.

Let me just put in the record, Mr. Chairman, as I close, to suggest that the program is riveted with fraud and abuse, and it's discriminatory, I take issue with that, and I would hope that we never get into the business of pitting Hispanics or Asians or Africans or Europeans against each other. We need a consistent policy. The Diversity Program was put in place because we have inconsistency. And so I would argue with Dr. Ting as to whether or not there is discrimination or not. We could probably do that for a long period of time.

But just as a probably noteworthy example or an interesting example or maybe a fun example is that of Freddy Adu, the 14-year-old boy who is now the newest star in our National Soccer League, and particularly in Washington, D.C., and the youngest professional player in the U.S. He had great promise, couldn't get in any other way. But for his entry to the U.S. on the Diversity Visa Program, that promise may not have been realized. The Diversity Visa Program does not provide opportunity for people who have few options to pursue their dreams, but most importantly it provides the diversity our country needs and, though small, the program adds to the important character of our country.

So we have a lot to do on this issue, and I thank the Chairman for allowing me to submit that into the record, and I hope we will be looking to put forward a comprehensive program, and I look forward to hearing or having the opportunity for H.R. 3918 to be heard before this Committee.

Thank you.

Mr. HOSTETTLER. I thank the gentlelady.

The chair will just simply recognize that while there are tremendous success stories with the Diversity Visa Program, the question ultimately must be asked about the two individuals, for example, that perished in the airport in Los Angeles. Is the fame and potential wealth of this one soccer player worth the lives of the two individuals who were slain in the airport? And that is a question that we must ultimate pit all of our decisions against.

So I appreciate the fact that the young man will benefit greatly as a result of America's generosity, but there are two individuals that will have not benefitted from America's generosity and, in fact, had funerals as a result of America's generosity.

So, in that——

Ms. JACKSON LEE. If the gentleman would just simply yield for a moment——

Mr. HOSTETTLER. No——

Ms. JACKSON LEE. Because I wouldn't want it to be——

Mr. HOSTETTLER.—I've yielded.

Ms. JACKSON LEE. I wouldn't want it to be thought that I had no concern for the loss of life, and so I would not want that to be on the record.

Mr. HOSTETTLER. I did not——

Ms. JACKSON LEE. I truly have sympathy for that.

Mr. HOSTETTLER. I did not——

Ms. JACKSON LEE. I just know that you can't eliminate a program for the tragedies that have occurred, and so I would hope——

Mr. HOSTETTLER. That's an interesting topic of discussion, too.

Ms. JACKSON LEE. I look forward to it, Mr. Chairman.

Mr. HOSTETTLER. The perishing of 3,000 individuals on September 11th.

Ms. JACKSON LEE. Correct, and it was on legal visas, and you're absolutely right, and that's why we must fix this system so it will work so that we can keep out terrorists, but allow those who want to come and do good in this country to be admitted. I agree with you, Mr. Chairman, very much. Thank you.

Mr. HOSTETTLER. That's why we must also deal with legal immigration, as well as illegal immigration, given the fact that the preponderance of those who perpetrated 9/11 did not only come here legally, but were here legally when they flew those planes into those buildings.

The chair, recognizing that all Members will have seven legislative days to enter remarks and statements into the record, the business before this Committee being completed, the hearing is now adjourned.

[Whereupon, at 11:27 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman, for holding this hearing. The United States has the world's most generous immigration policy. Approximately one million immigrants are legally admitted to this nation each year. In addition, it is estimated that another half million per year come to the United States illegally.

I question whether the visa lottery program should continue. Under this program the U.S. hands out approximately 50,000 visas per year, largely on a random basis. The visa recipients are chosen without regard to US priorities to reunite families or provide workers for American industries in need. And, unfortunately, the program is rife with fraud and has been exposed to be a vehicle for extremists to enter the country.

The program was originally designed to make visas available to nations that were not sending large numbers of immigrants. For example, Mexican citizens are not eligible. However, it does benefit people coming from nations where terrorism thrives. In fact, one of the beneficiaries of this program was Hesham Mohamed Hadayet, the terrorist that killed 2 and wounded 4 when he opened fire on the El Al counter at Los Angeles International Airport a couple of years ago. According to the Office of the Inspector General , between 2 and 4 percent of diversity visa issuances are to nationals of countries that are designated as state sponsors of terrorism. This greatly concerns me.

I also have concerns with the incidence of fraud in the visa lottery. A partial study of the program exposed 360,000 duplicate applications in violation of the law. The Office of the Inspector General concluded, "Identity fraud is endemic, and fraudulent documents are commonplace. Many countries exercise poor control over their vital records and identity documents, exacerbating the potential for program abuse."

I am looking forward to the testimony of today's witnesses, particularly in regards to these concerns. Thank you, Mr. Chairman, I yield back my time.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

The Immigration and Nationality Act (INA) weighs the allocation of immigrant visas heavily towards aliens with close family in the United States and, to a lesser extent, aliens who meet particular employment needs. The diversity immigrant category was added to the INA to encourage new, more varied migration from other parts of the world.

Diversity visas are limited to 6 geographic regions with a greater number of visas going to regions with low rates of immigration. The Diversity Visa Program does not provide visas for countries that have sent more than 50,000 immigrants to the United States in the past 5 years. The top 5 countries in the latest year for which detailed data is available, FY 2002, were Albania, Ethiopia, Nigeria, Poland, and the Ukraine.

Applicants for diversity visas are chosen by a computer-generated, random lottery drawing. The winners who can qualify for immigrant visas and are eligible for admission to the United States are granted legal permanent residence status. To qualify, an applicant must have completed twelve years of formal education (the equivalent of graduating from a United States high school) or 2 years of qualifying work experience.

When aliens with diversity-based visas seek admission to the United States, they are inspected by Homeland Security officers in the same way that other immigrants are inspected. This is done to ensure that they are not ineligible for visas or for admission under the exclusion grounds in section 212 of the INA.

In September of 2003, the Office of the Inspector General for the State Department issued a report on the Diversity Visa Program. According to the report, the Diversity Visa Program is subject to widespread abuse. Despite the rule against duplicate submissions, thousands of duplicates are detected each year. Identity fraud is endemic, and fraudulent documents are commonplace. Many countries exercise poor control over their vital records and identity documents, exacerbating the potential for program abuse.

The report recommends legislative changes to bar aliens from states that sponsor terrorism; legislative changes that would permanently bar all adults identified as multiple applicants from future diversity visa programs; legal authority to make the program self-financing; and the establishment of standards to improve the application of the program eligibility criteria.

The State Department has made changes in the application process to deal with the problem of duplicate applications. It has converted from paper to electronic applications and has required each applicant to include an electronic photograph. This new application process went into effect for the FY 2005 visas. State has selected approximately 80,000 winners from the 6 million applications it received for this drawing, and it will compare all 80,000 winning applications to the entire field of 6 million applications. This new processing system should be effective in detecting duplicate applications.

The electronic application system, however, has created a new problem. Many people waited until the last 2 days of the 60-day application period before submitting their applications. This overwhelmed the registration computers. A substantial number of applications were not filed, despite the fact that they were submitted during the 60-day filing period.

I also am concerned about the effect of government processing delays on the people who win the diversity lottery. Applications for diversity visas must be processed before the end of the fiscal year for which they are won. If an application is not processed before that deadline, the visa is lost, regardless of the circumstances. Every year, a substantial number of diversity visa applicants lose their chance for lawful permanent resident status this way. This happened to Charles Nyaga, a native of Kenya, who came to the United States with his family as a student and is currently pursuing a master's degree in divinity. I have asked him to come to this hearing and share his story with us. People who follow the rules and file timely diversity visa applications should not lose their immigration benefits on account of processing delays.

Thank you.

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